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A Political Subdivision Is Not a State for 11th Amendment Purposes

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1.1.1.7—USERRA applies to state and local governments
1.4—USERRA enforcement
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In Law Review 14036[1] (the immediately preceding article in this series), I explained that sovereign immunity and the 11th Amendment of the United States Constitution immensely complicate the enforcement of the Uniformed Services Employment and Reemployment Rights Act (USERRA) with respect to state governments as employers. But what about local governments? This issue is significant because 10% of National Guard personnel work for state governments but another 11% work for local governments.[2] Local government entities (counties, cities, school districts, etc.) are referred to as "political subdivisions of states."

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[3] 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

[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 1,027 articles about laws that are especially pertinent to those who serve our country in uniform, along with 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 169 new articles in 2013.

[2] I invite the reader's attention to the "National Security Report" titled "Too Much to Ask? Supporting Employers in an Operational Reserve Era." The article is by Dr. Susan Gates and is published on pages 32-40 of the November 2013 issue of *The Officer,* ROA's bi-monthly journal. In a pie-chart on page 34, Dr. Gates reports that 10% of National Guard and Reserve members not on active duty work for state governments, and another 11% work for local governments (counties, cities, school districts, etc., which are known as "political subdivisions of states.")

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

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."[4] 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.

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). 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

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

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) 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). Much more recently, the Supreme Court (in a unanimous decision written by Justice Clarence Thomas) rejected the claim of a Georgia county (Chatham County) that it was immune from suit under the 11th Amendment or "residual sovereignty" in a case involving the malfunction of a drawbridge damaging a vessel. *Northern Insurance Co. of New York v. Chatham County, Georgia,* 547 U.S. 189 (2006).

I invite the reader's attention to *Rimando v. Alum Rock Union Elementary School District,* 356 Fed. Appx. 989, 2009 U.S. App. LEXIS 27385 (9th Cir. Dec. 15, 2009). A three-judge panel of the 9th Circuit[5] held that the Alum Rock Union Elementary School District (a political subdivision of the State of California) could not be sued in federal court under USERRA. This erroneous

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

decision was made without oral argument and without official publication in *Federal Reporter Third Series.*

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 entity of the Alaska state government, just as Indiana University (in *Velasquez)* is an entity 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 a state government entity. The school district is a political subdivision of the State of California.

I invite the reader's attention to *Huff v. Office of the Sheriff, County of Roanoke, Virginia,* 2013 U.S. Dist. LEXIS 161954 (W.D. Va. Nov. 13, 2013), *reconsideration denied,* 2014 U.S. Dist. LEXIS 12800 (W.D. Va. Jan. 31, 2014). Judge Glen E. Conrad (Chief Judge of the United States District Court for the Western District of Virginia) erroneously held that Army Reservist Pamela Huff, a Deputy Sheriff, was precluded from suing the Office of the Sheriff for violating her USERRA rights. A successful appeal may be precluded by the fact that her counsel imprudently conceded that the Office of the Sheriff is "an arm of the state" of Virginia for 11th Amendment purposes.

I invite the reader's attention to *Weaver v. Madison City Board of Education,* 947 F. Supp. 2d 1308 (N.D. Ala. 2013), Magistrate's Recommendation Adopted by District Judge 2013 U.S. Dist. LEXIS 114926 (N.D. Ala. Aug. 14, 2013). Michael E. Weaver, a Warrant Officer in the Army Reserve and a member of ROA, sued the Madison City Board of Education, claiming that the school district had violated his USERRA rights. The school district sought the dismissal of the case, claiming immunity from suit under the 11th Amendment of the United States Constitution. The Magistrate Judge recommended that the motion to dismiss be denied, and the District Judge adopted the Magistrate Judge's recommendation.

The school district sought and was granted permission to file an interlocutory appeal to the United States Court of Appeals for the 11th Circuit.[6] The Alabama School Boards Association has filed an *amicus curiae* brief in the 11th Circuit, urging the appellate court to overturn the District Court finding that the school district (a political subdivision of the State of Alabama) is not immune from suit under the 11th Amendment. ROA will be filing an *amicus* brief urging the appellate court to affirm the District Court.

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

Ordinarily, the losing party is not permitted to appeal to the Court of Appeals until the District Court has made a dispositive ruling, effectively ending the case at the trial level. When leave is granted to file an interlocutory appeal, the trial on the merits is put on hold until the appellate court resolves the preliminary issue, and in this case the preliminary issue is the asserted immunity of the school district. If (as I expect) the Court of Appeals affirms the District Court's rejection of the school district's 11th Amendment immunity claim, there will then be a trial on the merits.

This is an important issue because 11% of National Guard and Reserve members are employed by counties, cities, school districts, and other local government entities. We will keep the readers informed of developments.