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Enforcing USERRA against State Government Employers—Good News from New Mexico

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

Update on Sam Wright

1.1.1.7—USERRA applies to state and local governments
1.1.3.3—USERRA applies to National Guard service
1.2—USERRA forbids discrimination
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

***Ramirez v. State of New Mexico Children, Youth, and Families Department,* 372 P.3d 497 (New Mexico Supreme Court 2016).**

On April 14, the New Mexico Supreme Court released a long awaited decision, cited above. The oral argument in this case was held almost 16 months earlier, on December 17, 2014.[3]

Phillip G. Ramirez, Jr. joined the New Mexico Army National Guard in 1991. He is now retired as a Sergeant First Class (SFC). In July 2005, he was called to active duty and deployed to Iraq, where he participated in heavy combat. At the time he was called to the colors, he was employed by the New Mexico Department of Children, Youth, and Families (CYFD).

Ramirez served honorably and when he returned to New Mexico he met the five conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1400 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other 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. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1200 of the articles.

[2] BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For six years (2009-15), I served as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. After ROA disestablished the SMLC last year, I returned to Tully Rinckey PLLC, this time in an "of counsel" role. To arrange for a consultation with me or another Tully Rinckey PLLC attorney, please call Ms. JoAnne Perniciaro (the firm's Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

[3] Please see Law Review 14102 (December 2014) for a description of the oral argument. That article was written by Rosario D. Vega Lynn, Esq. and Thomas G. Jarrard, Esq.

(USERRA).[4] He was reemployed by CYFD, but after he returned to work he was harassed by his CYFD supervisors about his military service and he was fired by CYFD.

Ramirez contacted the New Mexico office of the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), requesting assistance with his USERRA claim against CYFD. He was told, "We can't help you because your case is too complicated."[5] After receiving no assistance from DOL-VETS, he contacted New Mexico attorney Rosario D. Vega Lynn, Esq. On behalf of Ramirez, she initiated this lawsuit that is now finally over.

On October 13, 1994, President Bill Clinton signed into law Public Law 103-353 (USERRA), 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).[6] The VRRA has applied to the Federal Government and to private employers since 1940. In 1974, the VRRA was amended to expand its application to include state and local governments.[7]

As originally enacted in 1994, USERRA permitted an individual to sue a state government employer in federal court. In 1998, the 7th Circuit[8] held that USERRA was unconstitutional insofar as it permitted an individual to sue a state in federal court.[9] In finding USERRA to be unconstitutional, the 7th Circuit relied on the 11th Amendment, which provides:

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[4] Ramirez left his civilian job for the purpose of performing service in the uniformed services, and he gave the employer (CYFD) prior notice. He did not exceed USERRA's five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which he sought reemployment, and since the 2005 period of active duty was involuntary it did not count toward his five-year limit. He was released from the period of service without having received a disqualifying bad discharge from the Army. After release, he made a timely application for reemployment at CYFD. USERRA is codified in title 38 of the United States Code, at sections 4301-4335 (38 U.S.C. 4301-4335).

[5] DOL-VETS vehemently denies that Ramirez ever contacted that agency for assistance. I believe Ramirez.

[6] The STSA is the law that led to the drafting of more than ten million young men (including my late father) for World War II.

[7] On December 4, 1974, President Gerald Ford signed the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA), Public Law 93-508, 88 Stat. 1578. VEVRAA made several important changes to the VRRA and other laws. The most important change was to require state and local governments to reemploy persons who left state or local government jobs for voluntary or involuntary military service. As in 1974, it is important to provide for effective enforcement of the reemployment statute against state and local governments as employers, because 10% of Reserve Component (RC) personnel work for state government employers and another 11% for local government employers. Please see "Too Much To Ask? Supporting Employers in the Operational Reserve Era" by Dr. Susan M. Gates. The article was published in the November-December 2013 issue of *The Officer,* ROA's magazine. I also invite the reader's attention to Law Review 14047 (April 2014).

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

[9] *See Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998). The citation means that you can find this case in Volume 160 of *Federal Reporter Third Series,* and the decision starts on page 389.

> 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.[10]

Later in 1998, Congress amended USERRA to address the *Velasquez* problem. The 1998 amendment provides for two ways to enforce USERRA against a state government employer. Under section 4323(a)(1)[11] a USERRA lawsuit against a state brought by the United States Department of Justice (DOJ) is brought "in the name of the United States as the plaintiff in the action." This solves the 11th Amendment problem because that amendment does not preclude a suit against a state when the suit is brought by the United States.

That option was not available to Ramirez because the DOL-VETS office was unwilling to open a case on his behalf.[12] Ramirez was forced to rely on section 4323(b)(2), 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.*[13]

What is the meaning of the phrase "in accordance with the laws of the State?" If all it means is that you can sue the state in state court if state law permits such suits, this phrase is meaningless. If the state law permits such suits, we don't need a federal law permitting the suits.

I think that section 4323(b)(2) means that *you can sue the state in state court for violating USERRA whether the state law permits such suits or not.* We only look to the state law to determine in which state court to file the suit. Is that the meaning of section 4323(b)(2)? Is section 4323(b)(2) constitutional? The New Mexico Supreme Court found it unnecessary to reach these questions.

Sovereign immunity or "the King can do no wrong" has been part of the common law tradition in Great Britain and the United States for many centuries. In the last century, there have been many inroads in sovereign immunity at the federal level and the state level. Congress and the state legislatures have enacted statutes permitting lawsuits against the Federal Government and the states in federal and state courts, but there remain many limitations and conditions on these waivers of sovereign immunity.

In New Mexico, the Legislature enacted the following provision:

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[10] United States Constitution, Amendment XI, ratified February 7, 1795. Yes, it is capitalized just that way, in the style of the late 18th Century. Although the 11th Amendment, by its terms, only precludes a suit against a state by a citizen of another state, the Supreme Court has held that a suit against a state by a citizen of that same state is also precluded. *See Hans v. Louisiana,* 134 U.S. 1 (1890).

[11] 38 U.S.C. 4323(a)(1)(final sentence).

[12] The only way to get to DOJ is through DOL-VETS. *See* 38 U.S.C. 4323(a)(2).

[13] 38 U.S.C. 4323(b)(2) (emphasis supplied).

> The rights, benefits, and protections of the federal Uniformed Services Employment and Reemployment Rights Act shall apply to *a member of the National Guard*[14] ordered to federal or state active duty.[15]

Based on this provision, Rosario Vega Lynn, Esq. filed suit against CYFD, on behalf of Ramirez, in the New Mexico District Court. CYFD, through its retained private counsel, filed a motion to dismiss, arguing that the District Court did not have jurisdiction because the legislature had not effectively waived sovereign immunity to permit a lawsuit of this nature. The District Court judge impliedly denied the motion to dismiss.[16]

The trial judge permitted the case to go to trial, before a jury. The jury ruled in favor of Ramirez, holding that CYFD had taken adverse employment actions against him because of his military service and awarding him money damages for lost pay. The trial judge refused to set aside the jury verdict, and CYFD appealed to the New Mexico Court of Appeals (NMCOA), the state's intermediate appellate court.

The NMCOA reversed the trial judge on the jurisdictional issue. The intermediate court held that there is a rule of statutory construction that waivers of sovereign immunity must be explicit and unambiguous and that the statutory provision that Ramirez relied upon did not meet that high standard. The NMCOA set aside the District Court judgment for Ramirez.

Ramirez then applied to the New Mexico Supreme Court (NMSC) for *certiorari* (discretionary review), and the NMSC granted that discretionary review. After briefs and oral argument in 2014, the NMSC deliberated on this case for 16 months before coming down with a favorable decision for Ramirez on April 14, 2016. In a scholarly decision by Justice Judith K. Nakamura, joined by all four of her colleagues, the NMSC reversed the decision of the NMCOA and reinstated the District Court judgment for Ramirez.

The NMSC decided, contrary to the NMCOA, that the legislative provision effectively waived sovereign immunity to permit a lawsuit of this nature, against a state agency employer. Having decided the case on state law grounds, the NMSC did not need to reach the federal law question of whether section 4323(b)(2) of USERRA waives the sovereign immunity of state agencies as employers and whether section 4323(b)(2) is constitutional under the United States Constitution.

This interesting and important case is now over. We will keep the readers informed of other cases, in other states, about enforcing USERRA against state agencies as employers.

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[14] If Ramirez had been a member of the Army Reserve rather than the Army National Guard, this section would not have given him the right to sue CYFD for violating USERRA.

[15] New Mexico Statutes section 20-4-7.1 (emphasis supplied).

[16] In its opinion, the New Mexico Supreme Court criticized the trial judge for failing to address the motion to dismiss explicitly in a written decision.