LAW REVIEW 17033[1]
April 2017

Can You Sue the State of Tennessee for Violating USERRA?

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

Update on Sam Wright

1.1.1.7—USERRA applies to state and local governments
1.3.1.1—Left job for service and gave prior notice
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

Smith v. Tennessee National Guard,* 387 S.W.3d 570 (Tennessee Court of Appeals 2012).[3] (*Smith I)

Smith v. Tennessee National Guard,* 2017 Tenn. App. LEXIS 216 (Tennessee Court of Appeals March 31, 2017).[4] (*Smith II)

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, 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 1500 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. I have dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for more than 34 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me through ROA at (800) 809-9448, extension 730, or SWright@roa.org. Please understand that I am a volunteer, and I may not be able to respond the same day.

[3] This is a published decision of the Tennessee Court of Appeals, Tennessee's intermediate appellate court, above the trial court and below the Tennessee Supreme Court. The Legislature created this court in 1925. The court has 12 members, and it meets in panels of three judges. The citation means that you can find this case in Volume 387 of *Southwestern Reporter, Third Series,* and the court decision starts on page 570. *Southwestern Reporter* is published by the West Publishing Company, now part of Thomson-Reuters-West and is part of the company's regional reporting system. Decisions of the state high courts and intermediate appellate courts in Arkansas, Kentucky, Missouri, Tennessee, and Texas are published in *Southwestern Reporter,* which is now in its third series. The regional reporting system for state appellate courts began in the late 19th Century.

In 2010, David R. Smith was a Lieutenant Colonel (LTC) in the Tennessee Army National Guard (TNARNG) and was serving full-time with the Tennessee National Guard. As is explained more fully below, it is unclear what kind of full-time service he was performing, and this makes a big difference in determining the validity of his claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

In 2010, LTC Smith left his full-time National Guard position to attend the Naval War College (Newport, Rhode Island) for approximately one year.[5] After he successfully completed the course in 2011, he made a timely application for reemployment with the Adjutant General of Tennessee, who heads up the Tennessee Army and Air National Guard. The Adjutant General offered to reinstate Smith as a traditional National Guard member, performing periodic training, but refused to reinstate him to the full-time position that he had left in 2010. This lawsuit resulted, and the case is still pending six years later.

As I have explained in Law Review 15116 (December 2015) and many other articles, a service member or veteran has the right to reemployment under USERRA if he or she meets five simple conditions:

a. Must have left a *civilian position of employment* to perform uniformed service, as defined by USERRA.
b. Must have given the employer (federal, state, local, or private sector) prior oral or written notice.
c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which he or she seeks reemployment. A professional military education tour of this nature would ordinarily be exempt from the computation of the individual's five-year limit under section 4312(c)(3) of USERRA.[6]
d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
e. After release from the period of service, must have made a timely application for reemployment with the pre-service civilian employer.[7]

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[4] This is a published decision of the same court, the Tennessee Court of Appeals, in the same case, almost five years after the first decision. This court decision is not yet published in *Southwestern Reporter, Third Series,* only because the case is only a few days old, having been decided March 31, 2017. When the citation to *Southwestern Reporter, Third Series* becomes available, we will amend this article by adding that citation.

[5] It is not unusual for an Army officer to attend the Naval War College or for a Navy officer to attend the Army War College (Carlisle, Pennsylvania). The 1986 enactment of the Goldwater-Nichols Act has jointness among the services, and training with other services is highly prized and often considered career-enhancing.

[6] 38 U.S.C. 4312(c)(3).

[7] After a period of service of 181 days or more, the returning service member or veteran has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

It is necessary to meet all five of these conditions to have the right to reemployment. It is unclear if Smith met the first condition.

USERRA applies to a person who leaves a *civilian position of employment* to perform uniformed service and who seeks reemployment in the civilian position of employment after uniformed service. USERRA does not apply to a person who leaves one form of uniformed service (like Active Guard and Reserve (AGR) duty under title 32 of the United States Code) to perform another form of uniformed service (like training duty or active duty under title 10 of the United States Code).

It is possible that Smith was a *National Guard Technician* (technician)[8] when he left his full-time Tennessee service to report to the Naval War College (Newport, Rhode Island) in 2010. If Smith was a technician, and if he left the technician position for uniformed service and met the five USERRA conditions, he had the right to reemployment in 2011 when he returned from the Naval War College tour.

It is also possible that Smith was on title 32 AGR duty in 2010 when he left that status to attend the Naval War College for one year. If that is the case, Smith did not have the right to reemployment in 2011, and the Adjutant General of Tennessee was under no legal obligation to reinstate him. It may be that Smith and his lawyer have managed to waste the court's time and everyone else's time and money for six years, although Smith will lose on the merits once the court finally reaches the merits. Up to this point, the entire argument has been about sovereign immunity—about whether Smith had the right to bring this case, not about the merits of the case.

As I have explained in detail in Law Review 17032, the immediately preceding article in this series, the 11th Amendment of the United States Constitution makes it impossible for an individual to sue a state government in federal court to enforce USERRA. Accordingly, Smith brought his USERRA suit in state court after the Adjutant General refused to reinstate him to the full-time position that he had left in 2010 to attend the Naval War College.

In the state trial court, the State of Tennessee filed a motion to dismiss for want of jurisdiction. The State argued that it had sovereign immunity—the Smith was precluded from bringing such a

[8] In any Reserve Component, the great majority of the members (perhaps 95%) are part-timers, but the component needs a cadre of full-timers (perhaps 5%) to perform functions like recruiting, organizing the training for the part-timers on their drill weekends, performing maintenance on the aircraft and other equipment, etc. In the four Army and Air Force Reserve Components (the Army National Guard, the Army Reserve, the Air National Guard and the Air Force Reserve), much of the full-time support is performed by technicians. *A technician is a civilian employee,* but it is often difficult to discern that an individual is a technician, because he or she often wears a military uniform and observes military courtesies (saluting, etc.) while performing the civilian job. In the four Army and Air Force Reserve Components, full-time support is also provided by Reserve and National Guard officers and enlisted personnel on AGR duty. A person who leaves a technician position for voluntary or involuntary uniformed service will have the right to reemployment under USERRA if he or she meets the five USERRA conditions. A person who leaves an AGR tour for another form of uniformed service does not have the right to reemployment under USERRA.

suit and therefore the court had no jurisdiction. The trial judge agreed with the State's argument and dismissed the case for want of jurisdiction. Smith appealed to Tennessee's intermediate appellate court. In *Smith I,* the appellate court agreed with the State's argument and the trial judge's ruling. The appellate court affirmed the dismissal of the case for want of jurisdiction.

In 2014, the Tennessee Legislature enacted a provision that explicitly waives the sovereign immunity of state government agencies, to permit state court lawsuits against such agencies under USERRA. That new section reads as follows:

> Immunity from suit of any governmental entity, or any agency, authority, board, commission, council, department, office, or institution of higher education, is removed for the purpose of claims against and relief from a governmental entity under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. 4301-4334.[9]

This new section was signed into law by the Governor on July 1, 2014. By its terms, it applies to USERRA claims against state government entities "*accruing* on or after such date."[10]

After the enactment of this waiver of sovereign immunity, Smith filed a "Rule 60 motion" seeking to reopen his case, and the state trial court reopened it. The pertinent section of Tennessee's civil rules is as follows:

> On motion and under such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated as intrinsic or extrinsic), misrepre-sentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released, or discharged, or a prior judgment on which it has been based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) *any other reason justifying relief from the operation of the judgment.* The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this Rule 60.02 does not affect the finality of a judgment or suspend its operation, but the court may enter an order suspending the operation of the judgment upon such terms as to bond and notice as to it [the court] shall seem proper pending the hearing of such motion. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court. Writs of error coram nobis, bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining relief from a judgment shall be by motion as prescribed in these rules or by an independent action.[11]

[9] Tennessee Code Annotated, section 29-20-208.
[10] Emphasis supplied.
[11] Tennessee Rules of Civil Procedure, Rule 60.02.

The trial court held that the 2014 enactment of section 29-20-208 amounted to a change in circumstances that justified reopening the case, and the Tennessee Court of Appeals agreed. Section 29-20-208 was enacted (signed by the Governor) on July 1, 2014, and by its terms it applies to claims "*accruing* on or after that date." In *Smith II,* the State of Tennessee argued that Smith's claim accrued in 2011, when Smith returned from his year at the Naval War College, applied to the Adjutant General for reinstatement to the full-time position that he had left, and was denied reinstatement. Thus, the State argued that Smith's claim accrued prior to July 1, 2014, and thus the waiver of sovereign immunity did not apply.

Smith argued that a claim *accrues* only when the party has the present right to file suit on that claim. Smith did not have the right to file suit on his claim until July 1, 2014, when the Legislature enacted section 29-20-208 and waived the State's sovereign immunity. Thus, Smith argued that his claim accrued *on July 1, 2014,* and section 29-20-208 applied.

The trial judge agreed with the State's accrual argument and rejected Smith's argument. Thus, the trial judge held that there had been no effective waiver of sovereign immunity with respect to Smith's claim, and the trial judge dismissed Smith's claim for want of jurisdiction.

Smith appealed to the Tennessee Court of Appeals. In accordance with the standard procedure in that court, the case was assigned to a panel of three judges. In this case, the three judges were Judge Brandon O. Gibson, Judge Frank G. Clement, Jr., and Judge W. Neal McBrayer. Judge Gibson wrote the majority opinion and was joined by Judge Clement. Judge McBrayer dissented and wrote a separate dissenting opinion.

The Gibson-Clement majority agreed with Smith's argument that his case accrued on July 1, 2014 and that section 29-20-208 applied. Thus, the Court of Appeals reversed the decision of the trial judge.

Because there was a dissent in the Court of Appeals, and because this case involves an important legal issue, it seems likely that the Tennessee Supreme Court will agree to review the decision of the Court of Appeals. We will keep the readers informed of developments in this interesting and important case.