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NELA Advocates for USERRA Improvements

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

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The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent employees in civil rights, employment, and labor disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. With 69 circuit, state, and local affiliates, NELA has a membership of over 4,000 attorneys working on behalf of those who are illegally treated in the workplace.

A year ago (June 2016), NELA filed written testimony in the Senate Veterans' Affairs Committee, suggesting improvements to the Uniformed Services Employment and Reemployment Rights Act (USERRA). Here is a copy of the NELA testimony:

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1500 "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 1300 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 35 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 by e-mail at SWright@roa.org or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

June 30, 2016

The Honorable Johnny Isakson
Chairman
U.S. Senate Committee on Veterans' Affairs
Washington, DC 20510

The Honorable Richard Blumenthal
Ranking Member
U.S. Senate Committee on Veterans' Affairs
Washington, DC 20510

Re: Written Testimony Of The National Employment Lawyers Association For The June 29, 2016 Hearing Of The Senate Committee On Veterans' Affairs Regarding Pending Legislation

Dear Chairman Isakson, Ranking Member Blumenthal, and Members of the Committee:

Thank you for inviting the National Employment Lawyers Association (NELA) to participate in the June 29, 2016 hearing of the Senate Committee on Veterans' Affairs by providing written testimony expressing our strong support for the Justice for Servicemembers Act (JSA, S. 3042). NELA commends Senators Blumenthal, Leahy, Durbin, and Franken on the introduction of the Justice for Servicemembers Act. We also commend Chairman Isakson on this hearing and the timely consideration of this important bill. Our testimony also addresses additional proposed amendments to the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) contained in the Discussion Draft that is under consideration by the Committee.

Founded in 1985, NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in civil rights, employment, and labor disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. With 69 circuit, state, and local affiliates, NELA has a membership of over 4,000 attorneys working on behalf of those who are illegally treated in the workplace.

Many of our members represent servicemembers and veterans who seek representation for legal claims arising under USERRA. Thus, our members understand the employment-related challenges faced by those who sacrifice a great deal to serve our nation. As lawyers and as Americans, we must do all we can to help servicemembers and veterans who have suffered violations of their employment and reemployment rights as a result of their military service. It is critical that we strengthen USERRA and especially important that we restore enforcement rights that have been undermined by court decisions.

I. USERRA Overview

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 4301 *et seq.*, ensures that the civilian jobs of servicemembers and veterans (including members of the Reserves and National Guard) will not be jeopardized by their military service. USERRA provides reemployment rights and benefits to employees who leave civilian jobs to perform military service, protects against employment discrimination due to military membership or service, and entitles employees to certain rights and benefits while away for military service. USERRA covers all civilian employers in the United States, regardless of size or number of employees. USERRA is the most recent in a series of federal laws originating in 1940 that provide reemployment rights and job protection to servicemembers and veterans.

USERRA's enforcement mechanisms permit persons who believe their USERRA rights have been violated to file a complaint with the U.S. Department of Labor (DOL) Veterans' Employment and Training Service (VETS). If VETS does not resolve the complaint, the servicemember or veteran may request that the U.S. Department of Justice (DOJ) pursue litigation on their behalf. USERRA also grants servicemembers and veterans a private right of action if they choose not to file a complaint with VETS or to pursue the DOJ representation procedure, or if DOJ declines to pursue the alleged violation. Remedies for violations of USERRA include back pay, liquidated damages for willful violations (in cases against private, state, and local government employers), and injunctive relief.

II. NELA Strongly Supports The Justice For Servicemembers Act

The Justice for Servicemembers Act is a critically important bill that will amend Section 4302 of USERRA to clarify that servicemembers cannot be precluded from filing claims alleging violations of their USERRA rights in a court of law, and instead be forced to arbitrate such claims. Servicemembers typically find themselves bound by a forced arbitration clause, not because they had the opportunity to negotiate or to accept or decline such a provision, but rather because the forced arbitration clause was a prerequisite to being hired and keeping their jobs. When such clauses are in effect, servicemembers and veterans are forced to challenge employer conduct that violates their USERRA rights in arbitration rather than in a court of law. Forced arbitration clauses are a significant problem for servicemembers who are fired because of their military obligations or who cannot get their jobs back after returning from military service.

Properly construed, Section 4302(b) of USERRA, which is USERRA's anti-waiver provision, prohibits contracts requiring servicemembers to give up their enforcement rights under USERRA in order to gain employment or keep their jobs.[1] USERRA's legislative history confirms this interpretation. In explaining Section 4302(b), the House Committee on Veterans' Affairs stated that "resort to . . . arbitration . . . is not required," and that "[a]n express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, would be contrary to the public policy embodied in [USERRA] and would be

[1] Section 4302(b) provides:

> (b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

void."[2] Moreover, DOL interprets Section 4302(b) as prohibiting arbitration clauses waiving a servicemember's right to pursue a court action under USERRA.[3]

That servicemembers cannot be compelled to relinquish their statutory enforcement rights is a principle established long before USERRA's enactment. In 1958, the U.S. Supreme Court held servicemembers cannot be forced by employers to grieve or arbitrate their reemployment claims before enforcing their rights in court.[4] In enacting Section 4302(b), Congress intended to reaffirm and codify this longstanding principle.[5]

In 2006, however, the U.S. Court of Appeals for the Fifth Circuit in *Garrett v. Circuit City Stores, Inc.*, held USERRA claims can be subject to forced, binding arbitration.[6] The Fifth Circuit so held despite the express language in Section 4302(b) voiding "any" agreement that limits "any right or benefit" provided to servicemembers by USERRA, "including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit." The Fifth Circuit misconstrued Section 4302(b) as protecting only USERRA's substantive rights and excluding the enforcement rights granted to servicemembers by the Act.

In the wake of the Fifth Circuit's decision, numerous courts, including the U.S. Court of Appeals for the Sixth Circuit, have enforced forced arbitration clauses against servicemembers who sought to exercise their rights under USERRA to have their claims heard in court.[7] The arbitration clauses enforced in these cases, like that in the Fifth Circuit case, were imposed by employers as a mandatory condition of employment before the claims had arisen.

Passage of the JSA will restore and safeguard servicemembers' procedural rights under USERRA that have been eroded by the decisions of the Fifth and Sixth Circuits and their progeny. The JSA will amend USERRA to clarify that servicemembers' and veterans' procedural and enforcement rights are protected by Section 4302(b) of USERRA, just as their substantive rights are protected, and that pre-dispute clauses forcing USERRA claims into arbitration are unenforceable because they violate Section 4302(b).

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[2] H.R. REP. No. 103-65, pt. 1, at 20 (1993) ("House Report").

[3] Department of Labor, Preamble to USERRA Regulations, 70 Fed. Reg. 75,246, 75,257 (Dec. 19, 2005) (stating that Section 4302(b) "includes a prohibition against the waiver in an arbitration agreement of an employee's right to bring a USERRA suit in Federal court.").

[4] *McKinney v. Missouri-Kansas-Texas R.R. Co.*, 357 U.S. 265, 268-69 (1958).

[5] House Report at 20 (explaining that "section [4302(b)] would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required") (citing *McKinney*, 357 U.S. at 270; *Beckley v. Lipe-Rollway Corp.*, 448 F. Supp. 563, 567 (N.D.N.Y. 1978)).

[6] *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006) (employer's pre-dispute arbitration policy provided to servicemember treated as agreement to arbitrate his USERRA claims arising years later by virtue of his failure to opt out of policy within 30 days of receipt).

[7] *See, e.g., Landis v. Pinnacle Eye Care*, LLC, 537 F.3d 559 (6th Cir. 2008); *Ziober v. BLB Resources, Inc.*, No. 8:14-cv-00675-CJC-DFM (C.D. Cal. July 31, 2014); *Bodine v. Cook's Pest Control, Inc.*, No. 2:15–cv–00413–RDP, 2015 WL 3796493 (N.D. Ala. June 18, 2015); *McGee v. Armstrong*, No. 5:11CV2751, 2014 WL 3012879 (N.D. Ohio July 3, 2014); *McLean v. Byrider Sales of Ind. S, LLC*, No. 2:13–cv–524, 2013 WL 4777199 (S.D. Ohio Sept. 5, 2013); *Palmer v. Midland Food Servs. Inc.*, No. 1:11 CV 1343, 2011 WL 4458781 (N.D. Ohio Sept. 23, 2011); *Will v. Parsons Evergreene, LLC*, No. 08–cv–00898–DME–CBS, 2008 WL 5330681 (D. Colo. Dec. 19, 2008); *Ohlfs v. Charles Schwab & Co., Inc.*, No. 08–cv–00710–LTB–MEH, 2008 WL 4426012 (D. Colo. Sept. 25, 2008); *Ernest v. Lockheed Martin Corp.*, No. 07–cv–02038–WYD–KLM, 2008 WL 2958964 (D. Colo. July 29, 2008); *Kitts v. Menards, Inc.*, 519 F. Supp. 2d 837 (N.D. Ind. 2007).

We urge Congress to enact the JSA in the 114th Congress. Given the Armed Forces' heavy reliance on Guard and Reserve members to staff our military's operations, it is essential for servicemembers and veterans to be assured that they can serve in the military and return to their jobs. Any servicemember or veteran facing adverse action that is prohibited under USERRA should be assured that she or he can seek enforcement of their USERRA rights in a court of law.

III. NELA Testimony On The Discussion Draft

The Discussion Draft provided to us by the Committee on Veterans' Affairs includes the language of the JSA, but also goes further and addresses additional proposals for amending USERRA. NELA's testimony below addresses each proposal contained in the Discussion Draft.

a. NELA Supports Section 1 Of The Discussion Draft Clarifying The Scope Of Procedural Rights Under USERRA

The language of Section 1 of the Discussion Draft is identical to that of the Justice for Servicemembers Act. For the reasons stated above, NELA also strongly supports Section 1 of the Discussion Draft.

b. NELA Opposes Proposed Elimination Of The Remedy Of Liquidated Damages As Set Out In The Discussion Draft

Section 2(d)(1)(A) of the Discussion Draft would delete Section 4323(d)(1)(C) of USERRA, which authorizes awards of liquidated damages in an amount equal to a plaintiff's lost wages and benefits against private, state, and local government employers who willfully violate USERRA.

NELA opposes reducing remedies presently available under USERRA. The existing provision for liquidated damages should be improved to strengthen USERRA enforcement, and NELA strongly opposes eliminating liquidated damages as a remedy. One important improvement would be to amend the provision to eliminate the "willfulness" requirement. This change would align the provision more closely with the liquidated damages provisions in the Fair Labor Standards Act[8] and the Family and Medical Leave Act.[9]

Depending on the amount of lost wages and benefits awarded to a plaintiff, a liquidated damages award under the existing Section 4323(d)(1)(C) can be substantial and the potential for such an award can deter employers from violating USERRA. Importantly, unlike the compensatory and punitive damages provisions proposed in the Discussion Draft, the existing Section 4323(d)(1)(C) imposes no cap on the amount of liquidated damages, sets no threshold for the number of employees necessary for the employer to be liable for awards of liquidated damages, and treats public employers the same as private employers.

[8] *See* 29 U.S.C. §§ 216(b), 260.
[9] *See* 29 U.S.C. § 2617(a)(iii).

c. NELA Supports Strengthening USERRA Enforcement To Include Compensatory And Punitive Damages, But Opposes The Limits And Exemptions Proposed In The Discussion Draft

The enforcement mechanisms contained in USERRA should be strengthened by adding compensatory and punitive damages as remedies. NELA, however, opposes the language of the compensatory and punitive damages provisions in the Discussion Draft at Section 2(d). As drafted, the language in the Discussion Draft would have the unintended consequence of removing important remedies currently available. This language would remove relief for some servicemembers and provide inadequate relief for others.

The proposed compensatory and punitive damages provisions borrow from 42 U.S.C. § 1981a, which governs awards of compensatory and punitive damages under Title VII of the Civil Rights Act and the Americans with Disabilities Act (ADA). Although not identical to Section 1981a, the compensatory and punitive damages provisions in the Discussion Draft largely replicate Section 1981a, including setting caps on the combined amount of compensatory and punitive damages.

The Section 1981a caps on compensatory and punitive damages, enacted in 1991, are woefully inadequate to compensate victims of unlawful employment practices as the tragic story of the Henry's Turkey Service case illustrates (see http://nyti.ms/1oAJhgi). The caps limit full and just relief and reduce the amount of many damages awards to a level that renders them merely a cost of doing business for employers. Further, capped damages fail to deter employers from violating the law.

The Section 1981a caps ostensibly were adopted to protect businesses from potential financial ruin that could result from very large verdicts. The Section 1981a caps, and the caps included in the Discussion Draft, however, are based on the number of employees working in a business, and bear no relationship to an employer's actual financial profile. In the absence of caps, an employer would be free to move for remittitur based on its financial profile. If caps are to be incorporated into USERRA, caps based on an employer's net financial worth would be preferable to capping damages based on number of employees.

Another deficiency in Section 1981a, which is also reflected in the Discussion Draft, is that in both instances the caps are applied on a per person, rather than a per claim, basis. This approach provides a windfall to an employer who is the defendant in a lawsuit in which a plaintiff prevails on two or more claims and precludes adequate relief for the plaintiff. This approach also weakens the value of the remedy as a deterrent to employers.

Further, as proposed in the Discussion Draft, compensatory and punitive damages would be unavailable to USERRA plaintiffs suing employers with fewer than 15 employees. The Discussion Draft only allows for awards of compensatory damages against employers with 15 or more employees. This is inconsistent with other aspects of USERRA and makes no sense. Although Title VII and the ADA cover employers with 15 or more employees, USERRA applies to *all civilian employers* regardless of the number of employees.

The Discussion Draft also would weaken USERRA enforcement by exempting public employers from a penalty for willful violations of the Act. USERRA's current liquidated damages penalty allows for awards of liquidated damages (doubling of back pay) against state employers and

local government employers, as well as private employers who willfully violate USERRA. As noted above, the provisions of the Discussion Draft not only would eliminate the liquidated damages remedy, but also would immunize public employers from liability under the proposed punitive damages provision.

NELA further notes that compensatory damages under the Discussion Draft would be even more restrictive than under Section 1981a. Section 1981a does not cap past pecuniary losses.[10] The caps on compensatory damages under Section 1981a do not apply to past pecuniary losses, whereas the proposal in the Discussion Draft would cap all compensatory damages, including past pecuniary losses.

d. NELA Opposes Amending USERRA's Pension Rights Section

Section 4318 of USERRA is the Act's pension rights provision. It requires employers to treat persons reemployed after an absence for military service as having been continuously employed for pension purposes, and to make pension contributions covering the period of the person's absence. As drafted, the amendment to Section 4318 proposed in section 2(g) of the Discussion Draft could be detrimental to the pension rights of employees who take military leave. It would also create uncertainty for both employees and employers, as well as a potential for abuse by employers.

USERRA establishes rules governing the method for computing a reemployed employee's compensation for the period of the employee's military absence, for purposes of determining the amount of retroactive pension contributions to be made for such period. The compensation normally is the rate or rates of pay the employee would have received had the employee remained continuously employed.[11] If, however, the employee's rate of compensation "is not reasonably certain," the employee's compensation must be based on "the employee's average rate of compensation during the 12-month period immediately preceding" the employee's military absence, or, if shorter than 12 months, the period of employment immediately preceding such absence.[12] Examples of employees whose compensation "is not reasonably certain," include pilots whose wages routinely vary from month to month, or police officers who may, but do not always, earn substantial overtime pay.

The proposed language in the Discussion Draft amending Section 4318 retains this approach for employees whose compensation is not reasonably certain and who take military leave for one year or less. It also creates a new and separate methodology for employees whose compensation is not reasonably certain and who take military leave for *more* than one year. Pursuant to the Discussion Draft language for calculating pension contributions for employees whose military leave exceeds one year, the employee's compensation would be "the average rate of compensation during such period of service of employees of that employer who are similarly situated to the servicemember in terms of having similar seniority, status, and pay."

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[10] Compensatory damages subject to the caps under Section 1981a are "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(b)(3). *See also id.* § 1981a(b)(2) ("Compensatory damages awarded under [§ 1981a] shall not include backpay, interest on backpay, or any other type of relief authorized under [Title VII].").
[11] 38 U.S.C. § 4318(B)(3)(A).
[12] 38 U.S.C. § 4318(b)(3)(B).

For an individual employee whose compensation is not reasonably certain, it may be difficult to determine properly and fairly which other employees he or she "is similarly situated to" in terms of seniority, status, and pay. In some cases the employer's decision about which employees are "similarly situated" may leave the employee with far smaller pension contributions than if the employer had applied the current rule under Section 4318(b)(3)(B) by using the employee's average rate of compensation during the 12-month period before the military service.

In addition, this "similarly situated" standard creates potential for abuse by employers, as many employers would refuse to disclose to their employees how their pension contributions are calculated under Section 4318, leaving employees without the ability to determine whether their pension contributions were calculated in a manner consistent with the requirements of USERRA. (Currently, some employers do not disclose to their employees how their pension contributions under Section 4318 were calculated.) Furthermore, employees who begin a period of military leave and are subject to having their military service extended will not know in advance how their pension contributions will be calculated at the conclusion of their military leave, eliminating the certainty that the current bright line rule provides. This proposal also creates greater uncertainty for an employer seeking to plan for pension contributions to those employees on military leave for longer than one year.

NELA strongly recommends that the language in § 4318 of USERRA be left unchanged.

e. NELA Opposes Time Limits On Protection Of Employees With Service-Related Disabilities Discovered After Reemployment

The proposal at Section 2(h) of the Discussion Draft to restrict service-related disabilities covered under Section 4313(a)(3) of USERRA to those brought to an employer's attention within five years after a person's reemployment would weaken existing USERRA rights. Section 4313(a)(3) provides job placement and accommodation rights to returning servicemembers who cannot perform the duties of their otherwise applicable reemployment position due to a disability incurred or aggravated while away for military service. When liberally construed (as required in interpreting USERRA),[13] Section 4313(a)(3) covers latent service-related disabilities of reemployed servicemembers. DOL has interpreted the provision in this way.[14] Section 4313(a)(3) sets *no time limit* for notifying an employer of an employee's need for accommodation of a service-related disability.

By limiting covered disabilities to those discovered within five years after reemployment, this proposed amendment would cut off the current rights of veterans with latent or undiagnosed service-related disabilities that are discovered more than five years after reemployment. It is not

[13] *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (holding that the federal reemployment law "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need"). *Accord Alabama Power Co. v. Davis*, 431 U.S. 581, 584 (1977) (reaffirming that the "guiding principle" of liberal construction for the benefit of servicemembers "govern[s] all subsequent interpretations of the re-employment rights of veterans"). *See also King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980); *Tilton v. Missouri Pac. R. Co.*, 376 U.S. 169, 181 (1964).

[14] Department of Labor, preamble to USERRA regulations, 70 Fed. Reg. 75246, 75277 (Dec. 19, 2005) ("The disability [subject to § 4313(a)(3)] must have been incurred or aggravated when the service member applies for reemployment, even if it has not yet been detected. If the disability is discovered after the service member resumes work and it interferes with his or her job performance, then the reinstatement process should be restarted under USERRA's disability provisions.").

unusual for service-related cancers and psychiatric problems to manifest or be diagnosed after five years have elapsed. Further, many known but non-disabling service-related conditions progress to the point of being disabling in a period of time longer than five years.

It is our recommendation that language be added clarifying that service-related disabilities under Section 4313(a)(3) include those discovered after a servicemember resumes work, which is consistent with the intent of USERRA. Conversely, it would be unjust to servicemembers who take great risks and often expose themselves to both known and unknown dangers, to establish an arbitrary time limit for protection under Section 4313(a)(3).

f. NELA Supports USERRA Language Clarifying That Employers Have The Burden Of Identifying Reemployment Positions

NELA supports the proposal at Section 2(i) of the Discussion Draft to add a new provision to Section 4313 stating that "the employer shall have the burden of identifying the appropriate reemployment positions." Under a proper construction of Section 4313, which requires employers to reemploy returning servicemembers in accordance with the dictates of that Section, an employer bears that burden.

Amending Section 4313 to make the employer's responsibility explicit would clarify the reemployment obligations of employers and thereby protect the reemployment rights of servicemembers. Legislation amending Section 4313 to include the proposed language should state that the amendment is a clarification of reemployment rights.

g. NELA Recommends Revision Of The Proposed Sovereign Immunity Provision To Include Congress' War Powers As A Basis To Abrogate Immunity And Restore Jurisdiction To The Federal Courts

Servicemembers seeking to bring lawsuits to enforce their USERRA rights against state employers have increasingly been denied access to courts. When enacted in 1994, USERRA authorized servicemembers to sue state employers in federal court. Based on well-established case law under USERRA's predecessor legislation, Congress' War Powers under Article I of the Constitution fully authorized Congress to subject states to private lawsuits to enforce servicemembers' civilian employment and reemployment rights.[15]

The tide turned, however, with the U.S. Supreme Court's 1996 decision in *Seminole Tribe of Florida v. Florida,* which held Congress cannot use its commerce powers under Article I of the Constitution to override states' immunity under the Eleventh Amendment from private suits for damages.[16] Although *Seminole Tribe* did not concern Congress' War Powers, broad language in the decision suggested no Article I power authorized Congress to override the Eleventh Amendment. In the immediate aftermath of *Seminole Tribe*, some federal courts held states

[15] *See Reopell v. Commonwealth of Mass.*, 936 F.2d 12 (1st Cir. 1991); *Peel v. Florida Dep't of Transportation,* 600 F.2d 1070, 1084 (5th Cir. 1979); *Jennings v. Illinois Office of Educ.*, 589 F.2d 935, 938 (7th Cir. 1979); *Moore v. State of Kan.*, No. 78-1079, 1979 WL 1866 (D. Kan. May 31, 1979); *Sheely v. Idaho Falls Sch. Dist. No. 91*, No. 78-4012, 1978 WL 1667 (D. Idaho Nov. 8, 1978); *Camacho v. Public Svc. Com. of Commonwealth of Puerto Rico*, 450 F.Supp. 231 (D.P.R. 1978).

[16] *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996).

enjoyed Eleventh Amendment immunity from USERRA claims.[17] The U.S. Court of Appeals for First Circuit, however, ruled that *Seminole Tribe*'s "hold[ing] that Congress lacks the power to abrogate the Eleventh Amendment under the Commerce Clause ... does not control the War Powers analysis."[18]

In response to the post-*Seminole Tribe* decisions holding states have Eleventh Amendment immunity from private USERRA suits filed in federal court, and in an effort to ensure state employees a forum to bring lawsuits to enforce USERRA, in 1998 Congress amended USERRA's enforcement provisions to (among other things) replace federal court jurisdiction over private suits against states with state court jurisdiction over such suits.[19] The understanding at the time was that states would have no immunity from federal claims brought in state courts. In 1999, however, the U.S. Supreme Court ruled in *Alden v. Maine* that Congress' authority under Article I did not include the power to subject nonconsenting states to private suits for damages in state courts.[20] *Alden* was not a USERRA case and did not concern Congress' War Powers. Rather, *Alden* was brought under the Fair Labor Standards Act, which is a commerce powers enactment. Nonetheless, in the wake of *Alden*, a number of state courts have held that state employers enjoy immunity from USERRA claims brought in state court, such as those in Alabama, Delaware, and Georgia.[21] As a result, no forum is available for state employees in these states to bring private suits to enforce their rights under USERRA. State courts in New Mexico, Ohio, South Carolina, and Wisconsin have found no state immunity from USERRA claims.[22] A Tennessee statute waives state immunity from USERRA claims arising on or after July 1, 2014, but not for USERRA claims that accrued before that date.[23] Few other states have enacted laws waiving sovereign immunity from USERRA claims.[24] State employees in most other states have no assurance they can sue to enforce their USERRA rights.

As a solution, NELA recommends that Congress amend USERRA to provide explicitly once again for federal court jurisdiction over private USERRA suits against states. NELA believes Congress' War Powers authorize Congress to subject unwilling states to lawsuits in federal court

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[17] *See Velasquez v. Frapwell*, 160 F.3d 389, 395 (7th Cir. 1998), *vacated in part*, 165 F.3d 593 (7th Cir. 1999); *Palmatier v. Michigan Dept. of State Police*, 981 F. Supp. 529 (W.D. Mich. 1997).

[18] *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609, 616 n.9 (1st Cir. 1996).

[19] *See* 38 U.S.C. § 4323(b)(2). Note: Federal appellate courts addressing the issue have ruled the 1998 amendment divested the federal courts of jurisdiction to hear private suits against states. *See Velasquez v. Frapwell*, 165 F.3d 593, 593–94 (7th Cir. 1999); *McIntosh v. Partridge*, 540 F.3d 315, 320–21 (5th Cir. 2008); *Townsend v. University of Alaska*, 543 F.3d 478, 484–85 (9th Cir. 2008); *Wood v. Florida Atlantic University Bd. of Trustees*, 432 Fed. Appx. 812, 815 (11th Cir. 2011) (citing *Velasquez*, *McIntosh*, and *Townsend*). *See also Rimando v. Alum Rock Union Elementary School Dist.*, 356 Fed. Appx. 989 (9th Cir. 2009) (California public school district is treated same as state for jurisdictional purposes under USERRA.).

[20] *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240 (1999).

[21] *Anstadt v. Board of Regents of University System of Ga.*, 303 Ga. App. 483, 693 S.E.2d 868 (2010); *Janowski v. Division of State Police, Dept. of Safety and Homeland Sec., State of Delaware*, 981 A.2d 1166 (Del. 2009); *Larkins v. Department of Mental Health and Mental Retardation*, 806 So. 2d 358 (Ala. 2001).

[22] *Ramirez v. State, CYFD*, No. S–1–SC–34613, —P.3d—, 2016 WL 1459129 (N.M. Apr. 14, 2016); *Copeland v. South Carolina Dept. of Corrections*, No. 2013-CP-42-2498 (S.C. Ct. Com. Pl. Mar. 28, 2014); *Scocos v. State Dept. of Veteran Affairs*, 2012 WI App 81, 343 Wis. 2d 648, 819 N.W.2d 360 (Wis. Ct. App. 2012); *Panarello v. State*, No. PC 03-5569, 2009 WL 301888 (R.I. Super. Ct. Jan. 22, 2009).

[23] *Smith v. The Tennessee Nat'l Guard*, No. M2014–02375–COA–R3–CV, 2015 WL 3455448, at *3 (Tenn. Ct. App. May 29, 2015) (holding waiver of sovereign immunity for USERRA claims in Tenn. Code Ann. § 29-20-208 only applies to causes of action that accrue on or after July 1, 2014), *appeal denied*, (Sept. 17, 2015).

[24] *See* Fla. Stat. Ann. § 250.82; Minn. Stat. Ann. § 1.05; Mont. Code Ann. §§ 10-1-1003 (3)(a), 10-1-1004, 10-1-1020, 10-1-1021; Ohio Rev. Code Ann. §§ 5903.02.

under USERRA.[25] NELA notes that a decade after deciding *Seminole Tribe*, the U.S. Supreme Court held in *Central Virginia Community College v. Katz* that the language in *Seminole Tribe* suggesting that Article I power cannot be used to override states' Eleventh Amendment immunity was dicta based on an "assumption" that "was erroneous."[26] Significantly, *Katz* went on to hold that Congress's power under Article I to enact bankruptcy laws included authority to subject states to bankruptcy proceedings.[27] Certainly, the case for Congress' War Powers overriding states' claims of sovereign immunity is even stronger.[28] Indeed, the United States has taken the position that Congress' constitutional War Powers empower Congress to subject nonconsenting states to private suits under USERRA.[29]

As a result of the 1998 amendment's elimination of federal court jurisdiction over private suits against states under USERRA, the question of whether the War Powers authorize Congress to subject nonconsenting states to private suits in federal court under USERRA was not fully litigated and thus never reached the U.S. Supreme Court. NELA believes jurisdiction should be restored to the federal courts so that the matter can be fully litigated with possible ultimate review by the Supreme Court. Accordingly, NELA supports the Discussion Draft's proposal to restore to the federal courts jurisdiction over private suits to enforce USERRA against state employers.[30]

NELA, however, recommends that the Discussion Draft's proposed amendment addressing state sovereign immunity[31] be revised to provide that Congress' War Powers under Article I of the Constitution continue as the basis to abrogate state immunity for any action under USERRA against a state employer. While dismissal of USERRA claims against states on sovereign immunity grounds remains a major obstacle to enforcement of USERRA rights by state employees, Congress should not abandon its reliance on the War Powers to abrogate state immunity from private actions under USERRA.

NELA supports the Discussion Draft's provision that uses the Constitution's Spending Clause as a new source of power to abrogate state immunity. NELA does not support, however, the Discussion Draft's apparent exclusive reliance on the Spending Clause to accomplish abrogation.

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[25] For excellent law review articles on this subject, *see* Harner, *The Soldier and the State: Whether the Abrogation of State Sovereign Immunity in USERRA Enforcement Actions Is a Valid Exercise of the Congressional War Powers*, 195 Mil.L.Rev. 91 (2008); Hirsch, *Can Congress Use its War Powers to Protect Military Employees from State Sovereign Immunity?*, 34 Seton Hall L.Rev. 999 (2004). *See also* Brief for The United States as *Amicus Curiae* in Support of the Petitioner, *Ramirez v. State of N.M. Children, Youth, and Families Dep't* (N.M. Aug. 6, 2014) (No. No. 34,613), *available at* http://1.usa.gov/1BR29l1.

[26] *Central Virginia Community College v. Katz*, 546 U.S. 356, 363 (2006).

[27] *Id.* at 379.

[28] *Cf. Lichter v. United States*, 334 U.S. 742, 781 (1948) ("'[Congress' war] power, explicitly conferred and absolutely essential to the safety of the Nation, is not destroyed or impaired by any later provision of the constitution or by *any one of the amendments*.'") (quoting address by Hon. Charles E. Hughes) (emphasis added); *In re Tarble*, 80 U.S. 80 U.S. 397, 408 (1871) (Congress' war powers are "plenary and exclusive").

[29] *See* Brief for The United States as *Amicus Curiae* in Support of the Petitioner, *Ramirez v. State of N.M. Children, Youth, and Families Dep't* (N.M. Aug. 6, 2014) (No. No. 34,613), *available at* http://1.usa.gov/1BR29l1; Brief for the United States As Intervenor-Appellee, *Weaver v. Madison City Bd. of Educ.*, (11th Cir. Mar. 14, 2014) (No. 13-14624-F), *available at* http://1.usa.gov/2931Lrb.

[30] NELA also supports the Discussion Draft's authorization for concurrent jurisdiction of the state courts over such suits. Servicemembers should have a right to choose between a federal and state forum to enforce their USERRA rights.

[31] Sec. 2(b) of the Discussion Draft.

While the Spending Clause may solve the sovereign immunity problem going forward, the proposed Spending Clause fix, in contrast to reliance on the War Powers, would not abrogate claims of state immunity arising previously. Furthermore, the War Powers, which are sweeping, may ultimately prove more effective in accomplishing abrogation.

h. NELA Supports The Proposals To (1) Grant Individuals A Right To Intervene In Lawsuits Brought By The Attorney General On Their Behalf, (2) Authorize The Attorney General To Bring "Pattern Or Practice" Suits, (3) Expand The Bases For Venue, And (4) Authorize The Attorney General To Issue And Serve Civil Investigative Demands

NELA supports the Discussion Draft's proposed amendments that would grant individuals a right to intervene in lawsuits brought by the Attorney General on their behalf, authorize the Attorney General to bring "pattern or practice" suits, expand the bases for venue, and authorize the Attorney General to issue and serve civil investigative demand. Each of these provisions would further strengthen enforcement of USERRA and the protections USERRA is intended to provide for our nation's servicemembers and veterans.

Finally, NELA supports the proposed conforming amendments on standing and attorneys' fees.

In conclusion, NELA strongly supports passage of the JSA as well as additional legislation that is consistent with our written testimony and ensures the enforcement of the employment and reemployment rights of our nation's servicemembers and veterans.

Thank you for the opportunity to provide written testimony on the above important legislation.

Respectfully submitted,

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Executive Director