

LAW REVIEW 17086¹

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Enforcing USERRA against a State Government Employer—Continued

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1.1.1.7—USERRA applies to state and local governments

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

Q: I am a Captain in the Marine Corps Reserve and a member of the Reserve Officers Association (ROA). I have read with great interest some of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). On the civilian side, I am a career employee of the Commonwealth of Virginia.³

I am scheduled to perform two weeks of Marine Corps annual training next month, and I gave my civilian supervisor six weeks of notice, orally and in writing. My supervisor told me that I

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.

³ Four states (Kentucky, Massachusetts, Pennsylvania, and Virginia) are called “commonwealths.” The difference is only in terminology. These four states are exactly like the other 46 with respect to their position in our federal system of government.

do not have his permission to be absent from work at that time and that if I am absent he will write me up for insubordination and absence without leave and seek to get me fired. Help!

I read with great concern your Law Review 16124 (December 2016), about the recent Virginia Supreme Court case⁴ holding that the government of the Commonwealth of Virginia is immune from being sued by a state employee claiming that his or her USERRA rights have been violated by the Commonwealth, as employer. If I cannot sue my employer, the state government, in federal court and I cannot sue in state court, what good is USERRA to me? How do I enforce my USERRA rights against the state?

A: As I have explained in Law Review 16124 and other articles, USERRA (as enacted in 1994) permitted an individual (like you) to sue a state government employer in federal court, to enforce USERRA. In 1998, the United States Court of Appeals for the 7th Circuit⁵ held that USERRA was unconstitutional insofar as it permitted an individual to sue a state government employer in federal court.⁶

Later in 1998, Congress amended USERRA, in response to this unfavorable 7th Circuit precedent. The 1998 amendment provided for two alternative ways to enforce USERRA against a state government employer. In this article, I will discuss the alternative that I believe is more likely to be successful in a case like yours.

I invite your attention to section 4323(a)(1) of USERRA:

A person who receives from the Secretary a notification pursuant to section 4322(e) of this title of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. Not later than 60 days after the Secretary receives such a request with respect to a complaint, the Secretary shall refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for

⁴ *Clark v. Virginia State Police*, 292 Va. 725 (2016). As I have explained in the July 2017 update to Law Review 16124, at the bottom of the article, Clark (the plaintiff) has applied to the United States Supreme Court for certiorari (discretionary review). We will probably know by late September whether the United States Supreme Court has agreed to review the decision of the Virginia Supreme Court.

⁵ The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

⁶ *Velasquez v. Frapwell*, 160 F.3d 389 (7th Cir. 1998).

such person. *In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.*⁷

Here is how you can make the system work for you. First, you need to file a formal written USERRA complaint against your employer with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS).⁸ That agency will investigate your complaint.⁹ DOL-VETS has subpoena authority for USERRA investigations.¹⁰

DOL-VETS is expected to complete the USERRA investigation within 90 days after receiving the written complaint.¹¹ Upon completing its investigation, the agency will notify you of the results of the investigation and of your options for USERRA enforcement.¹²

If the DOL-VETS investigation does not result in the resolution of your complaint, you can request (in effect, insist upon) referral of the case file from DOL-VETS to the United States Department of Justice (DOJ).¹³ If DOJ is reasonably satisfied that you are entitled to the benefits you seek, it is permitted but not required to file suit on your behalf against the employer (state or local government or private employer) in the appropriate federal district court.¹⁴ If DOJ represents you, you avoid any financial obligation for attorney fees or court costs.

Because in your case the defendant-employer is a state, DOJ will file the case in the name of the United States, as plaintiff.¹⁵ Making the United States the named plaintiff in a case brought by DOJ against a state government employer solves the 11th Amendment problem. The 11th Amendment bars a suit against a state by an individual. The 11th Amendment does not bar a suit against a state by the United States.¹⁶

Q: In several of your "Law Review" articles you have criticized DOL-VETS for accepting at face value the statements of law and fact by employers and employer attorneys and for closing as "without merit" USERRA cases that do have merit. How can I be assured that DOL-VETS will do a good job of investigating my case?

⁷ 38 U.S.C. 4323(a)(1) (emphasis supplied). The final sentence (italicized above) was added by the 1998 amendment.

⁸ 38 U.S.C. 4322(a).

⁹ 38 U.S.C. 4322(d).

¹⁰ 38 U.S.C. 4326.

¹¹ 38 U.S.C. 4322(f).

¹² 38 U.S.C. 4322(e).

¹³ 38 U.S.C. 4323(a)(1).

¹⁴ *Id.*

¹⁵ 38 U.S.C. 4323(a)(1) (final sentence). When the defendant-employer is a private employer or a political subdivision of a state (county, city, school district, etc.), DOJ files the suit in the name of the aggrieved individual. Please see Law Review 17081 (August 2017).

¹⁶ DOJ has successfully used this authority to enforce USERRA against the State of Alabama and the State of Nevada. *See United States v. Alabama Department of Mental Health*, 673 F.3d 1320 (11th Cir. 2012); *United States v. Nevada*, 817 F. Supp. 2d 1230 (D. Nev. 2011). I discuss the Alabama case in Law Review 12032 (March 2012) and the Nevada case in Law Review 13031 (February 2013).

A: You are correct that I have criticized DOL-VETS for cases that I believe they have handled poorly. For example, please see Law Review 16099 (September 2016). In other articles, I have praised DOL-VETS when they have done well. For example, please see Law Review 17081 (August 2017). I think that DOL-VETS is improving. If you believe that the DOL-VETS investigator assigned to your case does a poor job, I urge you to contact the national office leadership of DOL-VETS.

In any case, you must go through DOL-VETS to get to DOJ. Your best shot at getting relief against the Commonwealth of Virginia is to get DOJ to bring the case in the name of the United States.