LAW REVIEW 17116[1]
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Enforcing USERRA against the State of Minnesota

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Update on Sam Wright

1.1.1.7—USERRA applies to state and local governments
1.3.2.2—Continuous accumulation of seniority-escalator principle
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

Bottom line up front

If you have a federal reemployment rights claim against the State of Minnesota, as employer, and if your claim accrued on or after April 19, 2012, you can sue the State of Minnesota in state court. If you prove your case, you can obtain both monetary and injunctive relief. If your claim accrued before April 19, 2012, you probably have no judicial remedy.

***Breaker v. Bemidji State University,* 899 N.W.2d 515 (Minnesota Court of Appeals June 12, 2017).**[3]

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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 the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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 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.

[3] This is the published decision of a three-judge panel of Minnesota's intermediate appellate court. The decision has not been reviewed by Minnesota's Supreme Court, and it probably won't be. The citation means that you can find this decision in Volume 899 of *Northwest Reporter, Second Series,* and the decision starts on page 515.

The facts

Martin Breaker was a faculty member at Bemidji State University in Minnesota starting in 1997, and he was a member of the Army Reserve. In 2005, he left his faculty job because he was called to active duty by the Army. In 2008, he left active duty and sought reemployment at the university. It appears that he met the five conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[4]

Were Breaker's USERRA rights violated? Maybe

Because he met the USERRA conditions, Breaker was entitled to prompt reinstatement in the position that he *would have attained if he had been continuously employed,* or another position (for which he was qualified) that was of like seniority, status, and rate of pay.[5] The position that Breaker *would have attained if he had been continuously employed* is not necessarily equal to or better than the position he left. The Department of Labor (DOL) USERRA Regulation provides:

> **Can the application of the escalator principle result in adverse consequences when the employee is reemployed?**
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> - **Yes.** The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.[6]

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA),

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[4] He clearly left his civilian job to enter active duty, and he apparently gave the employer prior oral or written notice. It appears that he did not exceed the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which he sought reemployment. It appears that he served honorably and did not receive a disqualifying bad discharge from the Army, and that he made a timely application for reemployment after release from active duty. Please see Law Review 15116 (December 2015) for a detailed discussion of USERRA's five conditions.

[5] 38 U.S.C. 4313(a)(2)(A).

[6] 20 C.F.R. 1002.194 (bold question and bold "Yes" in original).

which was originally enacted in 1940. There have been 16 Supreme Court decisions under the VRRA and one (so far) under USERRA.[7] In its first case construing the VRRA, the Supreme Court enunciated the "escalator principle" when it held: "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war."[8]

It has always been the case that the escalator can descend as well as ascend. If the university can show that Breaker's position was abolished during the time that he was on active duty and that Breaker's job would have been downgraded *even if he had not been called to the colors,* offering him a lesser position upon reemployment than the position he held before he left was not a violation of USERRA.

Because of financial considerations and the changing interests of students, programs and even entire departments are sometimes abolished, and new programs and departments are established. To determine what *would have happened* to Breaker if he had not been called to the colors, we need to examine what happened to other faculty members in the same department who had similar seniority during the 2005-08 period, when Breaker was away from his job for military service. If such an examination shows that Breaker's job would have been downgraded anyway, the university did not violate USERRA.

Breaker's first lawsuit

Acting as his own attorney, Breaker sued Bemidji State University, the State of Minnesota, Minnesota State Colleges and Universities, and several individual defendants, alleging the tort of intentional infliction of emotional distress. He mentioned alleged USERRA violations, but he did not seek relief under USERRA. Not surprisingly, the defendants moved for judgment on the pleadings—asserting that even if all the facts were as alleged by Breaker he was not entitled to any relief that the court could award. The trial court granted the defendants' motion. Breaker appealed to Minnesota's intermediate appellate court, which affirmed. The judgment for the defendants became final when Breaker failed to make a timely request for review by the Minnesota Supreme Court.

The Minnesota Legislature explicitly waived sovereign immunity for alleged USERRA violations by state agencies, but only prospectively.

As I have explained in Law Review 12047 (May 2012), on April 18, 2012 Governor Mark Dayton signed into law S.F. No. 1689, a new law that amended several sections of the Minnesota Statutes to provide better and more enforceable rights to Minnesota veterans and members of

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[7] Please see Category 10.1 in our Subject Index for a case note on each of these 17 decisions.

[8] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). Please see Law Review 08001 (January 2008) for a detailed discussion of the *Fishgold* case. The escalator principle is codified in section 4313(a)(2)(A) and section 4316(a) of USERRA, 38 U.S.C. 4313(a)(2)(A), 4316(a).

the Reserve Components of the armed forces.[9] The most important section of S.F. No. 1689 was section 1, which amended section 1.05 of Minnesota Statutes by adding a new subsection 5, as follows:

> An employee, former employee, or prospective employee of the state who is aggrieved by the state's violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA), … may bring a civil action against the state in federal court or another court of competent jurisdiction for legal or equitable relief that will effectuate the purposes of that act.[10]

Governor Dayton signed S.F. No. 1689 into law on April 12, 2012. Section 1 of S.F. No. 1689 went on to provide: "This section is effective the day following final enactment [April 13, 2012] and applies to cases pending on or commenced after that date."[11]

Breaker's second lawsuit and the res judicata principle

After the Minnesota Legislature enacted S.F. No. 1689, waiving sovereign immunity for USERRA claims against the state, Breaker brought a second lawsuit against the university and the state. This time, he had lawyers to represent him.

The defendants responded to his complaint by filing a motion to dismiss, based on the legal principle of res judicata, which has been defined as follows:

> *Res judicata* translates as "a matter judged."
>
> Generally, res judicata is the principle that a cause of action may not be relitigated once it has been judged on the merits. "Finality" is the term which refers to when a court renders a final judgment on the merits.[12]

At least in Minnesota, res judicata bars not only claims that were litigated in an earlier suit involving the same plaintiff but also claims that *could have been litigated.* If the plaintiff had a fair opportunity to bring the new claim in the earlier lawsuit, he or she is precluded from bringing that claim in the new lawsuit. If the plaintiff did not have a fair opportunity to bring the new claim in the first lawsuit, res judicata does not bar asserting the new claim in the second lawsuit.

The trial court granted the defendants' motion to dismiss based on the res judicata principle. Breaker appealed to Minnesota's intermediate appellate court. A three-judge panel of that court reversed, holding that Breaker did not have a fair opportunity to assert his USERRA claim in the

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[9] Our nation has seven Reserve Components. In order of size they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard.

[10] Minnesota Statutes, section 1.05(5).

[11] Breaker's first lawsuit had been dismissed, and the dismissal had become final, prior to April 13, 2012. Thus, the new subsection 5 of section 1.05 did not apply to Breaker's first lawsuit.

[12] *See* www.law.cornell.edu/wex/res_judicata.

first lawsuit because the statutory amendment waiving sovereign immunity did not go into effect until April 19, 2012, and by that time Breaker's loss in the first lawsuit was final.[13]

Breaker's victory on the res judicata issue was pyrrhic because the appellate court upheld the dismissal of his second lawsuit on other grounds. The appellate court held that the waiver of sovereign immunity was not retroactive, except as to claims that were still pending in court on April 19, 2012. Breaker's claim was not pending on that date, and his claim accrued prior to that date. Therefore, the waiver of sovereign immunity did not apply to Breaker's claim, the court held.

The appellate court also considered and rejected the argument that USERRA, as amended in 1998, validly abrogated the sovereign immunity of states and required state courts to hear and adjudicate USERRA claims against state agencies as employers, without regard to state law. That argument is recited in detail in Law Review 17115 (December 2017), the immediately preceding article in this "Law Review" series.

We will keep the readers informed of new developments on the important issue of enforcing USERRA against state agencies as employers. This issue is important because 10% of Reserve Component part-timers have civilian jobs for state agencies.

[13] After Minnesota's intermediate appellate court affirmed the dismissal of Breaker's first lawsuit, he had a limited time to ask the Minnesota Supreme Court to hear the case. Breaker's loss in the first lawsuit became final when he failed to ask for review in the state's high court within the deadline. The end of the deadline was months before April 19, 2012.