

The Territorial Government of the United States Virgin Islands Does Not Have Sovereign Immunity with respect to USERRA Lawsuits

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[Update on Sam Wright](#)

1.1.1.7—USERRA applies to state and local governments

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

As I have explained in Law Review 17115 and 17116 (December 2017), the most recent two articles in the “Law Review” series, the concept of sovereign immunity and the 11th Amendment of the United States Constitution enormously complicate the process of enforcing the Uniformed Services Employment and Reemployment Rights Act (USERRA) against state agencies as employers. This issue is important because 10% of Reserve Component part-timers have civilian jobs for state government employers.

Recently, the sovereign immunity issue came up with respect to the Territorial Legislature of the United States Virgin Islands (USVI). Shorn Joseph, a First Lieutenant and judge advocate in

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 (VRRRA—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 VRRRA 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 VRRRA 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.

the United States Army Reserve (USAR), was employed as a legal counsel for the USVI Legislature. He left his civilian job to perform USAR training, and he met the five USERRA conditions for reemployment.³

The USVI Legislature unlawfully refused to reemploy Joseph after his USAR training, and Joseph sued the Legislature in the USVI Superior Court. The USVI Legislature claimed that it was immune from suit under the doctrine of sovereign immunity, the 11th Amendment to the United States Constitution, and the Revised Organic Act—the federal statute that provides for the USVI territorial government. The United States Department of Justice (DOJ) filed a friend of the court brief in the USVI Superior Court, arguing that the USVI is not immune from being sued by a reservist like Joseph for violating USERRA. I am pleased to report that the Superior Court accepted the DOJ argument and rejected the USVI Legislature’s claim of immunity from suit.

Here is a copy of the April 26, 2017 DOJ press release:

VIRGIN ISLANDS SUPERIOR COURT HOLDS THAT SOVEREIGN IMMUNITY DOES NOT SHIELD THE V.I. LEGISLATURE FROM SUIT UNDER USERRA

April 26, 2017

This week a decision was filed in the Superior Court of the Virgin Islands in the case of Joseph v. Virgin Islands, CV No. ST-11-CV-419, stating that the government of the United States Virgin Islands can be sued under the Uniformed Services Employment and Reemployment Rights Act (“USERRA”). In 2015, the United States filed a Statement of Interest in this matter on behalf of Shorn Joseph, who is the plaintiff in the lawsuit as well as a First Lieutenant and Judge Advocate in the United States Army Reserve. He was also employed by the Virgin Islands Legislature as legal counsel. In October 2010, Joseph was ordered by his command to attend military training from October 23, 2010 until February 3, 2011. On January 19, 2011, he was ordered to continue training until March 22, 2011. On January 31, 2011, Joseph informed his employer of the additional training, but received no response. The Virgin Islands Legislature terminated his employment a week later, and Joseph sued the Legislature and its president under USERRA and local law.

³ Joseph left his civilian job to perform service in the uniformed services as defined by USERRA, and he gave the employer prior oral or written notice. He served honorably and did not receive a disqualifying bad discharge from the Army. He did not exceed the five-year cumulative limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which he sought reemployment. After release from the period of service, he made a timely application for reemployment. Please see Law Review 15116 (December 2015) for a detailed discussion of the five USERRA conditions.

The defendants moved to dismiss Plaintiff's USERRA claims, arguing that they are immune from suit under the Eleventh Amendment and the Revised Organic Act—the federal statute which provides territoriality for the Virgin Islands. The United States' Statement of Interest, drafted by AUSA Noah Sacks and SVI Asst. Dir. Andrew Braniff, argued that the Virgin Islands Legislature, like other territorial governments, was subject to suit under USERRA. The Court denied the Virgin Island's motion to dismiss the USERRA claims, finding that the Virgin Island does not benefit from Eleventh Amendment immunity which applies only to states. The Court further noted that even if the Revised Organic Act could provide immunity to the Virgin Islands from suit in its own courts, any such immunity had been abrogated by USERRA and its amendments.

The Department of Justice is tasked with enforcing certain laws that protect the rights of servicemembers. In addition to protecting servicemembers' civilian employment rights by enforcing USERRA, the Department protects servicemembers' voting rights by enforcing the Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA"), and financial security through the Servicemembers Civil Relief Act ("SCRA"). The Servicemembers and Veterans Initiative coordinates with Department components and federal agencies to build a comprehensive legal support and protection network focused on serving servicemembers, veterans and their families.