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Can I Sue the Commonwealth of Kentucky For Violating my USERRA Rights?

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

1.1.1.7—USERRA applies to state and local governments
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Q: I am a recently retired Brigadier General in the Army Reserve (USAR) and a life member of the Reserve Officers Association (ROA). I have read with great interest many of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1600 "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 1400 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. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also 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 36 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.

For many years, I have worked for the University of Kentucky (UK) as a tenured professor. Over the years, and especially following 9/11/2001 and the increased operational tempo of the Reserve Components, I had a lot of friction with my superiors at the university about my USAR obligations and the time that those obligations have required me to be away from my civilian job. In fact, the term "divided loyalties" was used to describe my time as a faculty member and Army Reserve Soldier. Following my retirement from the Army Reserve about four years ago, my civilian job productivity rebounded, I received a "satisfactory" rating on my performance review (following a downgrade from my Dean), and I was awarded my first raise in ten years.

A little more than a year ago, I applied for and was interviewed for the position of department chair. If I had gotten the position, it would have meant a substantial increase in my UK salary and eventual pension, it would have afforded me the opportunity to use my experience and training in service to UK, and it would have positioned me for further career advancement. I was happy with my performance during the interview process, and by any objective measure, my credentials indicated high qualification for the position. However, I was notified by the Dean that I had not been selected. Moreover, the Dean informed me during a telephone conversation that my prior uniformed service – which had ended roughly three years earlier – was the "crux" of the reason for my non-selection, and that my chances of selection would have been greater had I applied anyplace but UK.

In your Law Review 15116 (December 2015), a primer on USERRA, you wrote:

> **Generally speaking, I think that you are better off with private counsel, if you can find a qualified private attorney who is willing to represent you on a contingent-fee basis. … There is one situation where I think that you are better off relying on DOL-VETS [the Veterans' Employment and Training Service of the United States Department of Labor] and DOJ [the United States Department of Justice] rather than retaining private counsel to sue on your behalf. The exception is when your employer is a state agency. Because of the 11th Amendment of the United States Constitution, you cannot sue a state in federal court, as an individual.[3]**

UK is a state university and is an arm of the Commonwealth of Kentucky. Accordingly, I followed the advice you gave in Law Review 15116. Instead of searching for a private attorney to represent me, I filed a formal, written USERRA complaint against UK with DOL-VETS. That agency assigned my case to an investigator, and he moved out smartly in investigating my claim. Based on all the evidence the DOL-VETS investigator sought out and obtained, and particularly the indisputable statement of the Dean on my non-selection due to

[3] Law Review 15116 (December 2015), page 14.

uniformed service, the investigator and his supervisor explicitly found my USERRA claim to have merit and so advised me and UK in writing.

In accordance with section 4323(a)(1) of USERRA,[4] I requested that my case file be referred to DOJ, and it was promptly referred. After an extended delay, DOJ recently sent me a form letter denying my request for representation in my USERRA claim against UK. The letter was signed by Andrew G. Braniff, the Special Litigation Counsel for the Employment Litigation Section of DOJ's Civil Rights Division.

While my request for representation was under consideration by DOJ, I met with an Assistant United States Attorney (AUSA) for the Eastern District of Kentucky, where I live and work. He told me that without regard to the merits of my case, DOJ might not be willing to provide me with free legal representation. He told me that as a former general officer in the USAR and a college professor, I should be able to find and pay for my own attorney. I found this to be highly problematic given the sovereign immunity of the Commonwealth of Kentucky (of which UK is an arm) and because of the 11th Amendment of the United States Constitution, circumstances with which the AUSA would have been very familiar.

Mr. Braniff sent me the standard boilerplate declination of representation letter, and that letter included the following two sentences:

> **After carefully reviewing your complaint and the investigative file, the Department of Justice has determined that it will not file a lawsuit on your behalf in this matter. However, *this decision does not affect your right to seek private counsel at your own expense, or to file a lawsuit against the employer in a court of competent jurisdiction.*[5]**

Mr. Braniff and his section seem not to understand or respect the fact that my case is different because my employer (the prospective defendant) is an arm of the state government and sovereign immunity and the 11th Amendment preclude me from suing UK in either federal court or state court. If DOJ will not file suit against UK in the name of the United States, as plaintiff, I have no chance of getting a court to examine my claim that UK denied me the promotion to Department Chair *because of my USAR obligations,* in violation of section 4311 of USERRA.[6] I could spend thousands of dollars and hire the best attorney in Kentucky to represent me, but if I cannot sue in federal court (because of the 11th Amendment) and cannot sue in state court (because of Kentucky's sovereign immunity), what would that expenditure avail me?

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[4] 38 U.S.C. 4323(a)(1).
[5] Andrew G. Braniff letter to the complainant dated 7/10/2018 (emphasis supplied).
[6] 38 U.S.C. 4311.

It appears that I have a strong case on the merits but no way to get justice if DOJ will not represent me. Help!

Answer, bottom line up front:

I think that it is shocking that Mr. Braniff and the Employment Litigation Section do not understand that your case is different because the prospective defendant is a state government agency and that you are effectively without a remedy if DOJ refuses to represent you. I

brought this matter to the attention of Mr. Braniff and asked him to reconsider his decision to decline to file a lawsuit against UK in the name of the United States, as plaintiff.

Explanation:

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA[7] and President Bill Clinton signed it into law on October 13, 1994. USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA).[8]

The VRRA has applied to the Federal Government and to private employers since 1940. In 1974, as part of the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA),[9] Congress expanded the application of the VRRA to include state and local governments. Applying the reemployment statute to state governments is even more important today than it was in 1974, because according to a Rand Corporation computation ten percent of Reserve Component (RC) part-timers have civilian jobs for state government agencies.[10]

Under the "Total Force Policy" adopted by the Department of Defense (DOD) in 1974, our country is more dependent than ever before on RC part-timers.[11] State and local governments, as well as the Federal Government and private employers, must comply with USERRA.

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[7] Public Law 103-353, 108 Stat. 3149. The citation means that USERRA was the 353rd new Public Law enacted during the 103rd Congress (1993-94), and you can find this Public Law, in the form that it was enacted, in Volume 108 of *Statutes at Large,* starting on page 3149. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-4335).

[8] Public Law 76-783, 54 Stat. 885.

[9] Public Law 93-508, 88 Stat. 1593.

[10] *See* Appendix C of "Supporting Employers in the Operational Forces Era," available at www.rand.org/pubs/research_reports/RR152.html.

[11] 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. The number of actively participating RC part-timers is almost equal to the number of persons serving full-time in the Active Component (AC) of the armed forces, so RC members account for almost half of the nation's pool of trained military personnel available in an emergency. Almost one million RC personnel have been called to the colors since the terrorist attacks of 9/11/2001. More than 300,000 of them have been called up more

Sovereign immunity and the 11th Amendment of the United States Constitution seriously impede the enforcement of USERRA against state government employers.

As I have explained in detail in Law Review 16070 (July 2016) and other articles, sovereign immunity or "the king can do no wrong" has been an important part of the common law of Great Britain and the United States for almost a millennium. Sovereign immunity means that you cannot sue the sovereign (state or federal) without the sovereign's consent. It is only in the last century, since about 1920, that there have been significant inroads into sovereign immunity, as Congress and the state legislatures have enacted statutes waiving sovereign immunity for certain kinds of claims. There remain many exceptions to and conditions upon waivers of sovereign immunity of state and federal government agencies.

In one of its first published decisions, the United States Supreme Court held that Mr. Chisholm (a citizen of South Carolina) could sue the sovereign State of Georgia in the nascent federal court system.[12] The reaction was immediate and negative. Congress quickly proposed, and the states quickly ratified a constitutional amendment, as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[13]

Although the 11th Amendment by its terms only forbids a suit against a state by a citizen of *another* state, the Supreme Court long ago held that the 11th Amendment also bars a suit against a state by a citizen of *the same state.*[14]

Those of us who drafted USERRA, especially Susan M. Webman and I,[15] were under the impression, based on the case law in effect at the time,[16] that Congress could abrogate the 11th Amendment immunity of states, so long as it did so deliberately and explicitly. Accordingly, we

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than once, and more than 5,000 of them have made the ultimate sacrifice in overseas military operations since 9/11/2001. The RC has been transformed from a "strategic reserve" that is available only for World War III (which thankfully never happened) to an "operational reserve" that is routinely called upon to participate in intermediate military operations like Iraq and Afghanistan. The days when RC service can be characterized as "one weekend per month and two weeks in the summer" are gone, and probably gone forever. Without a law like USERRA, the services would not be able to recruit and retain a sufficient quality and quantity of RC and AC personnel to defend our country. Please see Law Review 14080 (July 2014).

[12] *Chisholm v. Georgia,* 2 U.S. 419 (1793).

[13] United States Constitution, Amendment 11, ratified February 7, 1795. Yes, it is capitalized just that way, in the style of the late 18th Century.

[14] *See Hans v. Louisiana,* 134 U.S. 1 (1890).

[15] Please see footnote 2.

[16] *Reopell v. Commonwealth of Massachusetts,* 936 F.2d 12 (1st Cir. 1991).

included specific language showing the intent of Congress to abrogate the 11th Amendment immunity of state government employers.[17]

Ms. Webman and I did not anticipate an important Supreme Court decision that was decided two years after USERRA was enacted.[18] In that case, the Supreme Court held that a statute enacted by Congress under the authority of Article I, Section 8, Clause 3[19] did not and could not abrogate the 11th Amendment immunity of the State of Florida.

After the Supreme Court decided *Seminole Tribe,* it was thought that the principle enunciated by the Supreme Court meant that legislation enacted by Congress under any of the 18 clauses of Article I, Section 8 could not abrogate 11th Amendment immunity, because the Constitution was ratified in 1789 and the 11th Amendment in 1795. Accordingly, in 1998 the 7th Circuit[20] held that USERRA was unconstitutional insofar as it permitted an individual claiming USERRA rights to sue a state government employer in federal court.[21]

Later in 1998, Congress amended USERRA to address the *Velasquez* problem. The 1998 amendments provide for two separate ways to enforce USERRA against a state government employer. The first way is through section 4323(a)(1), which provides as follows:

> A person who receives from the Secretary [of Labor] 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 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*.[22]

The final sentence of section 4323(a)(1), italicized above, was added in 1998.

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[17] USERRA's section 4323(d)(3) provides: "A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this chapter." 38 U.S.C. 4323(d)(3).
[18] *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996).
[19] Article I, Section 8, Clause 3 gives the Congress the power to enact legislation "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This is one of 18 separate clauses that give Congress the authority to enact certain kinds of legislation.
[20] The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.
[21] *Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998).
[22] 38 U.S.C. 4323(a)(1) (emphasis supplied).

When the Department of Justice (DOJ) initiates a USERRA lawsuit against a state government employer, the named plaintiff is the United States, not the individual USERRA claimant.[23] This solves the 11th Amendment problem, because 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. In at least two cases, DOJ has used this provision to sue a state government employer for violating USERRA and has prevailed.[24]

When the employer-defendant is a state government agency, getting DOJ to bring the lawsuit in the name of the United States is the preferred solution. The problem with this approach is that it means that you must rely on DOJ, and DOJ may turn down your request for representation for any number of reasons.[25]
The other way to enforce USERRA against a state government employer is through section 4323(b)(2) of USERRA, which provides: "In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction *in accordance with the laws of the State.*"[26]

What is the meaning of the phrase "in accordance with the laws of the State?" There are two possible interpretations:

a. You can sue the state in state court if state law permits such a suit.
b. You can sue the state in state court regardless of whether the state law permits lawsuits against the state, because Congress has decided that such lawsuits are permitted. We must look to the state law only to determine *in which state court* to bring the lawsuit.[27]

If state law permits you to sue the state in state court, section 4323(b)(2) of USERRA is meaningless. If state law permits such a suit, you do not need permission from Congress to bring it. The rules of statutory construction do not favor an interpretation that renders a whole subsection meaningless.[28] Accordingly, I believe that the second interpretation is the correct one.

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[23] When DOJ initiates a USERRA lawsuit against a private employer or a political subdivision of a state, the named plaintiff is the individual veteran or service member. I have proposed that Congress should amend the law to make the United States the named plaintiff in any case brought by DOJ, but Congress has not made that change.
[24] *See United States v. Alabama Department of Mental Health & Mental Retardation,* 673 F.3d 1320 (11th Cir. 2012); *United States v. State of Nevada,* 817 F. Supp. 2d 1230 (D. Nev. 2011).
[25] For many years, it has been the firm policy of DOJ *not to disclose* to the complainant or anyone else the rationale for declining a request for representation in a USERRA case.
[26] 38 U.S.C. 4323(b)(2) (emphasis supplied).
[27] As *amicus curiae* (friend of the court) in the Virginia Supreme Court and the New Mexico Supreme Court, DOJ has argued for this interpretation. Please see Law Review 16124 (December 2016).
[28] If possible, each word or phrase has meaning. The law does not favor an interpretation that renders meaningless a word or a whole section or subsection. *See* https://vdocuments.site/documents/list-of-the-canons-of-statutory-interpretation.html.

Recently (December 2016), the Virginia Supreme Court agreed with the second interpretation of section 4323(b)(2) but then held:

> On appeal, Clark [the Virginia State Police (VSP) officer who claimed that the VSP had unlawfully denied him a promotion based on his USAR obligations] contends that the [state] trial court misapplied sovereign-immunity principles and thus erred in dismissing his USERRA claim. The United States, appearing as amicus, concurs with Clark and urges us to hold that the Commonwealth's sovereign immunity has been lawfully abrogated by 38 U.S.C. 4323(b)(2). The VSP responds that the trial court correctly applied sovereign-immunity principles and had no choice but to dismiss the USERRA action. We hold that the trial court properly dismissed Clark's USERRA claim based on the Commonwealth's sovereign immunity.[29]

The 11th Amendment has made it difficult or impossible to enforce the Fair Labor Standards Act (FLSA)[30] against many state governments. Accordingly, Congress amended the FLSA to require state courts to hear and adjudicate FLSA claims against state government agencies and to enforce the FLSA. The United States Supreme Court declared that FLSA amendment to be unconstitutional.[31]

Does that mean that section 4323(b)(2) of USERRA is unconstitutional if it means that the state courts *must* enforce USERRA against state government agencies? In my opinion, no. I believe that *Alden v. Maine* is distinguishable. But the Supreme Court of Virginia and several other courts have explicitly rejected this argument, holding *Alden v. Maine* to be controlling.

I appreciate that DOJ has filed *amicus curiae* (friend of the court) briefs in the Virginia Supreme Court and several other state courts arguing that section 4323(b)(2) of USERRA requires the state courts to hear and adjudicate claims that state government agencies have violated USERRA, without regard to conflicting state claims of sovereign immunity. ROA has made the same argument in *amicus* briefs that it has filed. But the fact remains that no state high court has accepted that argument. Except in a handful of states (not including Kentucky) where the legislature has enacted legislation explicitly waiving sovereign immunity and permitting state court USERRA suits against state agencies that violate USERRA, the only practicable way for a USERRA plaintiff to obtain justice is by getting DOJ to file the lawsuit in federal court in the

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[29] *Clark v. Virginia Department of State Police,* 292 Va. 725, 727, 793 S.E.2d 1 (2016), *cert. denied,* 138 S. Ct. 500 (2017).

[30] The FLSA is the federal statute that requires employers, including state governments, to pay their employees at least the federal minimum wage and to pay overtime at 150% of the regular rate when a non-exempt employee works more than 40 hours in a week.

[31] *Alden v. Maine,* 527 U.S. 706 (1999).

name of the United States, as plaintiff. Accordingly, DOJ needs to give priority to USERRA suits against state agencies, as employers.

A possible interpretation of *Seminole Tribe of Florida* is that a statute of Congress based on constitutional authority that pre-dates 1795 (when the 11th Amendment was ratified) cannot abrogate the 11th Amendment immunity of states. Under this interpretation, any statute that is based on one of the 18 clauses of Article I, Section 8 of the Constitution (ratified in 1789) cannot overcome the 11th Amendment (ratified in 1795). On the other hand, a federal statute that is based on Section 5 of the 14th Amendment (ratified in 1868) can overcome the 11th Amendment, because 1868 was after 1795.

I believe that the above interpretation of *Seminole Tribe* is overly simplistic and incorrect. If a federal statute is based on a clause of Article I, Section 8 that is *central to the role of the Federal Government, rather than the states, the statute can abrogate the 11th Amendment immunity of states.*

The federal Bankruptcy Code is based on Clause 4 of Article I, Section 8, and that clause gives Congress the authority "To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States." In a case decided ten years after *Seminole Tribe,* the Supreme Court upheld, over an 11th Amendment challenge, the power of Congress, under the Bankruptcy Code, to force state government entities to respect the power of federal courts to discharge debts owed to state agencies.[32]

Nothing is more central to the role of the Federal Government, rather than the states, than national defense. Accordingly, I believe that *Velasquez v. Frapwell* was wrongly decided by the 7th Circuit. I think that Congress should reconsider the 1998 amendment. Congress should reaffirm that an individual claiming USERRA rights against a state government employer can sue the state in federal court, in his or her own name and with his or her own lawyer. This will set up a constitutional question that the Supreme Court will be forced to answer. The states must not be allowed to hide behind hoary doctrines of sovereign immunity and to escape from the obligation to comply with USERRA.

But your case will be decided based on the law as it is presently written, not on how you and I want it to be amended. If we can get DOJ to file suit against UK, in the name of the United States (as plaintiff), you and DOJ have an excellent chance to prevail, because you have a strong case. But if DOJ turns down your request for representation, you will likely never get a hearing on the merits. The Kentucky courts, likely including the Kentucky Supreme Court, will hold that you cannot file and maintain a suit against UK in Kentucky state court because the Commonwealth of Kentucky (of which UK is a part) has sovereign immunity and cannot be

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

sued.[33] The merits of your case will never be considered, even if you are represented by the finest lawyer in the land. The only obvious solution is to get DOJ to reconsider its decision to decline your request for representation.

I have contacted Mr. Braniff and have asked him to reconsider the decision not to sue UK in the name of the United States, as plaintiff. We (ROA) will also be pushing for state law amendments explicitly waiving sovereign immunity and permitting individual veterans and RC service members to bring and maintain state court lawsuits against state agencies that violate USERRA. We will keep the readers informed of developments on this important issue.

Summary

If DOJ does not have enough resources to provide representation in every apparently meritorious USERRA case referred by DOL-VETS, it should give priority to cases (like this case) where the employer and prospective defendant is a state agency, like UK, as opposed to cases against private employers and political subdivisions of states.[34] In cases against states, if DOJ declines to sue in the name of the United States as plaintiff there is no prospect of the individual obtaining justice in the state court system, except in a handful of states where the legislature has explicitly waived sovereign immunity to permit state court actions against state agencies for violating USERRA.

On 8/3/2018, ROA's Executive Director [MG Jeff Phillips, USA (Ret.)] sent this letter (beginning on the following page) to the Attorney General of the United States:

[33] *See Autry v. Western Kentucky University,* 219 S.W.3d 713 (Kentucky Supreme Court 2007). I have done a computer search on *Autry,* and it has not been overruled by any later Kentucky Supreme Court decision.
[34] Political subdivisions include counties, cities, school districts, and other units of local government. The final subsection of section 4323 of USERRA provides: "For purposes of this section [USERRA enforcement], the term 'private employer' includes a political subdivision of a state." 38 U.S.C. 4323(i). This means that you can sue a political subdivision in federal court, in your own name and with your own lawyer. Please see Law Review 14037 (March 2014).

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August 3, 2018

Honorable Jeff Sessions
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Ave. NW
Washington, DC 20530-0001

Re: Enforcing USERRA against state government employers

Dear Attorney General Sessions:

I write on behalf of a member of the congressionally chartered Reserve Officers Association (ROA). Dwayne Edwards retired three years ago from the Army Reserve as a brigadier general. For many years, he has been a professor at the University of Kentucky.

During and even after his Army Reserve career, he has told us of having been accused of "divided loyalties" because his USAR responsibilities occasionally required that he absent himself from his civilian job. All his absences from work were protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301-35, a federal statute enacted in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940.

For 78 years, federal law has provided for the right to reemployment after voluntary or involuntary service in our nation's armed forces, including the Reserve Components of the armed forces. In 1974, Congress amended the VRRA to make it apply also to state and local governments, an important revision, as many members of the Reserve and National Guard work in government positions at the state and local levels.

Edwards applied for the position of department chair at the University of Kentucky and was interviewed but not selected. In a telephone conversation with Edwards shortly after the decision to select another candidate, the dean (the sole decision-maker) candidly admitted that Edwards was not selected for the department chair position *because of his USAR obligations over many years.* General Edwards taped the telephone conversation, which was lawful, and the statement of the dean is admissible. Denying him the department chair position clearly violated section 4311 of USERRA, 38 U.S.C. 4311.

In accordance with section 4322(a) of USERRA, 38 U.S.C. 4322(a), Edwards made a formal, written USERRA complaint against the University of Kentucky with the Veterans' Employment and Training Service of the U.S. Department of Labor (DOL-VETS). That agency investigated and found the complaint to have merit and so advised the university and General Edwards. In accordance with section 4323(a), Edwards requested referral of his case file to the Department of Justice, and the file was referred with a strong recommendation that DOJ sue the University of Kentucky for violating USERRA.

After a substantial delay, Andrew Braniff of the Employment Litigation Section of DOJ's Civil Rights Division advised Edwards by letter dated July 10 that DOJ would not bring an action against the University of Kentucky in this case.

In the standard, boilerplate declination of representation letter, Mr. Braniff told Edwards that despite DOJ's decision not to sue the university, Edwards can retain his own lawyer and sue the university. Unfortunately, that statement is wrong. The Kentucky Supreme Court has explicitly held that state universities and other state agencies of the Commonwealth of Kentucky have sovereign immunity and cannot be sued. *See Autry v. Western Kentucky University,* 219 S.W.3d 713 (Kentucky 2007).

In this case, because the prospective defendant is a state government agency, DOJ would bring the action in federal court against the state *in the name of the United States, as plaintiff. See* 38 U.S.C. 4323(a)(1) (final sentence). This approach has worked in enforcing USERRA against the State of Alabama and the State of Nevada. *See United States v. Alabama Department of Mental Health & Mental Retardation,* 673 F.3d 1320 (11th Cir. 2012); *United States v. State of Nevada,* 817 F. Supp. 2d 1230 (D. Nev. 2011).

If DOJ will not bring an action against the University of Kentucky in the name of the United States, Edwards is left entirely without a way to enforce his USERRA rights. He cannot sue the University of Kentucky in federal court because of the 11th Amendment of the United States Constitution. *See Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998). He cannot sue the University of Kentucky in state court because of Kentucky's sovereign immunity. *See Autry, supra.*

While the decision on representation was pending at DOJ, Edwards met with an Assistant United States Attorney in the Eastern District of Kentucky, where he lives and works. The AUSA told him that it was unlikely that DOJ would provide him free representation because, as a retired general officer and university professor he could afford to hire his own attorney.

Yes, Edwards could bankrupt himself by paying the finest lawyer in Kentucky his or her standard hourly rate, but that great expenditure would avail him nothing. Even the finest lawyer in the state cannot obtain justice for Edwards if there is no forum to hear and adjudicate his complaint.

I enclose a copy of our Law Review 18070, which will be added to our website on or about August 15. I invite your attention to www.roa.org/lawcenter, which has more than 1600 "Law Review" articles about USERRA and other laws especially pertinent to those who serve our country in uniform.

As is explained in detail in this article, it is essential that DOJ give priority to enforcing USERRA and special priority to USERRA cases against state government employers, which cannot otherwise be sued if DOJ will not bring the suit. Thank you for your kind attention. I would welcome the opportunity to come to your office, at your convenience, to make this pitch in person.

Very respectfully,

Maj. Gen. Jeffrey E. Phillips, USA (Ret.)
Executive Director

Enclosure as stated