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Smith v. Tennessee National Guard—
The Long Waste of Time Finally Comes to an End

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Update on Sam Wright

***David R. Smith v. The Tennessee National Guard,* 2018 Tenn. LEXIS 318 (Tennessee Supreme Court June 22, 2018).**

1.1.1.7—USERRA applies to state and local governments
1.1.3.3—USERRA applies to National Guard service
1.3.1.1—Left job for service and gave prior notice
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

As I predicted in Law Review 17033 (April 2017), the Tennessee Supreme Court agreed to review and then reversed the decision of the Tennessee Court of Appeals (the state's intermediate appellate court) that David R. Smith's claim against the Tennessee National Guard

[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. I have dealt with 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.

(an agency of the state government) was not barred by the doctrine of sovereign immunity.[3] This is a unanimous decision written by Justice Cornelia R. Clark.

In 2014, the Tennessee General Assembly enacted a new section explicitly waiving sovereign immunity so as to permit the Tennessee state courts to hear and adjudicate claims that Tennessee state agencies, as employers, have violated the Uniformed Services Employment and Reemployment Rights Act (USERRA). That new section provides as follows:

> Immunity from suit of any governmental entity, or any agency, authority, board, commission, council, department, office, or institution of higher education is removed for the purpose of claims against and relief from a governmental entity under the Uniformed Services Employment and Reemployment Rights Act [USERRA], 38 U.S.C. 4301-4335.[4]

This new section was signed into law by the Governor on 7/1/2014, and by its terms it applies to claims "accruing" on or after 7/1/2014. In a 2-1 decision of a 3-judge panel of Tennessee's intermediate appellate court, that court held that a claim "accrues" when a person has the legal right to bring a suit based on the claim. The majority decision of the Court of Appeals noted that Smith did not have the right to file suit based on his USERRA claim against the Tennessee National Guard until 7/1/2014, when the Legislature enacted section 29-20-208. Thus, the Court of Appeals majority held, Smith's claim accrued *on July 1, 2014* and Smith could file his lawsuit at that time[5] although his claim was based on events that occurred in 2010 and 2011. I am not surprised that the Tennessee Supreme Court agreed to review and then reversed this counterintuitive holding.

Contrary to the Court of Appeals, the Tennessee Supreme Court held that Smith's claim accrued in 2011, when he completed his year of training duty at the Naval War College (NWC) and applied for reinstatement to his full-time position with the Tennessee National Guard, and when his application for reinstatement was denied.

Full-time support in our nation's Reserve Components

David R. Smith is a Lieutenant Colonel (LTC) in the Tennessee Army National Guard (ARNG), perhaps now retired. He joined the ARNG as a traditional, part-time National Guard member in 1993 and moved up the ranks. In 2002, he applied for a long-term Active Guard & Reserve (AGR) tour, supporting the Tennessee ARNG, and his application was accepted. He served on

[3] *Smith v. Tennessee National Guard,* 2017 Tenn. App. LEXIS 216 (Tennessee Court of Appeals March 31, 2017).
[4] Tennessee Code Annotated section 29-20-208.
[5] Smith filed his third lawsuit on 7/2/2014, one day after the Legislature enacted section 29-20-208.

full-time AGR duty for the next eight years, until July 2010, when he left his AGR position to attend the residential program at the NWC[6] in Newport, Rhode Island.

Smith completed his NWC training in July 2011 and promptly applied to the Adjutant General[7] (TAG) of Tennessee for reinstatement to his AGR full-time position. The TAG told Smith that no AGR position was available for him but that Smith could return to a part-time traditional National Guard position. Smith asserted that under the Uniformed Services Employment and Reemployment Rights Act (USERRA) he was entitled to reinstatement in a full-time position because he had left a full-time position and most likely would have remained in the full-time position but for his year away to attend the NWC. The TAG asserted that USERRA does not apply to a situation of this nature. This dispute resulted in this long-running lawsuit.

Our nation has seven Reserve Components, and the ARNG is the largest. The other six are the United States Army Reserve (USAR), the Air National Guard (ANG), the United States Air Force Reserve (USAFR), the United States Navy Reserve (USNR), the United States Marine Corps Reserve (USMCR), and the United States Coast Guard Reserve (USCGR). The ARNG and ANG are hybrid federal-state organizations, while the other five entities are purely federal.

A Reserve Component is made up primarily of part-timers (traditional reservists or National Guard members), but a Reserve Component needs a cadre (perhaps 5% to 10%) of full-timers to perform functions like recruiting, equipment maintenance, and preparation of the training of the part-timers. In the four Army and Air Force Reserve Components (ARNG, USAR, ANG, and USAFR), the majority of the full-time support is provided by technicians. A technician is a civilian employee of the Army or Air Force (as the case may be) who is required, as a condition of employment, to maintain his or her membership in the supported component. During drill weekends and annual training periods, the technician participates with the supported unit in the technician's military status. At other times, and that is most of the time, the technician is working in his or her civilian employee status. Technicians typically wear military uniforms and observe military courtesies (saluting, etc.) while at work, but they are civilian employees and not service members at such times.

David R. Smith never had reemployment rights under USERRA.

As I have explained in Law Review 15016 (December 2015) and many other articles, a person must have met five simple conditions to have the right to reemployment under USERRA:

[6] Each service has a "war college" for training senior officers in military doctrine and leadership. It is not unusual for an Army officer to attend the Naval War College or for a Navy officer to attend the Army War College.
[7] The Adjutant General is the head of the ARNG and the Air National Guard (ANG) of a specific state. The AG is a state official, appointed by the Governor in most states.

a. Must have left a *civilian position of employment* to perform "service in the uniformed services" as defined by USERRA.
b. Must have given the employer prior oral or written notice.
c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which he or she seeks reemployment.
d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
e. After release from the period of service, must have made a timely application for reemployment with the pre-service civilian employer.

It is necessary to meet all five of these conditions to have the right to reemployment. Smith did not meet the first condition, so it does not matter that he meets the other four.

Smith did not leave a civilian position of employment to perform uniformed service. Rather, he left one form of uniformed service (an AGR tour) to perform another form of uniformed service (a training tour at the NWC). USERRA does not apply to a person in this situation.[8]

If Smith had been an ARNG technician, and if he had left his technician job to perform uniformed service (like training duty at the NWC), he would have had the right to reemployment under USERRA. In that case, he would have left a *civilian position of employment* to perform uniformed service, and he would have met the first USERRA condition.

It has become clear that Smith was never a National Guard technician—he was a National Guard member on AGR duty. Smith and his lawyer have managed to waste thousands of hours of the precious time of the Tennessee courts, not to mention the time of the Tennessee National Guard and their own time, on a lawsuit they never had a chance of winning. The Tennessee courts have never reached the merits of Smith's claim because the entire focus has been on the preliminary question of jurisdiction.[9]

Sovereign immunity

[8] In the Air National Guard, an Airman on AGR duty who leaves that status to perform a title 10 statutory tour is entitled to reinstatement in the AGR tour *as a matter of policy,* and not under USERRA, under Air National Guard Instruction 36-101, dated 6/3/2010. I discuss this issue in detail in Law Review 16061 (July 2016). It appears that there is no corresponding written policy in the Army National Guard, and in any case the state courts in Tennessee do not have the authority to interpret and enforce internal military policies.

[9] In a civil case, the judge's first question should always be "Do I have jurisdiction (legal authority) to decide this case?" If the answer is no, the proper thing for the judge to do is to dismiss the case for want of jurisdiction, without making a finding on the merits.

Sovereign immunity or "the King can do no wrong" has been the law in Great Britain, the United States, and other common law countries for almost a millennium. You cannot sue the sovereign (state or federal) without the sovereign's consent. It is only in the last century that there have finally been major inroads on sovereign immunity, as Congress and the state legislatures have enacted statutes waiving sovereign immunity as to certain enumerated kinds of claims. There remain many exceptions to and conditions upon waivers of sovereign immunity at the state and federal levels.

In this recent decision, the Tennessee Supreme Court held: "The sovereign State of Tennessee is immune from lawsuits 'except as it consents to be sued.' *Stewart v. State,* 33 S.W. 3rd 785, 790 (Tenn. 2000), quoting *Brewington v. Brewington,* 387 S.W. 2d 777, 779 (Tenn. 1965)." In Tennessee, sovereign immunity is based on the common law and also on Article I, section 17 of the Tennessee Constitution.

In its recent decision, the Tennessee Supreme Court made clear that waivers of sovereign immunity are to be strictly construed:

> Thus, courts will interpret a statute as waiving the State's sovereign immunity only if the legislation waives sovereign immunity "in plain, clear, and unmistakable terms." *Mullins v. State,* 320 S.W. 3d 273, 283 (Tenn. 2010) (quoting *Northland Ins. Co. v. State,* 33 S.W. 3d 727, 731 (Tenn. 2000)). A "waiver of sovereign immunity must be explicit, not implicit." *Colonial Pipeline Co. v. Morgan,* 263 S.W. 3d 827, 853 (Tenn. 2008). In other words, statutes waiving sovereign immunity must "clearly and unmistakably" express the General Assembly's intent to permit claims against the State. *Davidson v. Lewis Brothers Bakery,* 227 S.W. 3d 17, 19 (Tenn. 2007) (quoting *Scates v. Board of Commissioners of Union City,* 265 S.W. 2d 563, 565 (Tenn. 1954)). In determining whether a statute satisfies this standard, we focus "on the actual words chosen and enacted by the legislature." *Mullins,* 320 S.W. 3d at 283. Courts lack the authority to abrogate the State's sovereign immunity and must avoid inadvertently broadening the scope of legislation authorizing suits or claims against the State. *Hill v. Beeler,* 286 S.W. 2d 868, 869 (Tenn. 1956).

In its recent decision, the Tennessee Supreme Court explicitly held that Tennessee Code Annotated section 29-20-208 waives sovereign immunity of Tennessee state government agencies with respect to USERRA claims *that accrued on or after 7/1/2014* and that this waiver is sufficiently clear and unambiguous to meet the standards set forth above. The Supreme Court held, contrary to the Court of Appeals, that the waiver of sovereign immunity does not apply to USERRA claims (like Smith's) against state government agencies that are based on events that occurred prior to 7/1/2014.

I hope that this Tennessee Supreme Court decision finally marks the end of the monumental waste of time of the *Smith* case. We will keep the readers informed of future developments in this case, in the unlikely event that there are any future developments.

The issue of charging court costs against Smith

In its final sentence, the Supreme Court decision provides: "Costs of this appeal are taxed to David R. Smith, for which execution may issue if necessary." Taxing Smith to pay such costs violated section 4323(h) of USERRA.[10]

[10] 38 U.S.C. 4323(h).