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Enforcing USERRA against a State Government Employer—Bad News from Texas

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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

***Texas Department of Public Safety v. Torres,* 2018 Tex. App. LEXIS 9431 (Court of Appeals of Texas, 13th District, November 20, 2018).**

Facts

Leroy Torres enlisted in the Army Reserve (USAR) in 1989, and he was hired by the Texas Department of Public Safety (DPS) in 1998. In 2007, when he was a Captain in the USAR and a trooper in the DPS, he was involuntarily called to active duty and deployed to Iraq. While on

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "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 1500 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.

active duty, he was exposed to noxious fumes from "burn pits." As a result, he was diagnosed with constrictive bronchiolitis (CB), and the function of his lungs was seriously compromised.[3]

Torres was entitled to reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA) because he met the five USERRA conditions:

a. He left his civilian job at DPS to perform uniformed service.
b. He gave the employer prior oral or written notice.
c. He did not exceed USERRA's five-year cumulative limit on the duration of his period or periods of uniformed service, related to the employer relationship for which he sought reemployment.[4] Because he was called to active duty involuntarily, his period of service did not count toward exhausting his five-year limit with respect to his employer relationship with the State of Texas.[5]
d. He served honorably and did not receive the sort of disqualifying bad discharge that would disqualify him from reemployment under section 4304 of USERRA.[6]
e. After release from the period of service, he made a timely application for reemployment.[7]

Because Torres met the five USERRA conditions, he was entitled to prompt reinstatement in the position of employment that he would have attained if continuously employed (possibly a better position than the position he left) or another position (for which he was qualified) that was of like seniority, status, and pay.[8] Because Torres returned to work with a disability (CB) that he incurred or aggravated while on active duty, the employer (the State of Texas) was required to make reasonable efforts to accommodate the disability.[9] If the disability could not be reasonably accommodated in the position that Torres would have attained if continuously employed (DPS trooper), the State of Texas was required to reemploy him in some other position for which he was qualified or could become qualified with reasonable employer efforts and that provided like seniority, status, and pay, or the closest approximation consistent with the circumstances of his case.[10]

Torres' breathing problems (CB) made it impossible for him to return to the job of DPS trooper—a law enforcement officer must be able to perform vigorous physical activity at least occasionally. DPS reinstated Torres to the payroll, but it refused to make accommodations for his service-connected disability, as required by USERRA. Torres' resigned from his DPS job in

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[3] These facts come from the complaint that Torres filed in court. I have no personal knowledge of the facts.
[4] 38 U.S.C. 4312(c).
[5] 38 U.S.C. 4312(c)(4)(A).
[6] 38 U.S.C. 4304.
[7] After a period of service of 181 days or more, the returning service member or veteran has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.
[8] 38 U.S.C. 4313(a)(2)(A).
[9] 38 U.S.C. 4313(a)(3).
[10] Id. Please see Law Review 17058 (June 2017) for a detailed discussion of the obligations of the employer to a returning disabled veteran who meets the five USERRA conditions.

August 2012. His position is that DPS constructively discharged him, because it was impossible for him to work without the accommodations required by USERRA.[11]

Enforcing USERRA against a state government employer

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA[12] 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).[13]

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),[14] Congress expanded the application of the VRRA to include state and local governments. Applying the reemployment statute to state and local 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 and another 11 percent for political subdivisions of states (counties, cities, school districts, and other units of local government).[15]

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.[16] State and local governments, as well as the Federal Government and private employers, must comply with USERRA.

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[11] I discuss the "constructive discharge" concept in detail in Law Review 11067 (2011).

[12] 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).

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

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

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

[16] 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 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 enough RC and AC personnel to defend our country. Please see Law Review 14080 (July 2014).

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.[17] 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 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.[18]

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.*[19]

Those of us who drafted USERRA, especially Susan M. Webman and I,[20] were under the impression, based on the Supreme Court case law in effect at the time, that Congress could abrogate the 11th Amendment immunity of states, so long as it did so deliberately and explicitly. Accordingly, we included specific language showing the intent of Congress to abrogate the 11th Amendment immunity of state government employers.[21]

Ms. Webman and I did not anticipate an important Supreme Court decision that was decided two years after USERRA was enacted.[22] In that case, the Supreme Court held that a statute

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[17] *Chisholm v. Georgia,* 2 U.S. 419 (1793).
[18] United States Constitution, Amendment 11, ratified February 7, 1795. Yes, it is capitalized just that way, in the style of the late 18th Century.
[19] *See Hans v. Louisiana,* 134 U.S. 1 (1890).
[20] Please see footnote 2.
[21] 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).
[22] *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996).

enacted by Congress under the authority of Article I, Section 8, Clause 3[23] 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[24] held that USERRA was unconstitutional insofar as it permitted an individual claiming USERRA rights to sue a state government employer in federal court.[25]

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*.[26]

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

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.[27] 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.

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[23] 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.

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

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

[26] 38 U.S.C. 4323(a)(1) (emphasis supplied).

[27] 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.

In at least two cases, DOJ has used this provision successfully to sue a state government employer for violating USERRA and to prevail.[28]

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 get to DOJ through the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), and all too often investigators for that agency do slipshod investigations and simply accept as gospel the legal and factual assertions of attorneys representing employers, and close cases as "no merit" even when those cases have merit.[29]

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.*"[30]

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.[31]

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. Accordingly, I believe that the second interpretation is the correct one.

The Fair Labor Standards Act (FLSA) is the federal statute that requires employers to pay at least the federal minimum wage and that requires employers to pay non-exempt employees 150% of their usual hourly wage for hours worked beyond 40 in a week. The FLSA applies to state and local governments as well as private employers.

The 11th Amendment has made it difficult or impossible to enforce the FLSA 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

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[28] *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).

[29] Please see Law Reviews 0611, 0701, 0758, 1152, 1181, and 13126. As I explained in Law Review 16099, there has been some recent improvement at DOL-VETS, but much remains to be done.

[30] 38 U.S.C. 4323(b)(2) (emphasis supplied).

[31] 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).

Supreme Court declared that FLSA amendment to be unconstitutional.[32] 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.

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.[33]

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.

How these principles apply to the *Torres* case

Leroy Torres and his attorney[34] do not have the option to wait for Congress to change the law before initiating their lawsuit, and if Congress does amend USERRA it will most likely make the

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

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

[34] Leroy Torres is represented by Brian Lawler, an attorney in San Diego with a nationwide practice representing service members and veterans with cases under USERRA and other laws. Brian is a recently retired Lieutenant Colonel in the Marine Corps Reserve and a life member of ROA. He is the author of several of the "Law Review" articles in this series.

change prospectively, not retroactively. Because DOL-VETS was typically unhelpful in this case, and because USERRA and the 11th Amendment precluded him from bringing the suit in federal court, he initiated the suit in state court in Corpus Christi, Texas. The Attorney General of Texas filed a motion to dismiss, claiming that Texas' sovereign immunity precludes a state court from considering a lawsuit of this kind and entering a judgment against the State of Texas. The judge denied the motion to dismiss, implying from the bench that it cannot be the right answer that a service member like Torres has no remedy when the State of Texas violates USERRA.

As is typical in trial courts in Texas and most states, the judge did not write an opinion explaining his legal reasoning. The state will almost certainly appeal, and it will likely be an interlocutory appeal.[35] This case is a long way from over. We will keep the readers informed of developments in this interesting and important case.[36]

Texas DPS appeals to Texas' intermediate appellate court

The State of Texas appealed to the intermediate appellate court of Texas,[37] and that court reversed the trial judge and held that the *Torres* case should have been dismissed for want of jurisdiction, based on the sovereign immunity of state agencies like DPS. The next step is that Torres can appeal to the Texas Supreme Court. The state high court is not required to hear the appeal, but it probably will because of the importance of the issue and the dissent in the Court of Appeals. We will continue to keep the readers informed of developments in this interesting and important case.

[35] Ordinarily, a losing party is permitted to appeal only after there has been a dispositive decision, which has not happened in this case. Under certain circumstances, and with leave of court, a party can appeal a non-dispositive decision. Texas will argue that it is immune from suit and that it should not have to defend Torres' suit on the merits. I predict that there will be an appeal to Texas' intermediate appellate court, and perhaps to the Texas Supreme Court, before there is a trial on the merits in this case.

[36] This case is important because 10% of RC personnel have civilian jobs for state government employers.

[37] Texas has 14 intermediate appellate courts, above the trial courts and below the Texas Supreme Court (on the civil side) or the Texas Court of Criminal Appeals (on the criminal side). Each court has a geographical jurisdiction, covering part of the State of Texas. The *Torres* case was appealed to the 13th Court of Appeals, which sits in Corpus Christi and Edinburg. The case was heard by three Justices of that court—Justice Dori Contreras, Justice Nora Longoria, and Justice Gina Benavides. Justice Contreras wrote the majority decision and was joined by Justice Longoria. Justice Benavides wrote a vigorous and eloquent dissent.