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Your County Government Employer Does Not Have Sovereign Immunity under the 11th Amendment of the U.S. Constitution

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About Sam Wright

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Q: I am the same Coast Guard Reserve Lieutenant—the guy who asked the questions in Law Review 19090, the immediately preceding article in this series. The County Attorney recently said that the Virginia Supreme Court recently held that the Commonwealth of Virginia and its political subdivisions have sovereign immunity and cannot be sued for violating the Uniformed Services Employment and Reemployment Rights Act (USERRA). What do you say about that?

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1900 "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 1700 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 43 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.

A: The County Attorney is referring to *Clark v. Virginia Department of State Police,* 292 Va. 725, 793 S.E.2d 1 (2016), *cert. denied,* 138 S. Ct. 500 (2017). I discuss that case in detail in Law Review 16124 (December 2016). The County Attorney is misunderstanding or misconstruing the holding of the Virginia Supreme Court.

The *Clark* Case

Jonathan R. Clark is a soldier in the United States Army Reserve (USAR). On the civilian side, he is a police officer for the Virginia State Police (VSP). He was considered for a promotion in the VSP but not promoted. He claimed that the decision to deny him the promotion was based on animus against him because of his USAR service and absences from his VSP job necessitated by that service.

The importance of enforcing USERRA

Clark claimed that denying him the promotion violated section 4311(a) of the Uniformed Services Employment and Reemployment Rights Act (USERRA). That subsection provides:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, *promotion,* or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.[3]

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA[4] and President Bill Clinton signed it into law on October 13, 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940.[5] USERRA provides that a person who meets five simple conditions[6] is entitled to prompt reemployment in the position that he or she would have attained if continuously employed (perhaps a better position than the person left) or in another position for which he or she is

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[3] 38 U.S.C. 4311(a) (emphasis supplied).

[4] Public Law 103-353, 108 Stat. 3150.

[5] Congress originally enacted the VRRA as part of the Selective Training and Service Act (STSA), Public Law 76-783, 54 Stat. 885. The STSA is the law that led to the drafting of more than ten million young men (including my late father) for World War II.

[6] The person must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services and must have given the employer prior oral or written notice. The person must not have exceeded USERRA's cumulative five-year limit on the duration of the period or periods of uniformed service relating to that employer relationship. All involuntary service periods and some voluntary service periods are excluded from the computation of the five-year limit. Please see Law Review 16043 (May 2016). The person must have been released from the period of service without having received a disqualifying bad discharge from the military, like a punitive discharge (awarded by court martial as part of the sentence for a serious crime) or an administrative discharge characterized as "other than honorable." After release from the period of service, the person must have made a timely application for reemployment.

qualified that is of like seniority, status, and pay.[7] Upon reemployment under USERRA, the person is entitled to be treated for seniority and pension purposes as if he or she had remained continuously employed in the civilian job during the time that he or she was away from work for service.[8]

An employer could make a mockery of USERRA by firing RC members who are employees, to avoid having to accommodate their absences from work for uniformed service, or by denying them initial employment or by discriminating against them with respect to promotions or benefits of employment. Accordingly, section 4311 of USERRA[9] makes it unlawful for an employer to discriminate or take adverse employment actions based on performance of uniformed service, application or obligation to perform service, or having taken an action to enforce USERRA for any person (not limited to the person against whom the adverse employment action is taken).

USERRA and USERRA enforcement apply to almost all employers in the United States, including the Federal Government (Executive Branch and Legislative Branch), the states, the political subdivisions of states, and private employers regardless of size.[10] Only the following narrow classes of employers are exempt from USERRA enforcement:

a. Religious institutions (churches, synagogues, mosques, seminaries, etc.) with respect to the employment of ordained personnel (ministers, priests, rabbis, imams, etc.).[11]
b. Foreign embassies and consulates and international organizations like the World Bank and the United Nations.[12]
c. Native American tribes.[13]
d. The Judicial Branch of the Federal Government.[14]

The VRRA has applied to the Federal Government and to private employers since 1940. In 1974, Congress amended the VRRA to make it apply also to state and local governments as employers.[15]

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[7] 38 U.S.C. 4313(a)(2)(A).
[8] 38 U.S.C. 4316(a), 4318.
[9] 38 U.S.C. 4311.
[10] You only need one employee to be an employer subject to the federal reemployment statute. *See Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992).
[11] Please see Law Review 1206 (January 2012).
[12] These international organizations and foreign embassies and consulates have diplomatic immunity from the enforcement of U.S. criminal and civil laws.
[13] Please see Law Review 15111 (December 2015).
[14] Please see Law Review 15009 (January 2015).
[15] On December 4, 1974, President Gerald Ford signed into law the Vietnam Era Veterans Readjustment Assistance Act (VEVRA), Public Law 93-508, 88 Stat. 1578. VEVRA made several important changes to the VRRA. The most important change was to expand the applicability of the law to include state and local governments as employers.

Sovereign immunity as an impediment to USERRA enforcement

Clark sued the VSP in the Circuit Court of Chesterfield County. Judge Lynn S. Brice dismissed the lawsuit, without considering the merits, holding that the VSP, as an arm of the Virginia state government, was immune from suit in state court under the doctrine of sovereign immunity. Clark appealed to the Virginia Supreme Court, which affirmed the dismissal of the lawsuit in a unanimous decision written by Justice D. Arthur Kelsey. If state government agencies like the VSP are exempt from USERRA enforcement, that presents a significant problem because 10% of Reserve Component (RC)[16] members have civilian jobs for state government agencies.[17]

As I explained in detail in Law Review 16070 (July 2016), sovereign immunity or "the King can do no wrong" has been part of the common law of Great Britain and the United States 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 been significant inroads made on sovereign immunity, at the federal level and the state level, as Congress and the state legislatures have enacted laws waiving sovereign immunity with respect to certain kinds of claims against federal and state government agencies. There remain many exceptions to and conditions upon these waivers of sovereign immunity. USERRA clearly applies to state agencies as employers, but if it is impossible to sue a state agency, either in federal court or in state court, USERRA protections are essentially meaningless with respect to RC members who have or seek civilian jobs for such agencies.

USERRA applies to the states as employers, but enforcement of this law against states is immensely complicated and hindered by the 11th Amendment of the United States Constitution. That amendment provides:

> 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 or another State, or by Citizens or Subjects of any Foreign State.[18]

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[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 persons currently serving part time in these seven components is almost equal to the number of persons serving full time in the Active Component (AC) of the armed forces, so the seven Reserve Components provide almost half of the personnel strength of our nation's military. In the last quarter century, the Reserve Components have been transformed from a "strategic reserve" available only for World War III (which thankfully never happened) to an "operational reserve" routinely called upon for intermediate military operations like Iraq and Afghanistan. Almost one million RC members have been called to the colors since the terrorist attacks of September 11, 2001.

[17] Please see "Too Much To Ask? Supporting Employers in the Operational Reserve Era" by Dr. Susan M. Gates. The article was published in the November-December issue of *The Officer,* ROA's magazine. Dr. Gates also reported that an additional 11% of RC members work for political subdivisions of states (counties, cities, school districts, and other units of local government).

[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.

The Continental Congress adopted the Articles of Confederation (AOC) on November 15, 1777, and the 13 states ratified the AOC on March 1, 1781. Under the AOC, our new nation had a very weak central government with no reliable source of revenue and no way to command the sovereign states to work together to defend the country or for any other purpose.

In the summer of 1787, 55 delegates from the original states met in Philadelphia to draft our Constitution. The states ratified the Constitution and our new government convened in 1789. The Constitution provides for sovereign states, each of which has general "police power" authority to regulate activity within the state, except insofar as the Constitution reserves certain authority to the central government.

Article I, Section 8 contains 17 clauses, each of which gives the Congress certain powers. Clause 3 gives Congress the power to regulate commerce among the states and with foreign nations and Indian tribes. Clause 4 gives Congress the authority to enact "uniform Laws on the subject of Bankruptcies throughout the United States." Clause 10 gives Congress the power to declare war, Clause 11 to raise and support armies, Clause 12 to maintain a Navy, Clause 13 to make rules for the governance of land and naval forces, Clause 14 to provide for calling forth the militia of the various states, and Clause 15 for organizing, arming, and disciplining the militia when in federal service.

The Constitution also provides for a tripartite central government with a Legislative Branch (Congress), an Executive Branch (the President), and a Judicial Branch. The Judicial Branch consists of the Supreme Court and such inferior federal courts as Congress may by law establish. Today, the Judicial Branch includes 93 district courts and 13 circuit courts (appellate courts above the district courts and below the Supreme Court).

In one of its first decisions, the Supreme Court decided that Mr. Chisholm (a citizen of South Carolina) could sue the sovereign state of Georgia in federal court.[19] There was an immediate negative reaction. Congress quickly proposed the 11th Amendment and the states ratified it on February 7, 1795. Although by its terms the 11th Amendment only bars 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 that same state.[20]

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA and President Bill Clinton signed it into law on October 13, 1994.[21] As originally enacted in 1994, USERRA permitted an individual to sue a state (as employer) in federal court, alleging that the state had violated USERRA. Four years later, the United States Court of Appeals for the 7th

[19] *Chisholm v. Georgia,* 2 U.S. 419 (1793).
[20] *Hans v. Louisiana,* 134 U.S. 1 (1890).
[21] Please see footnote 2.

Circuit[22] held USERRA to be unconstitutional insofar as it permitted an individual to sue a state in federal court.[23] Later in 1998, Congress amended section 4323(b) of USERRA, pertaining to USERRA enforcement against states, as employers.

As amended in 1998, section 4323(b)(1) provides for enforcement of USERRA by a lawsuit against the state filed by the United States Attorney General, in the name of the United States, as plaintiff. This solves the 11th Amendment problem, because that amendment does not address the situation of a suit against a state filed by the United States of America.[24]

Alternatively, USERRA can be enforced against a state by a suit brought by an individual against the state in state court, under section 4323(b)(2), 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."*[25] What does the phrase "in accordance with the laws of the State" mean?

Appearing as amicus curiae (friend of the court) in the Virginia Supreme Court and earlier in the New Mexico Supreme Court,[26] the United States Department of Justice (DOJ) argued that section 4323(b)(2) means that state courts *must* hear and adjudicate USERRA cases against state agencies, without regard to state law claims of sovereign immunity, and that we should only look to state law to determine in which state court to file the suit and exactly how one initiates a civil case in state court in that specific state. The problem with this argument is that the Supreme Court has already struck down a federal statute that required the state courts to hear and adjudicate Fair Labor Standards Act (FLSA—the federal minimum wage and overtime law) claims by state employees against state agencies as employers. The Supreme Court held: "We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject non-consenting States to suits for damages in state courts."[27]

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

[23] *Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998). The 7th Circuit relied on an important Supreme Court decision decided two years earlier: *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996). In that case, the Supreme Court struck down under the 11th Amendment a federal statute that permitted an Indian tribe (like the Seminole Tribe) to sue a state (like Florida) in federal court. The federal statute was enacted under Clause 3 (the Commerce Clause) of Article I, Section 8. The 7th Circuit concluded (not illogically) that the 11th Amendment (ratified in 1795) applied to federal statutes enacted under any of the clauses of Article I, Section 8 of the Constitution (ratified in 1789). That conclusion was called into question by a later Supreme Court case, *Central Virginia Community College v. Katz,* 546 U.S. 356 (2006). In *Katz,* the Supreme Court held that the federal Bankruptcy Code authorized federal court lawsuits against state agencies and that this did not violate the 11th Amendment. Determining whether the 11th Amendment applies depends upon determining whether the function in question is central to the role of the central government under our Constitution, not simply a matter of determining whether the constitutional authority came before or after 1795. This argument was made to the Virginia Supreme Court but was rejected.

[24] *See United States v. Alabama Department of Mental Health & Mental Retardation,* 673 F.3d 1320 (11th Cir. 2012). I discuss that case in detail in Law Review 1232 (March 2012).

[25] 38 U.S.C. 4323(b)(2) (emphasis supplied).

[26] Please see Law Review 16034 (April 2016).

[27] *Alden v. Maine,* 527 U.S. 706, 712 (1999).

One can argue (as DOJ argued in the Virginia Supreme Court) that *Alden v. Maine* struck down a federal statute that relied on the Commerce Clause, not the War Powers Clauses, and that the Supreme Court would (based on *Katz)* limit *Alden* to statutes (like the FLSA) that rely on the Commerce Clause. The Virginia Supreme Court considered and rejected that argument, holding that it is up to the United States Supreme Court, not a state supreme court, to limit or overrule a United States Supreme Court precedent.[28]

Unless and until the Supreme Court explicitly limits or overrules *Alden,* it will be most difficult to enforce USERRA against state agencies as employers. This is a big problem because 10% of RC personnel have civilian jobs for state agencies.[29]

Q: How is my case different?

In your case, the employer and prospective defendant is a *political subdivision of a state, not a state.* The final subsection of section 4323 provides: "For purposes of this section [USERRA enforcement], the term 'private employer' includes a political subdivision of a State."[30] This means that you can sue a political subdivision (county, city, school district, etc.) in federal court, in your own name and with your own lawyer, just like suing a private employer. Unlike states, political subdivisions do not have sovereign immunity.[31]

Q: What is a political subdivision?

A: The term "political subdivision" is not defined in USERRA, but it is an important legal term with a specific meaning. The term has been defined as follows:

> A political subdivision is a separate legal entity of a State which usually has specific governmental functions. The term ordinarily includes a county, city, town, village, or school district, and, in many States, a sanitation, utility, reclamation, drainage, flood control, or similar district. A political subdivision's legal status is governmental.[32]

Q: If DOJ agrees to represent me in my suit against the county, who will be the named plaintiff in the lawsuit?

A: You (the individual service member) will be the named plaintiff, even if DOJ is representing you. If DOJ were representing you in a USERRA suit against a state (as employer and defendant), the

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[28] The Virginia Supreme Court cited and relied upon a Supreme Court statement that "Other courts should not conclude our more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton,* 521 U.S. 203, 237 (1997).
[29] Please see footnote 5.
[30] 38 U.S.C. 4323(i).
[31] *Weaver v. Madison City Board of Education,* 771 F.3d 748 (11th Cir. 2014); *Sandoval v. City of Chicago,* 560 F.3d 703 (7th Cir.), *cert. denied,* 558 U.S. 874 (2009).
[32] *See* https://www.ssa.gov/section218training/advanced_course_9.htm.

named plaintiff would be the United States.[33] In cases brought by DOJ against private employers and political subdivisions of states, the named plaintiff is the individual service member or veteran.

DOJ has proposed, on more than one occasion, that Congress amend section 4323(a)(1) of USERRA to provide that the United States would be the named plaintiff in any case brought by DOJ, and I agree with that proposal, but Congress has not enacted any such amendment.

Q: If DOJ turns down my request for legal representation, will I then be able to sue the county in federal court in my own name and with my own lawyer?

A: Yes.[34] When DOL-VETS informed you of the results of its investigation, you could have retained your own lawyer and sued the county in federal court.[35] You also could have bypassed DOL-VETS altogether—you could have filed suit without first filing a complaint with DOL-VETS.[36]

Q: If I retain private counsel and sue and win, can the court order the employer to pay my attorney fees?

A: Yes.[37]

UPDATE—OCTOBER 2022

On 6/29/2022, the United States Supreme Court held that all 50 States are subject to being sued in their own State courts for violating USERRA with respect to State employees, and the State courts are required to hear and adjudicate those claims without regard to State laws or State claims of sovereign immunity. *See Torres v. Texas Department of Public Safety,* 142 S. Ct. 2455 (2022). *See also* Law Review 22046 (July 2022) and Law Review 22001 (January 2022).

[33] 38 U.S.C. 4323(a)(1) (final sentence).
[34] 38 U.S.C. 4323(a)(3)(C).
[35] 38 U.S.C. 4323(a)(3)(B).
[36] 38 U.S.C. 4323(a)(3)(A).
[37] 38 U.S.C. 4323(h)(2).