

LAW REVIEW¹ 26007

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Recent USERRA Case regarding the State of Kansas

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¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,300 "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 Spouses' Protection Act (USFSPA), the title 38 chapters that provide for veterans' benefits administered by the Department of Veterans Affairs (VA), 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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

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 45 years, I have collaborated 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 (VRRRA—the 1940 version of the Federal reemployment statute) for 38 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 drafted the proposed VRRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. §§ 4301-35). I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as -an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at swright@roa.org.

***United States v. Kansas Department of Health & Environment*, 162 F.4th 1238 (10th Cir. Dec. 30, 2025).**

This is a very recent decision of the United States Court of Appeals for the 10th Circuit, the intermediate federal appellate court that sits in Denver and hears appeals from district courts in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

As is always the case in the federal appeals courts, this case was assigned to a panel of three judges. In this case, the panel consisted of Judge Jerome A. Holmes, the Chief Judge of the 10th Circuit, along with Judge Michael R. Murphy and Judge Carolyn B. McHugh of the 10th Circuit. The decision was written by Judge Murphy, and the other two judges joined in a unanimous panel decision.

Facts of the case

In his opinion, Judge Murphy set forth the facts of this case as follows:

KDHE [Kansas Department of Health & Environment] is a state agency that provides services related to health and environment. The agency has, within its organizational structure, various divisions, bureaus, and sections. The Sexually Transmitted Disease Intervention Section focuses its work on those affected by sexually transmitted infections and the Human Immunodeficiency Virus.

During the relevant time period, the Sexually Transmitted Disease Intervention Section received federal grants from the Center for Disease Control and Prevention ("CDC") in the form of the

Sexually Transmitted Disease Prevention Award. Under the supervision of KDHE, the Section used the grant in two primary ways: 1) it hired disease intervention specialists ("state disease intervention specialists") and 2) it distributed a portion of the fund as Aid-to-Local grants to counties within its jurisdiction.

State disease intervention specialists were each assigned to a clinic. Their primary task was to interview people who were diagnosed with a communicable disease. By conducting interviews, state disease intervention specialists were able to identify others at risk of infection or disease transmission, inform them of their health risk, and refer them to medical services. Depending on the circumstance, a state disease intervention specialist may assist individuals who voluntarily walk into a health clinic or be deployed to specified areas based on guidance from KDHE. Each state disease intervention specialist was provided a copy of the Field Services Manual, a document written by KDHE, which identified job expectations, protocols, and metrics by which their performance was evaluated.

KDHE also offered Aid-to-Local grants to county-level agencies in exchange for localized assistance in disease prevention. Accompanying the grant was the Notice of Grant Award Amount & Summary of Program Objectives ("Notice of Grant Award") which outlined the terms, objectives, and purposes of the grant. Acceptance of the grant fund constituted acceptance of its terms. KDHE decided every fiscal year whether to renew the grant or reallocate its resources.

Finney County Health Department (or "Finney County") was a recipient of an Aid-to-Local grant from 1998 to 2010. The Notice of Grant Award identified objectives to be satisfied by a disease intervention specialist, which resembled expectations set out in the Field Services Manual. Finney County dedicated a county-level disease intervention specialist ("local disease intervention specialist") to fulfill the terms of the Aid-to-Local grant. The position was funded in part by the Aid-to-Local grant, with Finney County making up any shortfall. The technical job responsibilities of a local disease intervention specialist essentially mirrored that of a state disease intervention specialist.

From 2001 to 2010, Stacy Gonzales served as Finney County's local disease intervention specialist. During this time, Gonzales was also an active member of the United States Army National Guard. She intermittently had military obligations, during which she was absent from her local disease intervention specialist position.

As a local disease intervention specialist, Gonzales interfaced with representatives from both KDHE and Finney County. Her main contacts at KDHE were Derek Coppedge and Jennifer VandeVelde. Coppedge was the Manager of Field Operations for the Sexually Transmitted Disease Section from 2000 to 2008. VandeVelde succeeded Coppedge in that position from 2008 until 2013, upon Coppedge's promotion to Director of the Sexually Transmitted Disease Section in 2008. The Manager of Field Operations supervised all state and local disease intervention specialists, tracking their deployment and assessing data collected from field work. The Director of the Sexually Transmitted Disease Section

oversaw the Aid-to-Local grants by communicating with the federal government, coordinating with the agency's legal department, and managing counties' compliance with the grant terms. Coppedge and VandeVelde led mandatory quarterly staff meetings for both state and local disease intervention specialists to review grant objectives and the progress made in the preceding quarter. Gonzales attended these quarterly meetings.

When she did not have military obligations, Gonzales reported daily for work at Finney County. She worked with county employees, including nurses and clinical staff. Her salary and benefits were determined by Finney County Human Resources Department, which issued her paychecks as well.

On or around April 1, 2010, a meeting was called to discuss problems with Gonzales's performance. Meeting minutes indicate those in attendance were Coppedge, VandeVelde, Gonzales, and Ashley Goss. Ashley Goss was the Finney County Health Department Administrator at the time. Perceived issues were two-fold. First, Gonzales had exhibited inappropriate behavior in the workplace which had strained relationships with her co-workers. Second, Finney County was failing to meet Aid-to-Local grant objectives. Goss and Gonzales were warned the Aid-to-Local grant might not be renewed if performance did not improve.

On April 9, 2010, Gonzales received a deployment order for military service beginning in October and she informed VandeVelde of her deployment.

Coppedge sent a follow-up letter, dated April 23, 2010, to Goss. The letter emphasized the performance deficiency of the disease intervention specialist in Finney County. The letter warned Finney County that if productivity did not "dramatically improve," the Aid-to-Local grant would be discontinued. App. Vol. II at 385. Coppedge scheduled a reevaluation of Finney County's performance for July 15, 2010.

In an internal email dated June 7, 2010, KDHE contemplated reallocating Finney County's Aid-to-Local grant. On July 1, 2010, KDHE decided not to renew Finney County's Aid-to-Local grant. Thereafter, Finney County terminated its local disease intervention specialist position and Gonzales became unemployed.³

KDHE ended its grant to Finney County, causing Army National Guard soldier Stacy Gonzales to lose her civilian job. If the KDHE decision to terminate the grant was motivated, in whole or in part, by irritation with Gonzales concerning her exercise of her rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), and specifically by her occasional absences from work to perform ARNG service and training, then terminating the grant violated section 4311 of USERRA, which provides as follows:

(a)

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,

³ *Kansas Department of Health & Environment*, 162 F. 4th at 1241-43.

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.

(b)

An employer may not discriminate in employment against or take any adverse employment action or other retaliatory action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c)An employer shall be considered to have engaged in actions prohibited—

(1)

under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is *a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or*

(2)

under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d)

The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.⁴

Q: Why is the United States (the Federal Government) listed as the named plaintiff in this case?

A: Section 4323(a)(1) of USERRA 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

⁴ 38 U.S.C. § 4311 (emphasis supplied).

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.*⁵

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress passed the Uniformed Services Employment and Reemployment Rights Act (USERRA), and President Bill Clinton signed it into law on 10/13/1994.⁶ As enacted in 1994, section 4323 of USERRA read as follows:

§4323. Enforcement of rights with respect to a State or private employer

"(a)(1) A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) 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. 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 appropriate relief for such person in an appropriate United States district court.

⁵ 38 U.S.C. § 4323(a)(1) (emphasis supplied).

⁶ Public Law 103-353, 108 Stat. 3149 (Oct. 13, 1994).

"(2) A person may commence an action for relief with respect to a complaint if that person—

"(A) has chosen not to apply to the Secretary for assistance regarding the complaint under section 4322(c);

"(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or

"(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph.

"(b) In the case of an action against a State as an employer, the appropriate district court is the court for any district in which the State exercises any authority or carries out any function. In the case of a private employer the appropriate district court is the district court for any district in which the private employer of the person maintains a place of business.

"(c)(1)(A) The district courts of the United States shall have jurisdiction, upon the filing of a complaint, motion, petition, or other appropriate pleading by or on behalf of the person claiming a right or benefit under this chapter— "(i) to require the employer to comply with the provisions of this chapter; "(ii) to require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter; and "(iii) to require the employer to pay the person an amount equal to the amount referred to in clause (ii) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

"(B) Any compensation under clauses (ii) and (iii) of subparagraph (A) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for in this chapter.

"(2)(A) No fees or court costs shall be charged or taxed against any person claiming rights under this chapter.

"(B) In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.

"(3) The court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.

"(4) An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter, not by an employer, prospective employer, or other entity with obligations under this chapter.

"(5) In any such action, only an employer or a potential employer, as the case may be, shall be a necessary party respondent.

"(6) No State statute of limitations shall apply to any proceeding under this chapter.

"(7) *A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.*⁷

⁷ 108 Stat. 3149, 3165 (emphasis supplied).

Under this language, an individual who was serving or had served our country in one of the uniformed services and who alleged that his or her employer (a State agency) had violated USERRA could sue that State agency employer in the appropriate federal district court, just like suing a private employer. In 1998, the United States Court of Appeals for the 7th Circuit⁸ held that USERRA, as originally enacted, was unconstitutional as far as it permitted an individual to sue a State in federal court.⁹

In *Velasquez*, the 7th Circuit held that permitting individuals to sue States in federal court violated the 11th Amendment, which provides 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.”¹⁰

Later in 1998, Congress amended section 4323 of USERRA into its present form.¹¹ As I have explained in detail in Law Review 24054 (November 2024), there are now two ways to enforce USERRA against a State agency as employer. The first way is to make a formal, written USERRA complaint against the employer with the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS). After that agency investigates your complaint, it will advise you of your right to request referral of your complaint to the United States Department of Justice (DOJ). If DOJ is reasonably satisfied that your complaint has merit, it will appear and act as your

⁸ The 7th Circuit is the intermediate federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

⁹ *Velasquez v. Frapwell*, 160 F.3rd 389 (7th Cir. 1998).

¹⁰ United States Constitution, Amendment 11, ratified 2/7/1795. Yes, it is capitalized in just that way, in the style of the late 18th Century.

¹¹ There have been some other amendments. The critical amendments for the present purpose were enacted in 1998 and relate to enforcing USERRA against State government employers.

attorney in suing the employer in the appropriate federal district court. If the case is against a State agency, the named plaintiff will be the United States.¹²

Gonzales chose the first way. She filed a formal complaint against KDHE with DOL-VETS. That agency investigated her complaint and found it to have merit. Gonzales requested that DOL-VETS transfer her case file to DOJ, and DOL-VETS transferred the file as requested. DOJ was reasonably satisfied that Gonzales' claim had merit, and it sued the State of Kansas and KDHE in the United States District Court for Kansas. In accordance with the final sentence of section 4323(a)(1),¹³ the suit was filed in the name of the United States.

Q: Gonzales lost her job in 2010. Why is this case just now being litigated 16 years later?

A: USERRA provides: "If any person seeks to file a complaint or claim with the Secretary, the Merit Systems Protection Board, or a Federal or State court under this chapter, alleging a violation of this chapter, *there shall be no limit on the period for filing the complaint or claim.*"¹⁴

It appears that Gonzales waited several years after losing her job in 2010 before she complained to DOL-VETS. Her complaint was not rejected as untimely because USERRA does not contain a statute of limitations and section 4327(b) specifically precludes the application of other statutes of limitations. Gonzales apparently was unaware of her USERRA rights until several years after she lost her job in 2010.

¹² The second way is to sue the State in State court, in accordance with section 4323(b)(2) of USERRA, 38 U.S.C. § 4323(b)(2).

¹³ 38 U.S.C. § 4323(a)(1).

¹⁴ 38 U.S.C. § 4327(b) (emphasis supplied).

This is not to say that I recommend waiting to assert your USERRA rights. The longer you wait, the more difficult it becomes for DOL-VETS or your attorney to obtain the evidence needed to prove your case. We need to do a better job of publicizing our ROA Law Review Library, which contains more than 1,500 “Law Review” articles about USERRA. The articles are available for free to everyone, not just ROA members.

Q: What happened in the District Court?

A: DOJ filed this lawsuit in the United States District Court for the District of Kansas, and the case was assigned to Judge Toby Crouse. Judge Crouse granted KDHE’s motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (FRCP). Judge Crouse found that there was no evidence to support the DOJ claim against KDHE and that no reasonable jury could find for DOJ and Gonzales.¹⁵

Q: What happened on appeal?

A: DOJ made a timely appeal to the 10th Circuit. The three-judge panel ruled that there was evidence to support the DOJ’s claim and that summary judgment should not have been awarded to KDHE. The panel also held that Judge Crouse misunderstood and misapplied USERRA.

Q: Finney County, not KDHE, was Gonzales’ employer. How can KDHE be said to have violated USERRA?

¹⁵ *United States v. Kansas Department of Health & Environment*, 2024 U.S. Dist. LEXIS 5375, 2024 WL 95387 (D. Kansas Jan. 9, 2024).

A: That is exactly the error that Judge Crouse made. In his opinion, Judge Murphy wrote:

The interpretation of a federal statute is a question of law which this court reviews de novo. *Koch Indus., Inc. v. United States*, 603 F.3d 816, 821 (10th Cir. 2010); see *WWC Holding Co. v. Sopkin*, 488 F.3d 1262, 1276 n.10 (10th Cir. 2007) ("[W]e are not limited to the parties' positions on what a statute means, because we review a question of statutory construction de novo.").

The analysis begins with the statutory text. *Tarango-Delgado v. Garland*, 19 F.4th 1233, 1238 (10th Cir. 2021). Undefined terms are given their ordinary meaning as understood at the time of enactment, considering the specific context in which the word is used. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566, 569, 132 S. Ct. 1997, 182 L. Ed. 2d 903 (2012). "[T]he text of a law controls over purported legislative intentions unmoored from any statutory text." *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 815, 144 S. Ct. 2440, 219 L. Ed. 2d 1139 (2024) (quotation omitted).

Kansas does not provide a valid reason to deviate from the textual analysis. Its argument analogizing USERRA to the Fair Labor Standards Act is unavailing because each statute has differing definitions of "employer." Compare 29 U.S.C. § 203(d) with 38 U.S.C. § 4303(4)(A). The Supreme Court's precedent on the common-law definition of control is irrelevant because included within USERRA is a statute-specific definition of the term "employer." See *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 444-45, 447, 123 S. Ct. 1673, 155 L. Ed. 2d

615 (2003) (explaining courts should look to common law if Congress is silent on an undefined term and the "undefined term has a settled meaning at common law").

USERRA provides, in relevant part:

A person who is a member of . . . , 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, . . . or obligation.

38 U.S.C. § 4311(a).

The term "employer" is defined in § 4303(4)(A):

[T]he term "employer" means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities including--

- (i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;
- (ii) the Federal Government;
- (iii) a State;
- (iv) any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph; and

(v) a person, institution, organization, or other entity that has denied initial employment in violation of section 4311.

The text identifies two avenues of analysis. First, whoever pays an employee's salary or wages for the work performed is considered an employer. To pay is to "give to (a person) what is due in discharge of a debt, or as return for services done." *Pay*, Oxford English Dictionary (2d ed. 1989). Under the terms' plain meanings, "salary" and "wages" both refer to regularly paid compensation. *See Helix Energy Sols. Grp., Inc. v. Hewitt*, 598 U.S. 39, 51-52, 143 S. Ct. 677, 214 L. Ed. 2d 409 (2023) (defining salary as "fixed compensation regularly paid, as by the year, quarter, month, or week" and wage as "[p]ay given for labor at short[-]stated intervals" (quotation omitted)). Section 4303(2) identifies salary or wages as a monetary subcomponent of the benefits of employment. *See also Advocate Christ Med. Ctr. v. Kennedy*, 605 U.S. 1, 10, 145 S. Ct. 1262, 221 L. Ed. 2d 684 (2025) ("The word 'paid' obviously connotes a cash benefit.").

Second, "control over employment opportunities" is an alternate and sufficient basis for employer status under USERRA. 38 U.S.C. § 4303(4)(A). This statutory language can be further parsed into two subcomponents: "control over" and "employment opportunities."

To exercise control over is to "exercise power or authority over." *Control*, Oxford English Dictionary (2d ed. 1989). Although the provision does not clarify the nature or degree of control necessary, absent from the text is any language to suggest only those who exercise direct or absolute control over an employee are considered employers. *See Muldrow*, 601 U.S. at 355 (refusing

to adopt a "heightened" statutory requirement by "add[ing] words" to the text); *White v. United Airlines, Inc.*, 987 F.3d 616, 627 (7th Cir. 2021) ("[S]ection 4303(4)(A)(i) does not require that an 'employer' have direct control over the matters that constitute a USERRA violation[,] . . . only that the employer must have control over the plaintiff's employment opportunities writ large.").

Pursuant to § 4303(4)(A)(i), those who perform employment-related responsibilities upon delegation by the employer also fall within the ambit of employer. This provision implies a servicemember may have more than one employer at a time as long as each employer either pays salary or wages or controls employment opportunities: 1) the employer that delegates the performance of employment-related responsibilities and 2) those to whom the responsibilities have been delegated. "The use of the word 'delegate[]' suggests an intent to reach both direct and indirect employers," provided each employer satisfies at least one of the two conditions identified in § 4303(4)(A). *White*, 987 F.3d at 627.

As a result, the term "control" must be construed to recognize that a servicemember can have more than one employer. *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933, 129 S. Ct. 2230, 173 L. Ed. 2d 1255 (2009) ("[W]ell-established principles of statutory interpretation . . . require statutes to be construed in a manner that gives effect to all of their provisions."). Even entities that share or co-determine matters constituting employment opportunities can concurrently be employers. *Cf. Knitter v. Corvias Mil. Living, LLC*, 758 F.3d 1214, 1226 (10th Cir.

2014) (explaining the joint-employer test under Title VII of the Civil Rights Act of 1964); *see also Staub v. Proctor Hosp.*, 562 U.S. 411, 417, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011) (observing USERRA "is very similar to Title VII"). The key determination concerns not the purported employer's "purely formal" functions, *White*, 987 F.3d at 627, but whether an entity individually exercises sufficient control over the servicemember's employment opportunities, *cf. Knitter*, 758 F.3d at 1226; *see Estes v. Merit Sys. Prot. Bd.*, 658 F. App'x 1029, 1032 (Fed. Cir. 2016).

Implementing regulations from the Department of Labor support this textual analysis. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394, 402, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024) (recognizing the non-binding but persuasive weight of "interpretations of those responsible for implementing particular statutes"). The agency confirmed not only that a servicemember may have more than one employer but also provided an example of the nature and scope of "control" necessary to be found a USERRA employer:

For example, if the employee is a security guard hired by a security company and he or she is assigned to a work site, the employee may report both to the security company and to the site owner. In such an instance, both employers share responsibility for compliance with USERRA. 20 C.F.R. § 1002.37 (2025).

The phrase "employment opportunities," on the other hand, refers both to opportunities for obtaining employment and opportunities within the scope of one's employment. *Compare* 38 U.S.C. § 4303(4)(A)(v) (treating as employers those who deny

initial employment), and *United States v. Nevada*, 817 F. Supp. 2d 1230, 1238 (D. Nev. 2011) (assessing which entity possessed the authority to hire employees), with *Estes*, 658 F. App'x at 1032 (discussing retention and termination of employment), and *White*, 987 F.3d at 626-27 (suggesting those who determine certain terms and benefits of employment may be considered employers).

Drawing a categorical distinction, Kansas argues no employment relationship can exist between Kansas and Gonzales because Finney County is the recipient of the Aid-to-Local grant, not Gonzales. Kansas theorizes that assessing USERRA liability by looking beyond contractual relationships would have no backstop. For instance, Kansas points out there is no reason why the government's interpretation would not apply up the chain of grantor-grantee relationships and expose the CDC to liability as Gonzales's USERRA employer since the Sexually Transmitted Disease Prevention Award, used to fund the Aid-to-Local grants, originated from the CDC. Because federal grants constitute a significant portion of state government funding, Kansas warns, an expansive interpretation of the scope of USERRA employer would implicate countless grantor-grantee relationships and expose the federal government to potentially significant liability. Kansas concludes Congress could not have intended such an outcome.

Kansas's position is not supported by the statutory language, which identifies no exceptions or alternate framework by which to analyze entities administering grants. See *Bostock v. Clayton Cnty.*, 590 U.S. 644, 669, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020)

("[W]hen Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.").

Moreover, USERRA calls for a case-specific analysis to determine not only employer status, but also whether the employer engaged in discriminatory conduct. 38 U.S.C. §§ 4303(4)(A); 4311(b)-(c). As they are based merely on speculation, Kansas's slippery-slope concerns are unpersuasive. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435-36, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006) (rejecting a slippery-slope argument based on "feasibility of case-by-case consideration"); *see also Silva v. Dep't of Homeland Sec.*, 112 M.S.P.R. 362, 369 (M.S.P.B. 2009) (explaining that just because the government may be a USERRA employer to one contractor does not mean the government is considered the USERRA employer of all contractors).

This leaves two questions, whether there is sufficient evidence that Kansas, through KDHE, 1) paid Gonzales's wages or salary or 2) exercised some control over employment opportunities of Gonzales.¹⁶

Q: Is this case over?

A: No, this case is not over. The 10th Circuit panel reversed the granting of KDHE's motion for summary judgment. The case has been remanded to the district court. Now, there will need to be a trial, perhaps under Judge Crouse and perhaps under a different judge. This

¹⁶ *Kansas Department of Health & Environment*, 162 F.4th at 1244-47.

case could drag on for several more years. Of course, it is also possible that the parties will settle.

Q: What is the importance of this case?

A: This case demonstrates that there is a remedy when an entity that is not the “employer” in the traditional sense causes the traditional employer to violate USERRA or stands in the way of the traditional employer complying with USERRA.¹⁷

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Our roots run deep. On October 2, 1922, veterans of the Great War gathered at Washington's historic Willard Hotel — at the invitation of General of the Armies John J. Pershing — to build something lasting. One of the junior officers in that room was Captain Harry S. Truman, who, as President, signed ROA's congressional charter in 1950. That

¹⁷ See Law Review 23005 (February 2023).

charter gives us a clear mission: advocate for policies that ensure adequate national security. For more than a century, we've made the case that America's Reserve Components and National Guard are among the most cost-effective pillars of our national defense.

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