

LAW REVIEW 14102¹

December 2014

USERRA in the New Mexico Supreme Court

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1.1.1.7—USERRA applies to state and local governments

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

In Law Review 1281, Captain Samuel F. Wright⁴ wrote, “There is one situation where I think that you are better off relying on Department of Labor -VETS and Department of Justice, rather than retaining private counsel to sue on your behalf.” The exception is when your employer is a state agency. Because of the 11th Amendment of the United States Constitution, an individual may not sue a state in federal court. In those cases the Department of Justice may sue the state employer in federal court on your behalf. But that is not the only alternative. If you have a USERRA claim against a state agency you may still be able to sue the state in state court, *but only if the state law permits such suits*.⁵ Many states have enacted statutes that waive sovereign immunity to be sued in their own courts, and in particular, for USERRA claims. One example is New Mexico Statute 20-4-7.1, which provides:

The rights, benefits and protections of the federal Uniformed Services Employment and Reemployment Rights Act of 1994 shall apply to a member of the National Guard ordered to federal or state active duty...

The State of New Mexico also has a long history of enacting statutes to protect the rights of its National Guard and Reserve citizens. So, how would a claim by a state employee fare in a New

¹ We invite the reader’s attention to www.servicemembers-lawcenter.org. You will find more than 1,300 “Law Review” articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week.

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⁵ 38 U.S.C. § 4323(b)(2); 20 C.F.R. §§.1002.305 and 307.

Mexico state court? A case recently argued before the New Mexico State Supreme Court will address sovereign immunity claims by the State and answer that question.

Sergeant First Class (SFC) Phillip Ramirez is a member of the New Mexico Army National Guard who worked for the State of New Mexico Children Youth and Families Department (CYFD). SFC Ramirez returned from war and sought to enforce his USERRA rights in state court. A New Mexico trial judge held that she had jurisdiction to hear this case and the jury determined that the CYFD violated SFC Phillip Ramirez's USERRA rights by discriminating and retaliating against him based on his military status. Following that trial, the CYFD appealed to the New Mexico Court of Appeals, which reversed the trial court decision based upon sovereign immunity grounds.

SFC Ramirez appealed to the New Mexico Supreme Court. Oral argument was heard on December 17, 2014, in Santa Fe. The court took on the task of deciding whether the New Mexico Legislature had waived state sovereign immunity to USERRA claims from its own employees by enacting certain statutes, or alternatively, whether Congressional War Powers supersede the state's claims of sovereign immunity. The five justices had many questions for both parties and decided that each side would have 50 minutes to argue. Arguing for SFC Ramirez were his attorneys (lead counsel on appeal was Alice Lorenz), the New Mexico Attorney General (David Pederson) and the Department of Justice (Nate Pollock). It may seem confusing, but, yes, both the U.S. Department of Justice and the Attorney General of the State of New Mexico interceded to argue on behalf of SFC Ramirez before the State Supreme Court. Defending the appeal on behalf of CYFD was Ellen Casey who has been that state agency's attorney since this case began.

For the Plaintiff, the justices were concerned whether any litigation against the state, as an employer, would have a fiscal impact against the state – meaning if any damages awarded to a service member would cost the state money. Of course, in civil litigation the court and jury can only award monetary compensation, so enforcing USERRA would have a financial impact on the state. But, USERRA limits the service members' damages to what the service member lost so any USERRA award would have to be limited to what was lost. Ms. Lorenz informed the Court that the state of New Mexico is the largest employer of service members in this state and enforcing USERRA would only make sense to protect all members of the military.

Mr. Pollock from the DOJ argued to the Justices that, because the United States Supreme Court has determined that Congressional authority supersedes state immunity in cases arising out of bankruptcy or commerce, then there is no doubt that Congress has this same authority under its War Powers; the Constitutional provision by which USERRA was enacted by Congress. Mr. Pollock also challenged whether CYFD could point to any evidence that the framers of the Constitution intended to limit war powers in any way, and submitted that the answer was CYFD could not.

For CYFD, the Justices questioned whether either the New Mexico Legislature or the U.S. Congress had enacted a law --- here USERRA and New Mexico Statute 20-4-7.1 – but would not

allow a service member to pursue a remedy in court on his/her own. The Justices said that a law without a private cause of action would be meaningless and any argument to the contrary does not make sense. CYFD's counsel responded that a service member can bring a USERRA claim only through the Department of Labor or rely on the "good will" of a department of the State of New Mexico. Otherwise, the 11th Amendment limits a service member's rights under USERRA. One Justice found it difficult to accept this argument when CYFD has refused to compensate SFC Ramirez following the case when it was determined by the jury. The Justices also discussed what the U.S. Supreme Court would do if these questions were presented to that Court; and one Justice remarked that, "If it concerns War Powers, you can bet your mortgage what the U.S. Supreme Court will do."

Certainly reading too much into the questions and comments from the Justices would be like reading tea leaves. There is no way to tell what direction the Justices will go in this case. Of course, advocates for service members are hopeful that the Court will find in favor of SFC Ramirez because service members like SFC Ramirez need to know that they can pursue a remedy in court, even when the DOL or DOJ decide not to pursue their case. The decision (which is expected several months from now) will also mark a path for other states and courts to follow when addressing these issues. SFC Ramirez has maintained from the beginning of his case – 8 years ago – that he is not pursuing this case for just himself, but for all members of the military.