

## LAW REVIEW<sup>1</sup> 19055

June 2019

### Unfavorable Virginia Supreme Court Decision on Enforcing USERRA against State Government Agency Employers.

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

**1.1.1.7—USERRA applies to state and local governments**

**1.4—USERRA enforcement**

**1.6—USERRA and statutes of limitations**

**1.8—Relationship between USERRA and other laws/policies**

***Clark v. Virginia State Police*, 292 Va. 725, 793 S.E.2d 1 (Virginia Supreme Court December 1, 2016), cert. denied, 138 S.Ct. 800 (2017).**<sup>3</sup>

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 1800 "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 1600 of the articles.

<sup>2</sup> 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 (VRRRA—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 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](mailto:SWright@roa.org).

<sup>3</sup> This is a 2016 decision of the Virginia Supreme Court. The citation means that you can find this decision in Volume 292 of *Virginia Reports*, starting on page 725, and in Volume 793 of *Southeastern Reporter Second Series*, starting on page 1. The "cert. denied" note means that the United States Supreme Court declined to hear this case.

Jonathan R. Clark is a Major in the Army Reserve (USAR) and a member of the Reserve Organization of America (ROA).<sup>4</sup> On the civilian side, he is a state police officer—a member of the Virginia State Police (VSP). He was considered for promotion in the VSP seven times 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

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The denial of certiorari does not necessarily mean that the United States Supreme Court agrees with the decision of the Virginia Supreme Court, but it means that the decision of the Virginia Supreme Court is final and is a binding precedent in Virginia. At least four of the nine Justices must vote for certiorari, or it is denied. Certiorari is denied in more than 99% of the cases where it is sought.

<sup>4</sup> At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new “doing business as” (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending 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 service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation’s pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

basis of that membership, application for membership, performance of service, application for service, or obligation.<sup>5</sup>

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA<sup>6</sup> and President Bill Clinton signed it into law on October 13, 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940.<sup>7</sup> USERRA provides that a person who meets five simple conditions<sup>8</sup> 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 qualified that is of like seniority, status, and pay.<sup>9</sup> 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.<sup>10</sup>

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

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<sup>5</sup> 38 U.S.C. 4311(a) (emphasis supplied).

<sup>6</sup> Public Law 103-353, 108 Stat. 3150.

<sup>7</sup> Congress originally enacted the VRRRA 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.

<sup>8</sup> 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 other-than-honorable administrative discharge. After release from the period of service, the person must have made a timely application for reemployment.

<sup>9</sup> 38 U.S.C. 4313(a)(2)(A).

<sup>10</sup> 38 U.S.C. 4316(a), 4318.

employment or by discriminating against them with respect to promotions or benefits of employment. Accordingly, section 4311 of USERRA<sup>11</sup> 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.<sup>12</sup> 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.).<sup>13</sup>
- b. Foreign embassies and consulates and international organizations like the World Bank and the United Nations.<sup>14</sup>
- c. Native American tribes.<sup>15</sup>
- d. The Judicial Branch of the Federal Government.<sup>16</sup>

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<sup>11</sup> 38 U.S.C. 4311.

<sup>12</sup> You only need one employee to be an employer subject to the federal reemployment statute. *See Cole v. Swint*, 961 F.2d 58, 60 (5<sup>th</sup> Cir. 1992).

<sup>13</sup> Please see Law Review 1206 (January 2012).

<sup>14</sup> These international organizations and foreign embassies and consulates have diplomatic immunity from the enforcement of U.S. criminal and civil laws.

<sup>15</sup> Please see Law Review 15111 (December 2015).

<sup>16</sup> Please see Law Review 15009 (January 2015).

The VRRRA has applied to the Federal Government and to private employers since 1940. In 1974, Congress amended the VRRRA to make it apply also to state and local governments as employers.<sup>17</sup>

**Sovereign immunity is 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)<sup>18</sup> members have civilian jobs for state government agencies.<sup>19</sup>

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

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<sup>17</sup> 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 VRRRA. The most important change was to expand the applicability of the law to include state and local governments as employers.

<sup>18</sup> 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.

<sup>19</sup> 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 2013 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).

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 11<sup>th</sup> 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.<sup>20</sup>

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.

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<sup>20</sup> United States Constitution, Amendment 11 (ratified February 7, 1795). Yes, it is capitalized just that way, in the style of the late 18<sup>th</sup> Century.

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.<sup>21</sup> There was an immediate negative reaction. Congress quickly proposed the 11<sup>th</sup> Amendment and the states ratified it on February 7, 1795. Although by its terms the 11<sup>th</sup> Amendment only bars a suit against a state by a citizen of another state, the Supreme Court long ago held that the 11<sup>th</sup> Amendment also bars a suit against a state by a citizen of that same state.<sup>22</sup>

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.<sup>23</sup> 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 7<sup>th</sup> Circuit<sup>24</sup> held USERRA to be unconstitutional insofar as it permitted an individual to sue a state in federal court.<sup>25</sup> Later in 1998, Congress amended section 4323 of USERRA, pertaining to USERRA enforcement against states, as employers.

As amended in 1998, sections 4323(a)(10) and 4323(b)(1) provide for enforcement of USERRA by a lawsuit against the state filed by the

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<sup>21</sup> *Chisholm v. Georgia*, 2 U.S. 419 (1793).

<sup>22</sup> *Hans v. Louisiana*, 134 U.S. 1 (1890).

<sup>23</sup> Please see footnote 2.

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

<sup>25</sup> *Velasquez v. Frapwell*, 160 F.3d 389 (7<sup>th</sup> Cir. 1998). The 7<sup>th</sup> 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 11<sup>th</sup> 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 7<sup>th</sup> Circuit concluded (not illogically) that the 11<sup>th</sup> 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 11<sup>th</sup> Amendment. Determining whether the 11<sup>th</sup> 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.

United States Attorney General, in the name of the United States, as plaintiff. This solves the 11<sup>th</sup> Amendment problem, because that amendment does not address the situation of a suit against a state filed by the United States of America.<sup>26</sup>

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.*”<sup>27</sup> 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,<sup>28</sup> 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.”<sup>29</sup>

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<sup>26</sup> See *United States v. Alabama Department of Mental Health & Mental Retardation*, 673 F.3d 1320 (11<sup>th</sup> Cir. 2012). I discuss that case in detail in Law Review 1232 (March 2012).

<sup>27</sup> 38 U.S.C. 4323(b)(2) (emphasis supplied).

<sup>28</sup> Please see Law Review 16034 (April 2016).

<sup>29</sup> *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*)<sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup>

### **Going forward, how do we enforce USERRA against state agency employers?**

Under section 4323 of USERRA,<sup>33</sup> USERRA claims against state and local governments and private employers<sup>34</sup> are adjudicated by federal district courts, like federal civil cases generally.<sup>35</sup> There are two ways that a USERRA case can be initiated. The plaintiff can be represented by DOJ, or the case can be initiated by private counsel that the claimant has retained.<sup>36</sup>

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<sup>30</sup> *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006).

<sup>31</sup> 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).

<sup>32</sup> Please see footnote 5.

<sup>33</sup> 38 U.S.C. 4323.

<sup>34</sup> Under section 4324, 38 U.S.C. 4324, there is a separate enforcement mechanism for cases against federal agencies as employers Please see Law Review 16012 (March 2016).

<sup>35</sup> The USERRA plaintiff is permitted to bring the case in the United States District Court for any district where the employer maintains a place of business. 38 U.S.C. 4323(c)(2).

<sup>36</sup> It is also possible for the individual to bring the lawsuit without legal representation, but I do not recommend that course of action. Abraham Lincoln said, “A man who represents himself has a fool for a client.” And the law today is so much more complicated than it was during Lincoln’s lifetime.

A person who claims that any employer (federal, state, local, or private sector) has violated USERRA may file a claim with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS).<sup>37</sup> That agency will then investigate the complaint.<sup>38</sup> DOL-VETS has subpoena authority to require employers and others to provide information and evidence that the agency needs to conduct its investigation.<sup>39</sup>

After completing its investigation, DOL-VETS is required to notify the complainant of the results of the investigation and of the complainant's options for enforcing USERRA.<sup>40</sup> The complainant can then request that DOL-VETS refer the case file to DOJ.<sup>41</sup> If DOJ is reasonably satisfied that the complainant is entitled to the USERRA benefits that he or she seeks, DOJ can file a lawsuit against the employer in the appropriate federal district court.<sup>42</sup> If DOJ takes the case, there is no cost to the plaintiff, either for attorney fees or for court costs.

If the defendant employer is a state government agency, the named plaintiff will be the United States of America.<sup>43</sup> In all other cases, the named plaintiff is the individual veteran or RC member.

If DOL-VETS refers to the DOJ and DOJ declines the request for representation, the complainant can file suit through retained private counsel.<sup>44</sup> When DOL-VETS advises the complainant of the results of the investigation, the complainant can then file suit through retained private counsel instead of requesting referral to DOJ.<sup>45</sup>

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<sup>37</sup> 38 U.S.C. 4322(a).

<sup>38</sup> 38 U.S.C. 4322(d).

<sup>39</sup> 38 U.S.C. 4326.

<sup>40</sup> 38 U.S.C. 4322(e).

<sup>41</sup> 38 U.S.C. 4323(a)(1). If the employer is a federal executive agency, the complainant can request referral to the United States Office of Special Counsel (OSC). 38 U.S.C. 4324(a)(1).

<sup>42</sup> 38 U.S.C. 4323(a)(1).

<sup>43</sup> 38 U.S.C. 4323(a)(1) (final sentence).

<sup>44</sup> 38 U.S.C. 4323(a)(3)(C).

<sup>45</sup> 38 U.S.C. 4323(a)(3)(B).

The complainant can also bypass DOL-VETS altogether. A person claiming USERRA rights against a private employer or a political subdivision of a state can file suit through private counsel without ever having filed a complaint with DOL-VETS.<sup>46</sup>

The best way to enforce USERRA against a state agency is to go through DOL-VETS and DOJ. Because the lawsuit is filed in the name of the United States, by DOJ, there is no 11<sup>th</sup> Amendment problem.<sup>47</sup>

The problem with this strategy is that it means that you must depend upon DOL-VETS. As I have explained in Law Review 16099 (September 2016) and other articles, DOL-VETS all too often conducts perfunctory investigations and accepts at face value the factual and legal assertions of the employer's attorney. As I explained in that article, we (the Reserve Officers Association) communicated in 2016 with the Honorable Michael Michaud, the Assistant Secretary of Labor for Veterans' Employment and Training, urging him to improve the practices and procedures of DOL-VETS.<sup>48</sup>

Very soon, there will be a new Assistant Secretary for Veterans' Employment and Training, nominated by the President and confirmed by the Senate. As soon as the new Assistant Secretary is confirmed, we will contact him or her.

**Q: Did Clark file a complaint against the VSP with DOL-VETS? Can he do so now?**

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<sup>46</sup> 38 U.S.C. 4323(a)(3)(A).

<sup>47</sup> The 11<sup>th</sup> Amendment bars a suit against a state by an individual. The 11<sup>th</sup> Amendment does not bar a suit against a state by the United States. See *United States v. Alabama Department of Mental Health and Mental Retardation*, 673 F.3d 1320 (11<sup>th</sup> Cir. 2012).

<sup>48</sup> Like almost all of President Obama's political appointees, Assistant Secretary Michaud left office of January 20, 2017, when President Trump was inaugurated. The position of Assistant Secretary for Veterans' Employment and Training is still vacant, 29 months into the Trump Administration. See the directory of the DOL-VETS national office at <https://www.dol.gov/vets/aboutvets/nationaloffice.htm>.

**A:** Clark did not and has not filed a complaint with DOL-VETS, but he can do so now. There is no statute of limitations on filing a USERRA complaint with DOL-VETS or in court.<sup>49</sup>

**Q:** In *Law Review 19003 (January 2019)*, you wrote that because of the doctrine of *res judicata*<sup>50</sup> an individual does not get a second bite of the apple and cannot reopen a closed case. Why does that result not apply to Clark?

**A:** The doctrine of *res judicata* does not apply to Clark's USERRA case against the Commonwealth of Virginia because the Virginia trial court never adjudicated Clark's claim on the merits. The trial court dismissed Clark's case without considering the merits, based on Virginia's claim of sovereign immunity.

### **Enforcing USERRA against political subdivisions of states.**

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."<sup>51</sup> 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.<sup>52</sup>

**Q:** Can the Virginia Legislature waive sovereign immunity to permit lawsuits against the Commonwealth of Virginia for violating USERRA?

**A:** Yes, the Virginia Legislature could enact legislation waiving sovereign immunity, either in general or specifically with respect to USERRA

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<sup>49</sup> 38 U.S.C. 4327(b).

<sup>50</sup> *Res judicata* is Latin for "the thing has been adjudicated."

<sup>51</sup> 38 U.S.C. 4323(i).

<sup>52</sup> *Weaver v. Madison City Board of Education*, 771 F.3d 748 (11<sup>th</sup> Cir. 2014); *Sandoval v. City of Chicago*, 560 F.3d 703 (7<sup>th</sup> Cir.), *cert. denied*, 558 U.S. 874 (2009).

violations by state agencies as employers. There is no reason to believe that such legislation will be enacted anytime soon. Even if such legislation were to be enacted, it would not help Clark, because any new provision waiving sovereign immunity would most likely not be retroactive. When Congress or a state legislature enacts a new law or amends an existing law, the new law or amendment normally applies only to causes of action that arise on or after the date of enactment of the new law or amendment.

In 23 states, sovereign immunity has been waived, either in general or specifically with respect to suits about USERRA violations: *Florida*: Fla. Stat. Ann. Section 150.82; *Idaho*: Idaho Code section 6-903; *Illinois*: Illinois Constitution, Article XIII, section 4; *Iowa*: Iowa Code section 91A.8; *Kansas*: Kansas Statutes Annotated section 75-6101; *Louisiana*: Louisiana Constitution, Article VII, section 10(A); *Maryland*: Maryland State Personnel & Pensions Code section 14-103; *Michigan*: *Zynda v. Aeronautics Commission*, 372 Mich. 285, 125 N.W.2d 858 (1964); *Minnesota*: Minnesota Statutes Annotated section 1.05. *See also* *Breaker v. Bemidji State University*, 899 N.W.2d 515 (Minnesota Court of Appeals 2017); *Montana*: Montana Statutes Annotated sections 10-1-1003(3)(a), 10-1-1004, 10-1-1021; *New Hampshire*: *Mahan v. New Hampshire Department of Administrative Services*, 693 A.2d 79 (N.H. 1997); *New Mexico*: *Ramirez v. New Mexico Department of Children, Youth & Families*, 2016-NMSC-016, 372 P.3d 497 (2016); *New York*: New York Consolidated Laws Service, Court of Claims Act, section 8; *North Dakota*: *Bulman v. Hulstrand Construction Co., Inc.*, 521 N.W.2d 632 (N.D. 1994); *Ohio*: Ohio Revised Code Annotated section 5903.02; *Oklahoma*: *Vanderpool v. State*, 672 N.W. 2d 1153 (Okla. 1983); *Pennsylvania*: *Mayle v. Pennsylvania Department of Highways*, 479 Pa. 384, 388 A.2d 709 (1978); *Rhode Island*: *Panarello v. State Department*

*of Corrections*, 88 A.3d 350 (R.I. 2014); *South Carolina: Copeland v. South Carolina Department of Corrections*, 2014 WL 1978165 (S.C.C.P. 2014); *Tennessee*: Tennessee Code Annotated section 29-20-208; *Vermont: Brown v. State of Vermont*, 195 Vt. 342, 88 A.3d 402 (2013); *Washington*: Revised Code of Washington section 73.16.070; *Wisconsin: Scocos v. State Department of Veterans Affairs*, 2012 Wis. App. 81, 343 Wis.2d 648, 819 N.W.2d 360 (Court of Appeals 2012).

Please see Law Review 18077 (August 2018) for a detailed state-by-state discussion of the issue of whether it is possible to sue a state government agency for violating USERRA.

### **Please join or support ROA**

This article is one of 1800-plus “Law Review” articles available at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s national defense needs.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal

rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at [www.roa.org](http://www.roa.org) or call ROA on 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Officers Association  
1 Constitution Ave. NE  
Washington, DC 20002

### **UPDATE—MAY 2026**

In a similar case involving a claim that the State of Texas, as employer, had violated USERRA, the United States Supreme Court later held that an individual is authorized to sue a state agency, as employer, for

violating USERRA in a state court and that the state courts are required to hear and adjudicate such claims.<sup>53</sup>

The first two paragraphs of the majority opinion in that case are as follows:

The Constitution vests in Congress the power “to raise and support Armies” and “to provide and maintain a Navy” Art. I, Section 8, Clauses 1, 12-13. Pursuant to that authority, Congress enacted a federal law that gives returning veterans the right to reclaim their prior jobs with state employers [as well as federal agencies, local governments, and private employers] and authorizes suit if those employers refuse to accommodate them. *See* Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301 *et seq.* This case asks whether States may invoke sovereign immunity as a legal defense to block such suits.

In our view, they cannot. Upon entering the Union, the States implicitly agreed that their sovereignty would yield to federal policy to build and keep a national military. States thus gave up the immunity from congressionally authorized suits pursuant to the “plan of the [Constitutional] Convention” as part of “the structure of the original Constitution itself.”<sup>54</sup>

The final two paragraphs of the majority opinion are as follows:

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<sup>53</sup> *Torres v. Texas Department of Public Safety*, 597 U.S. 580 (2022).

<sup>54</sup> *Torres*, 597 U.S. at 584.

Texas' contrary view would permit States to thwart national military readiness. We need not stray from the statute at hand [USERRA] to see the dangers of this approach. If a State—or even 25 States—decided to protest a war by refusing to employ returning servicemembers, Congress, on Texas' telling, would be powerless to authorize private reinstatement suits against those States. The potentially debilitating effect on national security would not matter.

We think that it does matter. Text, history, and precedent show that the States, in coming together to form a Union, agreed to sacrifice their sovereign immunity for the good of the common defense.<sup>55</sup>

As a result of this excellent Supreme Court precedent, veterans and service members in all 50 states can now sue state agencies as employers for violating USERRA, and state court judges are required to hear and adjudicate those USERRA claims, *without regard to state laws and state constitutions*. Under Article VI, Clause 2 of the United States Constitution, commonly called the “Supremacy Clause,” a federal statute like USERRA trumps a conflicting state statute or even a state constitution. *State agency employers can no longer hide behind the hoary doctrine of “sovereign immunity” to avoid their USERRA obligations.*<sup>56</sup>

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<sup>55</sup> *Torres*, 597 U.S. at 599.

<sup>56</sup> See Law Review 24054 (November 2024).

## **Second Update—May 2026.**

In the *Torres* case, the Reserve Organization of America (ROA) filed an amicus curiae (“friend of the court”) brief in the United States Supreme Court, urging the Court to grant certiorari (discretionary review). After the Supreme Court agreed to hear the case (granted certiorari), ROA filed a new brief on the merits. Thus, ROA played a critical role in accomplishing this great victory for Reserve Component service members who have civilian jobs working for state agencies.<sup>57</sup>

### **Join the Organization That Fights for You**

This article is one of more than 2,000 "Law Review" articles available at [www.roa.org/lawcenter](http://www.roa.org/lawcenter)— a free legal resource that the Reserve Organization of America (ROA) has built and maintained since 1997, adding new articles every month.

ROA is the only national military organization dedicated exclusively to America's reserve components — all eight of them. From the 6,179 members of the Coast Guard Reserve to the 329,705 soldiers of the Army National Guard, ROA exists to serve the nearly 773,000 men and women who answer the call while maintaining civilian lives. No other organization does what we do for the people we serve.

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,

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<sup>57</sup> See generally Law Review 24028 (May 2024), concerning the amicus curiae briefs that ROA files several times per year.

who, as President, signed ROA's congressional charter in 1950. That 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.

Beyond this library of legal resources, ROA files amicus curiae ("friend of the court") briefs in the Supreme Court and other courts, and actively educates service members, military spouses, attorneys, employers, legislators, and others about the legal rights of those who serve — and how to enforce them. We provide this information to all service members, regardless of membership. But it's ROA members — through their dues and contributions — who make it possible.

### **Your membership makes the mission possible.**

If you are currently serving, or have ever served, in any of America's eight uniformed services, you are eligible to join ROA — and membership starts at just \$20 for a full year, or \$450 for life. Officers and enlisted personnel alike qualify, whether your service was in the Active Component, the National Guard, or the Reserve. ROA has also recently expanded eligibility to include ancestors and lineal descendants of past or present service members, so families can stand with those who serve. Join online at [roa.org/memberoptions](https://roa.org/memberoptions) or call 800-809-9448.

If you are not eligible for membership but believe in this mission, your financial contribution directly funds this resource and the advocacy work that protects those who serve. Donations may be mailed to:

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1 Constitution Ave. NE  
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