LAW REVIEW 15011[1]

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Alabama School Districts Do Not Have 11th Amendment Immunity, Eleventh Circuit Holds

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.1.1.7—USERRA applies to state and local governments
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

***Weaver v. Madison City Board of Education,* 771 F.3d 748 (11th Cir. 2014), *rehearing denied* Jan. 22, 2015.**

Michael E. Weaver is a CW2 in the Army Reserve and a member of the Reserve Officers Association (ROA). He is the chief financial officer for the Madison City Board of Education in Alabama. His civilian career was interrupted by an active duty period of almost two years (mostly in Afghanistan).

As is explained in Law Review 1281 and other articles, a person has the right to reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA)[3] if he or she meets five simple conditions:

a. Left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
b. Gave the employer prior oral or written notice.
c. Has not exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment. As is explained in Law Review 201 and other articles, there are nine exemptions—kinds of service that do not count toward exhausting an individual's five-year limit.
d. Has been released from the period of service without having received a disqualifying bad discharge from the military.

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[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.

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[3] As is explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA is codified in title 38 of the United States Code, at sections 4301-4335 (38 U.S.C. 4301-4335)

e. After release from the period of service, has made a timely application for reemployment. After a period of service of 181 days or more, the individual has 90 days to apply for reemployment.[4] Shorter deadlines apply after shorter periods of service.

CW2 Weaver met these five conditions when he was released from his Afghanistan active duty period. Under section 4313(a)(2)(A) of USERRA[5] the employer (Madison City Board of Education) had a duty to reemploy Weaver in the position that he would have attained if he had been continuously employed[6] or another position (for which he is qualified) that is of like seniority, status, and pay. The employer reemployed Weaver but denied him the status, responsibility, and salary of the chief financial officer position that he had held and almost certainly would have continued to hold but for his military service. Thus, the employer violated USERRA, Weaver claims.

CW2 Weaver retained attorneys Kathryn Piscitelli and Edward Still[7] and sued the Madison City Board of Education in the United States District Court for the Northern District of Alabama. The defendant employer contended that it is an "arm of the state" of Alabama and that it is immune from suit in federal court under the 11th Amendment of the United States Constitution. The District Judge held (correctly in my view) that Alabama local school districts are political subdivisions of the State of Alabama, not arms of the state, and that Alabama local school districts do not have 11th Amendment immunity.

The defendant employer appealed to the United States Court of Appeals for the Eleventh Circuit.[8] In civil cases in federal court, a party ordinarily is not permitted to appeal a district court decision that is not dispositive—that does not resolve the whole case. In special circumstances, a court will permit an interlocutory appeal of an important decision that is not dispositive, and the *Weaver* case involves such special circumstances and an interlocutory appeal was permitted.

On appeal, the 11th Circuit consolidated the *Weaver* case with the case *Walker v. Jefferson County Board of Education.* In that case, another judge of the Northern District of Alabama held that the Jefferson County Board of Education was "an arm of the state" and that it was immune from suit in federal court. The 11th Circuit held that Alabama school districts are political subdivisions of the state and not arms of the state, and that these school districts do not have 11th Amendment immunity. Thus, the 11th Circuit affirmed *Weaver* and reversed *Walker.*

The 11th Amendment 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

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[4] 38 U.S.C. 4312(e)(1)(D).
[5] 38 U.S.C. 4313(a)(2)(A).
[6] In this case, it is clear that the position that Weaver would have attained if he had been continuously employed is the position he left, the chief financial officer.
[7] Ms. Piscitelli and Mr. Still are the co-authors of *The USERRA Manual,* annually published by Thomson Reuters Westlaw since 2008. This book is an excellent lawyers' reference on USERRA. I use it frequently, and I highly recommend it.
[8] The 11th Circuit is the federal appellate court that sits in Atlanta and hears appeals from district courts in Alabama, Florida, and Georgia.

United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[9] The Eleventh Amendment was proposed by Congress on March 4, 1794 and ratified by ¾ of the states by February 7, 1795.

In a way, the 11th Amendment is the first amendment. The United States Constitution was drafted at the Constitutional Convention, held in Philadelphia in the summer of 1787. To go into effect, the Constitution needed to be ratified by at least nine of the original 13 states. During the ratification debates, several states insisted that a "bill of rights" be added, and the understanding was that such amendments would be proposed by the First Congress. In accordance with that understanding, the First Congress proposed 12 amendments, and ten of them were quickly ratified and became the Bill of Rights.

The 11th Amendment was a direct reaction to *Chisholm v. Georgia,* 2 U.S. 419 (1793), one of the very first decisions of the United States Supreme Court. In *Chisholm,* the Supreme Court permitted Mr. Chisholm (a citizen of South Carolina) to sue the State of Georgia in federal court, claiming that certain actions of the State of Georgia violated the "obligations of contract" clause of the United States Constitution (Article I, Section 10).

Although the 11th Amendment by its terms refers to a suit against a state by a citizen of *another state,* the Supreme Court has held that the 11th Amendment also precludes a suit against a state by a citizen of *the same state.*[10] Of course, CW2 Weaver is a citizen of the State of Alabama.

As enacted in 1994, USERRA authorized individuals to sue state government employers in federal court, to enforce USERRA. The Seventh Circuit (the federal appellate court for Illinois, Indiana, and Wisconsin) held that USERRA was unconstitutional insofar as it permitted an individual to sue a state in federal court. *Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998), *citing Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996).

Later in 1998, Congress addressed the *Velasquez* problem by amending USERRA. As amended, USERRA provides for the Attorney General of the United States to bring the suit in the name of the United States, as plaintiff.[11] The 11thAmendment does not bar a suit against a state by the United States.

Under USERRA as amended in 1998, an individual claiming USERRA rights cannot sue a state government in federal court, but an individual can sue a *political subdivision of a state* in federal court. The 1998 amendment added a new final subsection to the USERRA section that provides for enforcement of USERRA against state and local governments and private employers. That new subsection reads: "In this section, the term 'private employer' *includes a political subdivision of a*

[9] Yes, it is capitalized just that way, in the style of the late 18th Century.
[10] *Hans v. Louisiana,* 134 U.S. 1 (1890).
[11] As amended, USERRA also permits an individual USERRA plaintiff to sue a state in a state court of competent jurisdiction "in accordance with the laws of the State." The meaning of that clause is enormously controversial, and suing state government employers in enormously difficult.

State."[12] Clearly, the intent and effect of this subsection is to permit an individual to sue a political subdivision in federal court, just as an individual can sue a private employer.

USERRA does not define the term "political subdivision of a state." I found a succinct and helpful definition in the *U.S. History Encyclopedia, "*Political subdivisions are local governments created by the states to help fulfill their obligations. Political subdivisions include counties, cities, towns, villages, and special districts such as school districts, water districts, park districts, and airport districts. In the late 1990s, there were almost 90,000 political subdivisions in the United States."

In *Weaver,* the 11th Circuit applied a three-part test in distinguishing an "arm of the state" (which cannot be sued in federal court because of the 11th Amendment) from a "political subdivision of a state" (which can be sued in federal court): (a) How state law defines the entity; (b) the degree of state control over the entity; and (c) Where the entity derives its funds and who is responsible for judgments against the entity. Applying this three-part test, the 11th Circuit held that the Madison City Board of Education and the Jefferson County Board of Education (and presumably all local school districts in Alabama) are political subdivisions of the state and not arms of the state.

CW2 Weaver has not won his case yet, and there has been no district court trial on his claim that the Madison City Board of Education violated his USERRA rights. The trial was precluded by the interlocutory appeal to the 11th Circuit. Now, that hurdle has been cleared, and the trial can proceed.[13] I believe that CW2 Weaver has a very strong case and that he will prevail. We will keep the readers informed of developments in this important case.

This case and this issue (asserted 11th Amendment immunity of political subdivisions) is very important because while 10% of Reserve and National Guard members have civilian jobs for state governments, another 11% work for local governments (political subdivisions). I invite the reader's attention to the excellent article titled "Too Much to Ask? Supporting Employers in an Operational Reserve Era." The article was written by Susan M. Gates, PHD, a senior economist and Director of Kauffman-RAND Institute for Entrepreneurship Public Policy in the RAND Institute for Civil Justice, and a professor of economics at the Pardee RAND Graduate School. The article is published on pages 32-40 of the November-December 2013 issue of *The Officer,* ROA's bimonthly magazine. The 10% and 11% percentages relate to those National Guard and Reserve personnel who are not currently on active duty and who have full-time civilian jobs (not unemployed or self-employed or employed in part-time jobs). Dr. Gates' analysis comes from official Department of Defense data about the civilian job status of Reserve and National Guard personnel.

The 7th Circuit[14] has held that it is possible to sue the City of Chicago in federal court, for alleged USERRA violations. *Sandoval v. City of Chicago,* 560 F.3d 703, 704 (7th Cir.), *cert. denied,* 558 U.S. 874 (2009). We also have a decision of the United States District Court for the Western District of

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[12] 38 U.S.C. 4323(i) (emphasis supplied).

[13] The Madison City Board of Education could conceivably apply to the United States Supreme Court for a writ of *certiorari* (discretionary review), but I believe that it is exceedingly unlikely that the Supreme Court would grant *certiorari.*

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

Kentucky, upholding the right of an individual USERRA plaintiff to sue a political subdivision of the Commonwealth of Kentucky in federal court. *Gentry v. Oldham County,* 2011 U.S. Dist. LEXIS 5935 (W.D. Ky. Jan. 21, 2011). Oldham County did not appeal this decision to the 6th Circuit.[15]

The outlier is the 9th Circuit,[16] *Rimando v. Alum Rock Union Elementary School District,* 2009 U.S. App. LEXIS 27385 (9th Cir. Dec. 15, 2009), holding that a local school district in California cannot be sued in federal court under USERRA. I discuss and criticize *Rimando* in Law Review 1029. It should be noted that *Rimando* was decided *without oral argument* and that the 9th Circuit panel did not deem the decision worthy of "official" publication in *Federal Reporter Third Series.* The 9th Circuit itself does not consider *Rimando* as a precedent that should be relied on in future cases in the 9th Circuit or elsewhere.

In *Rimando,* the 9th Circuit panel cited and relied on *Townsend v. University of Alaska,* 543 F.3d 478 (9th Cir. 2008). I agree with *Townsend* that the 11th Amendment and the 1998 USERRA amendment preclude a USERRA lawsuit brought by an individual in federal court against the University of Alaska, which is clearly an arm of the State of Alaska and not a political subdivision. The panel, in its haste to deal with a serious backlog, did not give *Rimando* the attention the case deserved and did not consider the possibility that a local school district is distinguishable from a state university for 11th Amendment purposes.

Another apparent outlier is *Huff v. Office of the Sheriff, County of Roanoke, Virginia,* 2014 U.S. Dist. LEXIS 12800 (W.D. Va. Jan. 31, 2014), wherein Judge Glen E. Conrad (Chief Judge of the United States District Court for the Western District of Virginia) held that the 11th Amendment precluded a federal court lawsuit under USERRA against the Office of the Sheriff of Roanoke County, Virginia. I believe that Judge Conrad clearly got it wrong, but this case was apparently not appealed to the 4th Circuit.[17]

[15] The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

[16] The 9th Circuit is the federal appellate court that sits in San Francisco and hears appeals from district courts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, the Commonwealth of the Northern Marianas Islands, Oregon, and Washington.

[17] The 4th Circuit is the federal appellate court that sits in Richmond and hears appeals from district courts in Maryland, North Carolina, South Carolina, Virginia, and West Virginia.