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States Not Immune from DOJ Suits Under USERRA

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By Ilana S. Pearlman

The U.S. Department of Justice (DOJ) may sue states for their failure to re-employ returning military veterans under the Uniformed Services Employment and Reemployment Rights Act (USERRA) without violating the 11th Amendment to the U.S. Constitution, according to the 11th U.S. Circuit Court of Appeals.

The Alabama Department of Mental Health (ADMH) employed Roy Hamilton at the Tarwater Developmental Center from 1987 until late 2003, when Hamilton's unit of the Alabama National Guard was called for military service. When Hamilton received deployment orders, he immediately provided them to his employer. Hamilton was deployed shortly thereafter.

Prior to his deployment, ADMH had already scheduled its Tarwater location for closure due to budget constraints, and in fact, Tarwater was permanently closed during Hamilton's military service. Before deployment, ADMH had assured Hamilton that it would seek other jobs for him.

When Hamilton returned from military duty in April 2005, he repeatedly contacted ADMH seeking re-employment. However, the department had lost his records and failed to re-employ him for over two years.

In February of 2008, Hamilton filed a claim against ADMH under USERRA. USERRA represents a longstanding national policy to encourage service in the armed forces. It requires employers to promptly re-employ returning veterans who have been absent due to military, as long as 1) the employee gives proper notice before leaving, 2) the absence is for less than five years and 3) the employee promptly applies for re-employment upon return. When these criteria are met, the employer must offer the veteran the position he would have had if his employment had not been interrupted by military service, or a position of like seniority, status and pay.

After determining Hamilton's claim had merit, the U.S. Department of Justice (DOJ) successfully sued ADMH under USERRA. The trial court ordered ADMH to pay the wages and benefits that Hamilton had lost because the department had failed to re-employ him in violation of the law.

The employer appealed, arguing that USERRA violated the 11th Amendment. The 11th Amendment provides that individual states and state agencies such as ADMH are immune from lawsuits by *individuals* without the state's consent.

The court of appeals rejected ADMH's argument, holding that USERRA did not violate the 11th Amendment. Specifically, the court held that USERRA gives the U.S. government and not individuals the right to sue states. The United States, not Hamilton, controls the prosecution of the case. Further, the United States has an independent interest in enforcing USERRA to encourage military service. Finally, the U.S. is legally allowed to seek victim-specific relief without violating the 11th Amendment.

United States v. Ala. Dep't of Mental Health & Mental Retardation, 11th Cir., No. 10-15976 (March 16, 2012).

Professional Pointer: It is a good idea for employers to keep records for at least five years for employees who perform military service, even if the particular branch or department for which the employee had worked has closed.

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