DOJ USERRA Enforcement

• DOJ Complaint Process
  • DOL/VETS Referral – Investigation – Representation-60 Days
  • AG Approval Needed For: Representation/Complaint/Settlement
  • Litigation - Settlement

• 97 USERRA Lawsuits filed since 2004

• 53 U.S. Attorney’s Offices (USAOs) have participated in the Department’s USERRA/USAO program.
Current Areas of State Litigation

• Sovereign Immunity
• Dual Status Technicians
Sovereign Immunity: USERRA

• USERRA originally provided for federal court jurisdiction over suits brought by private individuals against state employers. See USERRA, Pub.L. No. 103–353, § 2(a)(c)(1)(A) 108 Stat. 3149, 3165 (1994) -providing that “[t]he district courts of the United States shall have jurisdiction” over all USERRA actions, including suits against a state employer.

• Following Seminole Tribe, Congress amended USERRA in 1998 to provide that “[i]n the case of an action against a [s]tate (as an employer) by a person, the action may be brought in a [s]tate court of competent jurisdiction in accordance with the laws of the [s]tate.” 38 U.S.C. § 4323(b)(2).
Sovereign Immunity: Results

- Clark v. Virginia Department of State Police
  292 Va. 725 (Va. 2016)

  - Clark sued Virginia under USERRA arguing that that USERRA should be exempt from the general sovereign-immunity rule of *Alden* and be treated as the bankruptcy power was in *Katz*.
  - Virginia disagreed because “the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.” *Alden, 527 U.S. at 712*
Sovereign Immunity: Results

• **U.S. v. Alabama Dept. of Mental Health**

  673 F.3d 1320 (11th Cir. 2012)

  • United States brought suit in government's name under USERRA for state's alleged failure to reemploy servicemember upon his return from military duty in violation of the USERRA.
  
  • Eleventh Circuit held that cause of action was not brought by federal government as mere collection agent for servicemember, so that state could not raise its Eleventh Amendment immunity as bar to suit.
Sovereign Immunity: Concepts

- Availability of redress for state employees
- *Ex Parte Young* actions
- Effect on members of State Members of State National Guards (dual-techs)
- *Katz, Alden* and *Seminole Tribe*
Dual-Status Technicians: Results

- **U.S. v. Missouri, et al., 2:14-cv-04036-NKL**
  - Dual-Status Technicians (DSTs) are hybrid state employees/servicemembers
  - Earned 15 days of leave for AGR Duty (Active Guard and Reserve Duty)
  - MNG (Missouri National Guard) required DSTs to separate from MNG prior to AGR Duty to avoid leave accrual

- Result of Settlement
  - MNG DST earned lost leave (2000+ days for 137 members)

- Legislative changes - 32 U.S.C. 709(g)(2)
Resources

Andrew G. Braniff
USERRA-USAO Program Coordinator
Employment Litigation Section
Civil Rights Division
U.S. Department of Justice
andrew.braniff@usdoj.gov
www.servicemembers.gov
servicemembers@usdoj.gov
To learn more, please visit our website: Servicemembers.gov