No. 10-15976-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ALABAMA DEPARTMENT OF MENTAL HEALTH,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS APPELLEE

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Case No.: 10-15976
United States v. *Alabama Department of Mental Health*
CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for Appellee United States of America certifies that the Certificate of Interested Persons And Corporate Disclosure Statement filed with this Court on March 22, 2011, by Appellant Alabama Department of Mental Health with its Brief As Appellant, is correct.

s/ Roscoe Jones, Jr.
ROSCOE JONES, JR.
Attorney

Dated: May 9, 201

STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose appellant's request for oral argument.

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JURISDICTIONAL STATEMENT

The United States brought this suit against defendant-appellant Alabama Department of Mental Health (ADMH) under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301 *et seq*. The district court had jurisdiction under 38 U.S.C. 4323(b) and 28 U.S.C.

1331. The court entered final judgment on November 3, 2010 (Doc. 90, pp. 1-3),[1] and defendant filed a timely notice of appeal on December 28, 2010 (Doc. 94). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether Eleventh Amendment immunity bars the United States from enforcing an employee's claim that ADMH violated his reemployment rights under USERRA.

2. Whether the district court erred in determining that ADMH violated the reemployment provision of USERRA by failing to rehire an employee upon his return from military deployment.

3. Whether the district court erred in ordering an award of damages against ADMH for violating USERRA.

STATEMENT OF THE CASE

1. Statutory Background

The Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. 4301 *et seq.*, is the continuation of national policy originally enacted in 1940 (Pub. L. No. 103-53, 108 Stat. 3149) "to encourage service in the United

[1] "Doc. __" refers to the document number assigned to a document on the district court's docket sheet. "Br. __" refers to page numbers in defendant's opening brief to this Court.

States Armed Forces." H.R. Rep. No. 448, 105th Cong., 2d. Sess. 2 (1998). Enacted in 1994, its purposes are "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service," and "to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers * * * by providing for the prompt reemployment of such persons upon their completion of such service." 38 U.S.C. 4301(a)(1)-(2).

Towards those ends, USERRA requires an employer to promptly reemploy "any person whose absence from a position of employment is necessitated by reason of service in the uniformed services" when the following three conditions are met: (1) the employee gives proper notice to his employer when leaving; (2) the absence is for less than five years; and (3) the employee timely applies for reemployment upon his return. 38 U.S.C. 4312(a)(1)-(3).

If an employee meets those requirements, and his military service exceeded 90 days, the employer must place the employee in either the position he would have held had his employment not been interrupted by military service, or "a position of like seniority, status, and pay." 38 U.S.C. 4313(a)(2)(A). An "employer" is defined to include a "State" and the "agencies and political subdivisions thereof." 38 U.S.C. 4303(4)(A)(iii) and (14).

An employee may notify his employer of an impending military obligation either verbally or in writing. 38 U.S.C. 4312(a)(1). "The notice may be informal and does not need to follow any particular format." 20 C.F.R. 1002.85(c).

An employee has no duty to tell the employer that he intends to seek reemployment after completing his military service. 20 C.F.R. 1002.88. Even if the employee tells the employer before entering service that he "does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service." 20 C.F.R. 1002.88.

When military service exceeds 180 days, the employee has an obligation to submit "an application for reemployment (written or verbal) not later than 90 days after completing service." 20 C.F.R. 1002.115(c); 38 U.S.C. 4312(e)(1)(D).

Employees who claim that their employer has failed to comply with USERRA may file a complaint with the Secretary of Labor, who has the power to investigate the complaint and attempt conciliation. 38 U.S.C. 4322(a) and (d). When the Secretary's efforts do not resolve the complaint, an individual may request a referral to the Attorney General. 38 U.S.C. 4323(a)(1). If "reasonably satisfied" that a complaint has merit, then "the Attorney General may appear on behalf of, and act as attorney for" the complainant and bring suit in federal court. 38 U.S.C. 4323(a)(1).

In 1998, Congress enacted the Veterans Programs Enhancement Act, which amended USERRA's enforcement and jurisdictional provisions and modified the procedure to be followed in cases in which a State is the defendant. Pub. L. No. 105-368, § 211, 112 Stat. 3329. In cases in which a State has not complied with USERRA, the amended version provides that, instead of the United States filing suit as the complainant's attorney–the procedure that is followed in cases in which a private employer is the defendant–"the action shall be brought in the name of the United States as the plaintiff in the action." 38 U.S.C. 4323(a)(1). The amended version of USERRA also created three jurisdictional rules: a suit by the United States against a State or private employer must occur in federal court, an employee must sue a state employer in state court, and an employee must sue a private employer in federal court. 38 U.S.C. 4323(b)(1)-(3).

"A state shall be subject to the same remedies * * * [that] may be imposed [upon any] private employer under [USERRA]." 38 U.S.C. 4323(d)(3). The Act authorizes a court to issue monetary and equitable relief, including injunctions. 38 U.S.C. 4323(d)-(e). For actions brought by the United States, compensation awarded "shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to" the aggrieved employee. 38 U.S.C. 4323(d)(2)(B).

2. Facts

This case involves a long-time state employee whom the United States called to war, who served honorably, and who requested his state job back immediately upon his return from military service.

a. Hamilton Gave Advance Notice Of His Military Service

Roy Hamilton, a member of the United States Army National Guard, was employed by ADMH at its J.S. Tarwater Developmental Center (Tarwater) for more than sixteen years as a custodian, and later as a mental health assistant (MHA). Doc. 80, p. 2. In the fall of 2003, the National Guard notified Hamilton that he would be deployed to Iraq in support of Operation Iraqi Freedom. Doc. 80, p. 3. Pursuant to ADMH's policy, Hamilton notified his supervisor, Michael Lackey, of his upcoming deployment in October or early November 2003. Doc. 80, pp. 3-4. Hamilton told Lackey he expected his deployment to begin by the first of the year. Doc. 80, p. 4; Doc. 84, p. 46.

On or about December 22, 2003, Hamilton received his written military orders telling him to report for active duty on January 2, 2004. Doc. 80, p. 5. On that same day, he gave a copy of his orders to Lackey. Doc. 80, p. 5. That same day, Hamilton gave another copy of his orders to Doretta Strength, the Personnel Specialist in Tarwater's personnel department. Doc. 84, p. 91; Doc. 84, p. 184. Hamilton also gave his reviewing supervisor, Robert Wisenbaker, a set of his

orders regarding his upcoming deployment in Iraq. Doc. 84, p. 55. Hamilton gave Lackey, Strength, and Wisenbaker a copy of his orders so that they could send the orders to the location that would reemploy him upon his return. Doc. 84, p. 55. Hamilton was not told that he would lose his job with ADMH when he returned. Doc. 84, p. 56.

b. Hamilton Declined Transfer To Tuscaloosa

In mid-August 2003, employees of ADMH were notified of an approved plan for consolidation and closure of several Department facilities. Doc. 80, p. 2. Via an election form, ADMH offered Hamilton a promotion to a Mental Health Worker I (MHW) position, but only if he was willing to transfer to a facility in Tuscaloosa, Alabama. Doc. 79, U.S. Exh. 14; Doc. 80, p. 4. ADMH required Hamilton to accept or decline this offer, even though he had already told ADMH officials that he would soon deploy to Iraq, and his activation was scheduled to occur about the time the transfer would become effective. Doc. 80, p. 4.

Hamilton was concerned at the time that if he declined the offer, ADMH might halt its efforts to relocate him elsewhere. Doc. 84, pp. 52-53. But Department officials assured Hamilton that they would continue to look for other opportunities for him, even if he declined the transfer. Doc. 80, p. 4. On November 24, 2003, Hamilton signed the form and declined the transfer. Doc. 79, U.S. Exh. 14; Doc. 80, p. 4. At the time Hamilton signed this election form, he

knew he was going to deploy to Iraq. Doc. 80, p. 4; Doc. 84, p. 52. Hamilton testified at trial that, were it not for his deployment, he would have accepted the transfer to the MHW position in Tuscaloosa. Doc. 84, p. 53.

Following Hamilton's declination of the transfer, ADMH successfully relocated several other employees from Tarwater who, like Hamilton, declined an initial offer of transfer. Doc. 80, p. 4. Many of Hamilton's co-workers from the Tarwater facility eventually found job placements at Greil Psychiatric Hospital (Greil) and other locations closer to Montgomery than Tuscaloosa. Doc. 80, p. 4.

Effective December 31, 2003, ADMH considered Hamilton to have "voluntarily resigned," based upon his declination of the transfer to Tuscaloosa. Doc. 80, p. 5. At the time, Hamilton had already departed from his employment with ADMH to prepare for his deployment. Doc. 80, p. 5. His official separation document says "continued efforts will be made to find alternative employment for [Hamilton,] who declined offer of directed transfer." Doc. 80, pp. 5-6.

c. Hamilton's Deployment To Iraq

Hamilton served on active duty with the National Guard from January 2, 2004, until his honorable discharge on April 11, 2005. Doc. 80, p. 6. While Hamilton was on active duty, ADMH sent Hamilton a letter in May 2004 regarding its "continuing efforts to assist employees displaced as a result of the consolidation and closure of facilities" by locating alternative placements. Doc. 79, U.S. Exh.

34; Doc. 80, p. 6. Hamilton received this letter when he returned home from Iraq, and assumed it meant ADMH may have found him a job. Doc. 80, p. 6.

d. Hamilton's Repeated Reemployment Requests

In 2005, ADMH hired 378 MHW employees. Doc. 79, U.S. Exh. 36. In April 2005, within the same month as Hamilton's release from active military service, Hamilton sought reemployment with ADMH. Doc. 80, p. 6. With his military orders in hand, and dressed in his military uniform, Hamilton first went to Greil, where he had heard several of his Tarwater co-workers were working. Doc. 80, p. 6. He explained his job situation to the receptionist at Greil, and asked if he was employed there. Doc. 80, p. 6. She told him that he was not, and suggested he check with ADMH's Central Office. Doc. 80, p. 7.

That same day, Hamilton went to Central Office to seek reemployment. Doc. 80, p. 7; Doc. 84, p. 68. A personnel specialist told him that he would need to speak with Henry Ervin, the Personnel Director of ADMH, but he was unavailable. Doc. 84, p. 69. Hamilton then went to what he believed was the Alabama State Personnel Department to seek reemployment. Doc. 80, p. 7. Hamilton explained his situation. Doc. 80, p. 7. The receptionist told him that he had to direct his reemployment request to ADMH's Central Office. Doc. 80, p. 7; Doc. 84, p. 69.

Over the months that followed, Hamilton continued to request reemployment. Doc. 80, p. 7. He made telephone calls and in-person visits. Doc.

80, p. 7. But ADMH did not reemploy Hamilton in 2005. Doc. 80, p. 7. Out of necessity, Hamilton applied for and received unemployment benefits and found alternative employment. Doc. 80, p. 7.

e. Hamilton's Reemployment With ADMH In 2007

In 2007, Hamilton again contacted ADMH seeking reemployment. Doc. 80, p. 8. ADMH finally reemployed Hamilton in August 2007 at Greil as an MHA, the same position he held at Tarwater before his deployment to Iraq. Doc. 80, p. 2; Doc. 80, p. 8. Upon reemploying Hamilton, ADMH did not create a newly funded position for him; it simply moved funding from another open position. Doc. 80, p. 8. In the fall of 2007, Hamilton requested ADMH provide him with certain benefits he believed he was entitled to because his continuous employment was interrupted by military service. Doc. 80, p. 8. His request was denied. Doc. 80, p. 8.

3. Prior Proceedings

On February 6, 2008, Hamilton filed a complaint with the United States Department of Labor (DOL) alleging that ADMH had failed to comply with USERRA's reemployment provisions. Doc. 26-3, p. 1; Doc. 79, U.S. Exh. 64-A; Doc. 80, p. 8. After an investigation, DOL determined the claim had merit. Doc. 1, p. 3; Doc. 80, p. 8. Unable to resolve Hamilton's complaint, DOL referred his case to the United States Department of Justice. Doc. 80, p. 8.

On December 30, 2008, the United States filed this suit alleging that ADMH violated USERRA by failing to promptly reemploy Hamilton after he returned from active military service in Iraq. Doc. 1, p. 3; Doc. 80, p. 8. The complaint alleged, *inter alia*, that ADMH violated Sections 4312 and 4313 of USERRA by failing to promptly reemploy Hamilton upon his return from active military service to either the position he would have held had his employment not been interrupted by military service, or a position of like seniority, status, and pay. Doc. 1, p. 3. The complaint sought declaratory, injunctive, and monetary relief that would require ADMH to comply with USERRA and compensate Hamilton for his lost earnings, seniority, and benefits. Doc. 1, pp. 3-4.

ADMH's answer, filed January 29, 2009, asserted a number of "affirmative defenses," including an argument that the Eleventh Amendment barred the action against the state agency. Doc. 8, p. 4. On June 5, 2009, ADMH moved for dismissal and, alternatively, judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12. Doc. 17; Doc. 18. ADMH argued, *inter alia*, that the Eleventh Amendment bars this USERRA action because Hamilton, rather than the United States, is the real party in interest. Doc. 18, pp. 5-13. The United States argued in opposition that this action is not barred by the Eleventh Amendment because the United States has a real and substantial interest in this case. Doc. 26, pp. 8-11. The United States also filed a motion for partial summary judgment alleging, *inter*

alia, that Eleventh Amendment immunity does not bar this suit by the United States. Doc. 16, pp. 7-8.

4. District Court's Decision Denying Motion To Dismiss

The district court denied ADMH's motion to dismiss and granted the United States' motion for partial summary judgment. Doc. 52. The court held that "[n]either Alabama's sovereign immunity, nor the Eleventh Amendment, bars this action brought by the federal government to enforce" USERRA. Doc. 52, p. 7. The court noted that it "is well-settled that states are subject to suit by the United States" and "[S]tates, in ratifying the Constitution, did surrender a portion of their inherent immunity by consenting to suits brought by" the United States. Doc. 52, p. 8 (citations omitted). The court observed that, because the text of the statute expressly allows for actions brought "in the name of the United States," USERRA itself contemplates this action. Doc. 52, p. 8 (citation omitted). The court found that "the United States has a real and substantial interest in [e]nsuring compliance with its laws generally as well as USERRA specifically." Doc. 52, p. 9.

5. District Court's Findings Of Fact And Conclusions Of Law

A bench trial was held from June 7-10, 2010. See Middle District of Alabama Docket Sheet, No. 2:08-cv-1025.[2] On July 27, 2010, the court entered its opinion against ADMH. Doc. 80. The court determined that Hamilton was

[2] See Tab A of Appellant's Record Excerpts.

entitled to reemployment rights and benefits under USERRA because he "gave advance notice of his military service, served for less than five years, and timely sought reemployment." Doc. 80, p. 16.

The court rejected ADMH's argument that Hamilton had waived his right to reemployment under USERRA. The court noted that "Hamilton had already notified [ADMH] of his impending military duty when he declined the transfer"; thus, "his voluntary resignation could not operate to terminate his reemployment rights." Doc. 80, p. 17. The court concluded that Hamilton did not "engage in the kind of behavior that could establish a knowing, voluntary, clear and unequivocal waiver of his USERRA rights." Doc. 80, p. 17.

The district court awarded Hamilton monetary damages and ordered injunctive relief. Doc. 80, pp. 18-19. The court directed the United States to file an injunctive relief proposal. Doc. 80, p. 19. Following the submission, the court entered injunctive relief requiring revision of ADMH's military reemployment policies; mandating USERRA training for ADMH's employees; enjoining ADMH from retaliating against veterans exercising their USERRA rights; and retaining jurisdiction to ensure compliance with the order. Doc. 89, pp. 1-5.

ADMH appealed that entry of judgment to this Court. Doc. 94. ADMH moved this Court to stay the injunctive relief at issue in this case pending appeal.

This Court denied the motion to stay, finding that ADMH had failed to satisfy the standard for obtaining such relief. Order of Mar. 4, 2011.

SUMMARY OF ARGUMENT

This Court should affirm the judgment below.

1. The district court correctly denied ADMH's motion to dismiss on Eleventh Amendment immunity grounds. The plain language of the Eleventh Amendment does not prohibit the United States from bringing suit against a State, and an unbroken line of cases from the Supreme Court and federal courts of appeals confirms this meaning of that provision. ADMH's argument that this case is *not* an action by the United States for Eleventh Amendment purposes is at odds with USERRA's unambiguous language, as well as the fact the United States has controlled this litigation since its inception, without serving as the attorney for Hamilton.

2. USERRA's implementing regulations expressly provide that, even if a service member does not intend to seek reemployment after completing his military service, the employee does not forfeit his right to reemployment. Nor has any court concluded that declining a transfer before deployment precludes a USERRA reemployment claim. To the contrary, federal courts have held that an employee does not forfeit his reemployment rights, even if he resigns prior to his departure for military duty.

In addition, the district court's factual findings undermine ADMH's contention that Hamilton intended to resign when he declined a transfer. To be sure, the district court did not expressly find that Hamilton had no intention of resigning from ADMH when he declined the transfer in 2003. But it made ample findings that – when viewed in their totality – lead to no other reasonable conclusion. Because Hamilton's reemployment rights were not terminated when he declined the transfer, this Court should affirm the district court's finding of a USERRA violation.

3. Finally, the district court did not err in awarding Hamilton damages for ADMH's violation of his USERRA rights. ADMH concedes that USERRA allows a court to award damages to compensate the employee for wages and benefits lost "by reason of" the employer's failure to comply with the statute. 38 U.S.C. 4323(d)(1)(B). Consequently, if this Court concludes (as it should) that ADMH violated Hamilton's reemployment rights, the Court should affirm the damages award as an appropriate remedy for the statutory violation. ADMH's contention that no damages could be awarded absent a finding that Hamilton would have accepted one of the jobs that ADMH had to offer when he returned from military service finds no support in the language of USERRA, and is at odds with the statute's purpose.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY DENIED ADMH'S MOTION TO DISMISS ON ELEVENTH AMENDMENT IMMUNITY GROUNDS

A. Standard Of Review

The question whether the district court properly denied ADMH's motion to dismiss on the ground of Eleventh Amendment immunity is reviewed *de novo*. *National Ass'n of Bds. of Pharmacy* v. *Board of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1313 (11th Cir. 2011).

B. The Eleventh Amendment Does Not Bar Suits By The United States Against State Agencies Such As ADMH

ADMH contends (Br. 21-41) that the district court erred in failing to grant its motion to dismiss on sovereign immunity grounds. This argument is without merit.

ADMH's argument is based on the Eleventh Amendment to the Constitution, which 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 of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI. As the district court correctly observed (Doc. 52, p. 8), "[t]he plain text of this provision does nothing to prohibit the United States from bringing suit against a state."

This plain meaning of the Eleventh Amendment's text is confirmed by numerous decisions of the Supreme Court and federal courts of appeals. For example, in *United States* v. *Mississippi*, 380 U.S. 128, 85 S. Ct. 808 (1965), a voter registration case brought by the Attorney General pursuant to 42 U.S.C. 1971, the State argued that the case was barred by the Eleventh Amendment. In rejecting that contention, the Court stated that "nothing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States." *Mississippi*, 380 U.S. at 140, 85 S. Ct. at 815. After noting that "[t]he United States in the past has in many cases been allowed to file suits in this and other courts against States," *ibid*. (citations omitted), the Court went on to state that

> [t]he reading of the Constitution urged by Mississippi * * * is not required by any language of the Constitution, and would without justification in reason diminish the power of courts to protect the people of this country against deprivation and destruction by States of their federally guaranteed rights.

Mississippi, 380 U.S. at 141, 85 S. Ct. at 815.

More recently, in *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 71 n.14, 116 S. Ct. 1114, 1131 n.14 (1996), the Court noted that – notwithstanding the State's Eleventh Amendment immunity from *private* suits – "[t]he Federal Government can bring suit in federal court against a State" to ensure compliance with federal law. See also *Alden* v. *Maine*, 527 U.S. 706, 755, 119 S. Ct. 2240,

2267 (1999) ("In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government."); *West Virginia* v. *United States*, 479 U.S. 305, 311, 107 S. Ct. 702, 707 (1987) ("States have no sovereign immunity as against the Federal Government.").

The decisions of the courts of appeals are uniformly to this same effect. See, *e.g.*, *Equal Emp't Opportunity Comm'n* v. *Board of Supervisors for the Univ. of Louisiana Sys.*, 559 F.3d 270 (5th Cir. 2009) (Eleventh Amendment does not bar EEOC from suing state university under the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*); *Chao* v. *Virginia Dep't of Transp.*, 291 F.3d 276 (4th Cir. 2002) (Virginia's sovereign immunity does not bar the Secretary of Labor's suit alleging that the Virginia Department of Transportation violated the overtime wage and record-keeping provisions of the Fair Labor Standards Act, 29 U.S.C. 207, 211, and 215 (a)(2)).

Faced with this unbroken line of adverse authority, ADMH asserts that this USERRA action – captioned *United States* v. *Alabama Department of Mental Health* – is *not* a suit by the United States for purposes of the Eleventh Amendment. Rather, in ADMH's view, this is an action by Roy Hamilton, the real party in interest, and the United States is but a nominal party. Accordingly, in ADMH's view, this is in actuality a suit by a private person against a state entity,

and, as such, is barred by the Eleventh Amendment. This argument fails for several reasons.

In the first place, ADMH's contention is directly at odds with the language of USERRA. Unlike in cases against private employers, in which the Attorney General must "appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted," suits "against a State (as an employer) * * * *shall be brought in the name of the United States as the plaintiff in the action*." 38 U.S.C. 4323(a)(1) (emphasis added). Thus, USERRA contemplates that the United States will completely direct the litigation in cases against state employers, and not be controlled by the private parties who may stand to benefit from the action.

That is precisely what has happened here. This case was brought in the name of the United States, with attorneys for the United States Department of Justice acting throughout the litigation as counsel for the United States and not for Mr. Hamilton.[3] The United States has a broader interest in this case than simply

[3] Indeed, the record is clear that the United States did *not* represent Hamilton in this action. In his declaration, Hamilton affirmatively states that he understands that "the Department of Justice attorneys and the Department of Justice do not represent [him]" and that he was "not represented by an attorney in this case." Doc. 26-3, p. 2, ¶ 4; see also Doc. 26-3, p. 1, ¶ 3 (the United States' attorneys did not ask Hamilton's permission to file suit, nor did they show him the Complaint before it was filed); Doc. 26-3, p. 2, ¶ 4 (the United States' attorneys did not tell Hamilton that they represented him or entered into a representation agreement with him); Doc. 26-3, p. 2, ¶ 5 (the United States' attorneys have not

(continued…)

securing monetary relief for Hamilton. Protecting the reemployment rights of returning service members is a critical national-defense interest essential to ensuring a steady supply of volunteers for the armed forces and reserves. Pursuant to that national interest, the district court awarded (Doc. 89, pp. 1-5) the United States injunctive relief that will benefit not only Hamilton, but also other returning service members by preventing future violations of USERRA. This is injunctive relief that Hamilton likely could not have obtained on his own. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 1665 (1983) (emphasizing that an injunction's purpose is to prevent illegal conduct). To assert, as ADMH does (Br. 32), that "[t]he United States is merely the nominal plaintiff in USERRA cases" is thus to ignore reality, as well as the statute's explicit jurisdictional requirements.

In its sovereign immunity argument, ADMH repeatedly refers to the United States as the "nominal plaintiff" in this action. See Br. 27-28, 31-32, 34. In *Kansas* v. *Colorado*, 533 U.S. 1, 8-9, 121 S. Ct. 2023, 2028 (2001), however, the Supreme Court rejected Colorado's contention that Kansas was "merely a 'nominal party' to this litigation" for Eleventh Amendment purposes, noting that "Kansas

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(…continued)
asked Hamilton for settlement authority and he understands that they can decide whether or not to settle).

has been in full control of this litigation since its inception [and i]ts right to control the disposition of any recovery of damages is entirely unencumbered." In the instant USERRA case, the United States similarly has been in control of this litigation from the beginning, and has the right to control the disposition of any award of damages. See 38 U.S.C. 4323(d)(2)(B) ("In the case of an action commenced in the name of the United States for which the relief includes compensation[,] * * * such compensation shall be held in a special deposit account and shall be paid, *on order of the Attorney General*, directly to the person [aggrieved]."") (emphasis added). ADMH's characterization of the United States as the "nominal plaintiff" in this action is thus directly at odds with the Supreme Court's decision in *Kansas* v. *Colorado*, *supra*.

ADMH is equally incorrect in characterizing Mr. Hamilton as the "real party in interest" in this litigation. In fact, Mr. Hamilton is precluded by USERRA from suing ADMH in federal court for the conduct giving rise to this litigation. See 38 U.S.C. 4323(b)(2) ("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.") (emphasis added). Thus, if ADMH's Eleventh Amendment argument is correct (which it is not), States are not subject at all to suit under USERRA in federal court, notwithstanding Congress's clear contrary intention. See 38 U.S.C. 4323(a)-(d).

In essence, ADMH's argument is that because the Eleventh Amendment would prevent Hamilton from suing it in federal court for violating USERRA, the United States is similarly barred from bringing suit in federal court on his behalf. But nothing in Eleventh Amendment jurisprudence prevents Congress from requiring private plaintiffs to litigate USERRA claims against state defendants in state court, while authorizing the United States to bring USERRA actions against state defendants in federal court. Accordingly, the district court did not err in denying ADMH's motion to dismiss based on sovereign immunity grounds.[4]

[4] Even assuming ADMH's view (Br. 26) of the limits of the federal government's power to sue the States is correct, the Eleventh Amendment is no bar to a suit proceeding against a State or a state agency for prospective injunctive relief. See *Edelman* v. *Jordan*, 415 U.S. 651, 668-669, 94 S. Ct. 1347, 1358-1359 (1974) (concluding that the Eleventh Amendment does not bar an injunction seeking prospective relief); *Chao*, 291 F.3d at 281 n. 3 (same); see also *Green* v. *Mansour*, 474 U.S. 64, 68, 106 S. Ct. 423, 426 (1985) ("Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex Parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."). Consequently, even if this Court should conclude that ADMH's sovereign immunity argument is correct (which it isn't), the Court should nevertheless hold that the district court's issuance of prospective injunctive relief in this case is not barred by the Eleventh Amendment.

II

THE DISTRICT COURT CORRECTLY DETERMINED THAT ADMH VIOLATED THE PROMPT-REEMPLOYMENT PROVISION OF USERRA

In finding that ADMH violated USERRA, the district court rejected ADMH's contention that Hamilton waived his reemployments rights under USERRA. Doc. 80, p. 17. On appeal, ADMH argues (Br. 41-46) that Hamilton's decision to decline the transfer to Tuscaloosa was a resignation. As explained below, because that claim is both legally and factually inaccurate, the district court's ruling that ADMH violated USERRA should be affirmed.

A. Standard Of Review

This Court reviews factual findings made by a district court after a bench trial under the "highly deferential" standard of clear error. *Renteria-Marin* v. *Ag-Mart Produce*, 537 F.3d 1321, 1324 (11th Cir. 2008). This Court reviews *de novo* the district court's legal conclusion that ADMH violated Hamilton's reemployments rights under USERRA. *Ibid*.

B. USERRA Does Not Require An Employee To Decide To Seek Reemployment At The Time Of Departure For Military Service And, In Any Event, Hamilton's Declination Of A Transfer Offer Does Not Constitute Waiver Of His Reemployment Rights

ADMH suggests (Br. 43) that Hamilton waived his reemployment rights when he declined a transfer shortly before he departed for military duty, resulting in his having no statutory right to reemployment. USERRA, however, does not

require that a service member decide whether to seek reemployment at the time of departure for military service. See *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284, 66 S. Ct. 1105, 1111 (1946); see also H.R. Rep. No. 65, Pt. 1, 103d Cong., 1st Sess. 26 (1983) (noting that it was Congress's express intent when enacting USERRA that a service member be able to decide whether or not to seek reemployment after his service ends and/or he returns home).[5]

In addition, as the Secretary of Labor observed in final regulations implementing USERRA, "[e]ven if the employee tells the employer before entering or completing uniformed service that he or she *does not* intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service." 20 C.F.R. 1002.88 (emphasis added). That interpretation is entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 844, 104 S. Ct. 2778, 2781-2782 (1984). See *Buckner* v. *Florida Habilitation Network, Inc.*, 489 F.3d 1151, 1155-1156 (giving controlling weight to Secretary of Labor's

[5] USERRA is to be "liberally construed for the benefit of the returning veteran." *Coffy* v. *Republic Steel Corp.*, 447 U.S. 191, 196, 100 S. Ct. 2100, 2104 (1980) (citation omitted); see also *Petty* v. *Metropolitan Gov't of Nashville-Davidson Cnty.*, 538 F.3d 431, 439 (6th Cir. 2008) (recognizing that "[b]ecause USERRA was enacted to protect the rights of veterans and members of the uniformed services, it must be broadly construed in favor of its military beneficiaries") (citation omitted), cert. denied, 129 S. Ct. 1933 (2009).

interpretation of a regulation promulgated through notice-and-comment rulemaking). ADMH makes no mention of the Department of Labor Regulations in its opening brief.

In any event, the district court's rejection of ADMH's waiver argument is consistent with the decisions of numerous courts holding that "the mere fact of a resignation from civilian employment does not deprive a veteran of reemployment rights." *Lapine* v. *Wellesley*, 304 F.3d 90, 107 (1st Cir. 2002); see also *Leonard* v. *United Airlines*, 972 F.2d 155, 159 (7th Cir. 1992) ("[W]e do not think that Congress could have intended that employees would be able to waive their rights before entering military service."); *Davis* v. *Halifax Cnty. Sch. Sys.*, 508 F. Supp. 966, 968 (E.D.N.C. 1981) (holding that a service member who resigned had reemployment rights); *Duey* v. *City of Eufaula*, No. 79-149-N, 1979 WL 1936, at *4 (M.D. Ala. Oct. 31, 1979) (same).

The First Circuit's decision in *Lapine* squarely addresses the matter of prospective employment rights. In *Lapine*, the employee submitted a letter of resignation "indicating his profound dissatisfaction with the police department and, by implication, his intention not to return"; withdrew from his pension fund; signed a statement that he had permanently left the police service; and, in addition, was aware of his reemployment rights before resigning. 304 F.3d at 104. The First Circuit held that since Lapine had formed the intent to deploy on active duty before

resigning from his civilian position, he was entitled to reemployment despite his resignation. *Id*. at 103. The *Lapine* court recognized "strong reasons of policy for ruling out such prospective waivers in all but the most exceptional circumstances," and held that Lapine's circumstances were not sufficiently exceptional. *Id*. at 105.

ADMH's attempt to distinguish *Lapine* as a decision dealing with a predecessor statute to USERRA is unavailing. Although *Lapine* was decided under USERRA's predecessor statute, in passing USERRA, Congress intended to "restructure, clarify, and improve" the prior reemployment benefits statutes. See *Smith* v. *United States Postal Serv.*, 540 F.3d 1364, 1366 (Fed. Cir. 2008) (quoting S. Rep. No. 203, 102d Cong., 1st Sess. 27 (1991)). Congress made it clear that the "extensive body of case law" under the predecessor statutes "would remain in full force and effect" to the extent that it is consistent with USERRA. S. Rep. No. 203, 102d Cong., 1st Sess. 31 (1991). ADMH cited no authority in its brief to show that case law on prospective waivers under the predecessor statute is inconsistent with USERRA.

C. Because The District Court Made Clear Factual Findings Indicating That Hamilton Did Not Intend To Resign When He Declined The Transfer, The Record Is Clear On That Point And A Remand Is Unnecessary

ADMH argues (Br. 44) that the district court made no factual findings as to whether Hamilton resigned when he declined the transfer. The district court's findings of fact, however, undermine ADMH's contention. As ADMH concedes

(Br. 44), the district court expressly found that when Hamilton signed the form declining the transfer on November 24, 2003, "he knew he was going to be deployed" and "officials assured [him] that they would continue to look for other opportunities for him if he declined the transfer." Doc. 80, p. 4. The court also found that, prior to signing the form, ADMH "required Hamilton to accept or decline this offer, despite the fact that Hamilton had already told [ADMH] officials that he was being deployed to Iraq." Doc. 80, p. 4.

The court further found that Hamilton declined the transfer specifically because his "activation was scheduled to occur about the time the transfer would have become effective." Doc. 80, p. 4. Moreover, the district court found that after declining the transfer, Hamilton continued to work for ADMH – without "any documentation stating that he was separated, or about to be separated, from his employment" – up until "[w]hen Hamilton departed for military leave," and that several other employees from Tarwater who, like Hamilton, had declined an initial offer of transfer were "successfully relocated" into other positions by ADMH. Doc. 80, pp. 4-5.

In sum, although the district court did not expressly find that Hamilton *did not* resign, or intend to resign, when he declined the transfer, it made ample findings that – when viewed in their totality – lead to no other conclusion. Thus, the district court did not err, much less clearly err, in finding that the circumstances

surrounding Hamilton's departure from ADMH for active duty did not operate to extinguish his reemployment rights under USERRA. See Doc. 80, p. 17 ("[O]ther than declining the transfer, Hamilton did not expressly or by conduct engage in the kind of behavior that could establish a knowing, voluntary, clear, and unequivocal waiver of his USERRA rights.").

III

THE DISTRICT COURT CORRECTLY AWARDED DAMAGES BASED ON ADMH'S VIOLATION OF HAMILTON'S USERRA RIGHTS

The district court ordered ADMH to pay more than $25,000 for the wages and benefits Hamilton lost because of ADMH's failure to comply with USERRA's reemployment provisions. Doc. 80, p. 18. ADMH challenges that order on the ground that the district court erred in awarding damages absent any finding that Hamilton would have accepted a position that was available upon his return from active military duty in 2005, had one been offered to him. ADMH's argument lacks merit.

A. Standard Of Review

As described above, this Court reviews factual findings made by a district court after a bench trial for clear error. *Renteria-Marin* v. *Ag-Mart Produce*, 537 F.3d 1321, 1324 (11th Cir. 2008).

B. The District Court's Damages Award Should Be Affirmed

As an initial matter, ADMH concedes (Br. 47) that USERRA allows a court to compensate an employee "for any loss of wages or benefits suffered by reason of such employer's failure to comply with the" statute. See 38 U.S.C. 4323(d)(1)(B). Moreover, ADMH does not challenge the district court's methodology or accuracy in calculating the value of the wages and other benefits Hamilton lost as a result of ADMH's failure to rehire him upon his return from military service. See Doc. 80, pp. 9-14, 18. Consequently, if this Court determines that ADMH violated Hamilton's reemployment rights under USERRA, it should affirm the district court's award of damages as properly authorized by the statute.

Even assuming USERRA required ADMH to reemploy Hamilton in 2005, ADMH nevertheless argues (Br. 47) that the district court's factual findings do not establish that he lost wages or benefits "by reason of" ADMH's failure to reemploy him. The basis for this argument is ADMH's assertion that a dispute exists about whether Hamilton would have accepted any of the positions it had available in 2005. This contention is without merit.

Without citing any supporting authority, ADMH incorrectly asserts (Br. 48) that "unless the United States can show that [Hamilton] would have taken the position had it been offered, USERRA does not entitle him to any damages." But

under USERRA, when a returning service member is entitled to reemployment, and his military service exceeded 90 days, the employer has a duty to offer the employee either the position he would have held had his employment not been interrupted by military service, or "a position of like seniority, status, and pay." 38 U.S.C. 4313(a)(2)(A); 20 C.F.R. 1002.191.

It is undisputed that ADMH did not offer Hamilton any position at all upon his return from military service. Where, as here, the employer makes no reemployment offer whatsoever, it would be patently unfair – and inconsistent with the language and purposes of the statute – to require the employee to "show that he * * * would have taken the position had it been offered" (Br. 48) to be entitled to an award of damages. Accordingly, this Court should reject ADMH's suggestion that it remand the case to the district court to answer the hypothetical question whether Hamilton would have accepted a Mental Health Worker position, had ADMH offered him one in 2005. Rather, the district court's detailed findings regarding the losses suffered by Mr. Hamilton as a result of ADMH's failure to comply with its reemployment obligations under USERRA (see Doc. 80, pp. 9-14, 18) are more than sufficient to support the damages award it entered.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B), because:

This brief contains 6913 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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Dated: May 9, 2011

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2011, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the EDF system.

In addition, I hereby certify that on May 9, 2011, the original and six copies of the BRIEF FOR THE UNITED STATES AS APPELLEE were served by certified mail on the Clerk of the Court. I also certify that a copy of the foregoing brief was served by certified mail on the following:

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