

IN THE SUPREME COURT OF OHIO

State of Ohio, *ex rel.*,
HARRY C. TURNER, III,

Relator,

-vs-

Case No. 06-2240

MARC C. HOUK, *et al.*,

Respondents.

Original Action in Mandamus

RESPONDENTS' MOTION TO DISMISS

HARRY C. TURNER, III
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Youngstown, Ohio 44515
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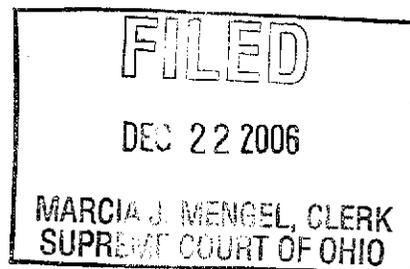
Relator *Pro Se*

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Counsel for Respondents
Marc C. Houk, *et al.*



MOTION TO DISMISS

Through counsel, Respondents move to dismiss this action pursuant to Ohio Civil Rule 12(b)(6) because Relator has failed to state a claim for which relief can be granted. Relator has an adequate remedy at law in an action filed in the Court of Claims of Ohio. A memorandum in support follows.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Introduction.

Relator, Harry C. Turner, III, an employee of the Ohio Department of Rehabilitation and Correction (“ODRC”), claims that Respondents have discriminated against him on the basis of military service. Turner claims that the respondents failed to give him a promotion, upon his return to ODRC from active military duty, that Turner claims he would have received had he not been deployed in active military service at the time someone else received the position. Turner seeks a writ of mandamus to cure the respondents’ alleged discrimination. It is not necessary to address the lack of merit in Turner’s theory because he has an adequate remedy at law.

Discrimination against an employee by an employer on the basis of military service is forbidden by the Uniformed Services Employment and Re-employment Rights Act of 1994 (USERRA), 38 U.S.C. § 4301, *et seq.* USERRA also provides a legal remedy to an employee who has been discriminated against by his or her employer on the basis of military service. Turner’s original action in mandamus should be dismissed because Turner has an adequate remedy at law in an action in the Court of Claims of Ohio.

II. Requirements for a Writ of Mandamus.

To be entitled to a writ of mandamus, a relator must establish (a) a clear legal right to the relief requested; (b) a clear legal duty on the part of the respondent to grant that relief; and (c) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 437, 2006 Ohio 5439, 857 N.E.2d 88, ¶ 18; *State ex rel. Ferguson v. Court of Claims of Ohio*, 98 Ohio St.3d 399, 2003 Ohio 1631, 786 N.E.2d 43, ¶ 10. If a remedy is available before the Court of Claims of Ohio, mandamus will not lie. *State ex rel. Liberty Mut. Ins. Co. v. Indus. Comm.* (1985), 18 Ohio St.3d 290, 480 N.E.2d 815.

III. Turner Has An Adequate Remedy At Law In The Court Of Claims.

Turner's petition in mandamus is based on claims that the State of Ohio, as Relator's employer, discriminated against him in violation of USERRA. USERRA provides specific methods for an individual to enforce his or her rights under USERRA against a State as an employer, however. 38 U.S.C. § 4323.

First, USERRA allows an individual to file a complaint with the U.S. Secretary of Labor if the individual complains that the State, as the individual's employer, has discriminated against the individual in violation of USERRA, and the Secretary of Labor will investigate the individual's claim. 38 U.S.C. § 4322(a). In addition, USERRA allows an individual to request that the Secretary of Labor refer the complaint to the United States Attorney General, and the Attorney General may litigate the claim for individual. 38 U.S.C. § 4323(a)(1). When the Attorney General brings such an action, he may do so in federal court. 38 U.S.C. § 4323(b)(1). But if an individual does not want the Secretary of Labor to investigate the individual's claim or the Attorney General to litigate the case, or the Attorney General declines to do so, then the individual may "commence an action for relief with respect to a complaint against the State as an employer." 38 U.S.C. § 4323(a)(2).

Under USERRA, when a person brings an action against the State as an employer, "the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State." 38 U.S.C. § 4323(b)(2). This provision, coupled with 38 U.S.C. § 4323(b)(1), indicates a clear Congressional intent that private USERRA actions may be brought only in a "State court of competent jurisdiction," and not in federal court. *See, Hostetler v. United States* (S.D. Ohio Oct. 31, 2005), No. 2:05-CV-433, 2005 U.S. Dist. LEXIS 26071 (attached). The question, then, is to identify the Ohio court of "competent jurisdiction."

The Eleventh Amendment to the United States Constitution recognizes and implements the underlying sovereign immunity of the States that was implicit in the federal constitutional design. *Alden v. Maine* (1999), 527 U.S. 706. “Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself.” *Atascadero State Hosp. v. Scanlon* (1985), 473 U.S. 234, 243. Because no language in USERRA purports to abrogate Ohio’s sovereign immunity – to wrest sovereign immunity from Ohio by force, as it were – then Ohio courts cannot be compelled to entertain USERRA claims against the State. Congress’s abrogation of immunity in State courts is no broader than its abrogation of immunity in federal court. *See Alden*, 527 U.S. at 754.

Thus, Ohio can be sued under USERRA only if and where it has waived its immunity from suit. R.C. § 2743.02(A)(1) provides, “The state hereby waives its immunity from liability ... and consents to be sued, and have its liability determined, in the court of claims.” Under this section, Ohio has waived its sovereign immunity only as to actions filed in the Court of Claims of Ohio. *See e.g. Manning v. Ohio State Library Board* (1991), 62 Ohio St.3d 24, 577 N.E.2d 650; *Leaman v. Ohio Dep’t of Mental Retardation & Developmental Disabilities* (6th Cir. 1987), 825 F.2d 946, 954 (en banc) *cert. denied* (1988), 487 U.S. 1204; *State of Ohio v. Madeline Marie Nursing Home* (6th Cir. 1982), 694 F.2d 449. Because, under R.C. § 2743.03, the Court of Claims has “exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in section 2743.02 of the Revised Code,” the Court of Claims has jurisdiction to entertain Turner’s USERRA claim.

Moreover, a “major purpose of the Court of Claims Act was to centralize the filing and adjudication of all claims against the state. *The Court of Claims was created to become the sole trial-level adjudicator of claims against the state*, with the narrow exception that specific types

of suits that the state subjected itself prior to 1975 could be tried elsewhere as if the defendant was a private party.” *Manning*, 62 Ohio St.3d at 30, 577 N.E.2d at 654, quoting *Friedman v. Johnson* (1985), 18 Ohio St.3d 85, 87-88, 480 N.E.2d 82, 84 (emphasis in *Manning*). *Manning* held that the Court of Claims was the logical trial forum for employment discrimination claims against the State, including those brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. *Manning* applies with equal force to USERRA claims.

Turner has an adequate remedy at law before the Court of Claims. Accordingly, his mandamus action must be dismissed because Turner has an adequate remedy at law. *State ex rel. Liberty Mut. Ins. Co. v. Indus. Comm.* (1985), 18 Ohio St.3d 290, 480 N.E.2d 815.

IV. Conclusion.

For the forgoing reasons, respondents respectfully submit that the Court dismiss Turner’s action, because Turner has an adequate remedy at law in the Court of Claims of Ohio.

Respectfully submitted,

JIM PETRO (0022096)
The Attorney General of Ohio


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Counsel for Respondents
Marc C. Houk, *et al.*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon Relator, Harry C. Turner, III, 4685 Rhode Island Drive, Youngstown, Ohio 44515, by ordinary U.S. Mail, postage prepaid, this 22nd day of December 2006.


TIMOTHY M. MILLER (0079064)
Assistant Attorney General