

## **4 Fast Focused Public-Sector Updates: ADA, FMLA, Veterans and Public Employee Relations Board**

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## ADA, FMLA, AND MHRA IN PUBLIC EMPLOYMENT LAW

### Fitness-for-Duty Exams & Direct Threat Defense

Like private employers, public employers must routinely address workplace situations involving employees with medical conditions and injuries and corresponding work restrictions. These situations necessarily implicate the Americans with Disabilities Act (“ADA”), the Family Medical Leave Act (“FMLA”), the Minnesota Human Rights Act (“MHRA”), the Women’s Economic Security Act (“WESA”), and/or other statutes. Oftentimes, these situations involve various considerations, including whether any reasonable accommodations exist (including leave, light duty, etc.), what medical documentation the employer can and should require the employee to provide, whether the employer should send the employee to a fitness-for-duty evaluation. There are often some special considerations that may be more common and/or more compelling in the public sector – such as whether an employee is physically or psychologically fit for duty, whether an employee poses a safety risk (direct threat), etc. – because of the nature of some public sector positions (i.e. police officers, firefighters, etc.).

An employer may require a medical examination or information if the exam/inquiry is job-related and consistent with business necessity, i.e. if the purpose is to determine whether employees (1) can perform job-related duties; and/or (2) pose a direct threat to the health and safety of themselves and/or others. Minn. Stat. § 363A.20, subd. 8(a)(2); 42 U.S.C. § 12112(d)(4)(A); 29 C.F.R. § 1630.14(c); *Wisbey v. City of Lincoln*, 612 F.3d 667, 673-674 (8th Cir. 2010) (fitness-for-duty exam of emergency dispatcher lawful); *Thomas v. Corwin*, 483 F.3d 516, 527-528 (8th Cir. 2007) (fitness-for-duty exam

was appropriate where employer sought to ascertain whether employee was fit to return to work under same working conditions that allegedly caused her stress and anxiety). Further, an employer may require an employee who seeks to return to work from a medical leave if (1) the employer has a reasonable belief that the employee's present ability to perform the essential job functions will be impaired by the medical condition; or (2) the employee will pose a direct threat.<sup>1</sup> *Id.*; 42 U.S.C. § 12112(d)(4); 29 C.F.R. § 1630.2(r).

Employees who pose a direct threat are not entitled to protection under the ADA or MHRA. Minn. Stat. § 363A.25; 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.15(b)(2). A direct threat is a significant risk of substantial harm to the health or safety of others that cannot be eliminated by reasonable accommodation. 42 U.S.C. § 12111(3); 29 C.F.R. § 1630.2(r); *Burroughs v. City of Springfield*, 163 F.3d 505, 508-509 (8th Cir. 1998) (police officer with diabetes who suffered two hypoglycemic episodes during work posed direct threat); *Johnson v. City of Blaine*, 970 F.Supp.2d 893, 908-909 (D. Minn. 2013) (police officer posed direct threat where psychologist determined she could not function safely, she had been hospitalized for suicide ideation many times, and she had threatened to commit suicide using her service weapon). The direct threat defense is an affirmative defense for which the employer bears the burden of proof. *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571-572 (8th Cir. 2002).

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<sup>1</sup> Generally, the FMLA allows employers to require fitness-for-duty certifications from an employee's treating provider but prohibits the employer from seeking second opinions from independent providers. 29 U.S.C. § 2614(a); 29 C.F.R. §§ 825.300(d)(3); 825.312. However, upon return to work from a serious health condition that is also a disability under the ADA, an employer may follow ADA procedures for requesting medical information and requiring medical exams. 42 C.F.R. § 825.312(h).

In determining whether an employee poses a direct threat an employer must conduct an individualized assessment that relies on the “best current medical or other objective evidence” in order to “protect disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear.” *EEOC*, 477 F.3d at 571. Restrictions based upon the recommendations of medical providers are not based upon myths or stereotypes. *Wisbey*, 612 F.3d at 673. Considerations include (1) the duration of risk; (2) the nature and severity of the potential harm; (3) the likelihood the potential harm will occur; and (4) the imminence of the potential harm. *EEOC*, 477 F.3d at 571.

Employers are permitted to use reasonable means, including fitness-for-duty exams, to ascertain the cause of troubling behavior without exposing themselves to liability. *Thomas*, 483 F.3d at 527. Psychological fitness-for-duty exams and inquiries are job-related, particularly for police officers, because an employee’s ability to handle reasonably necessary stress and work reasonably well with others are essential functions of any position. *Wisbey*, 612 F.3d at 673 (psychological fitness-for-duty exam lawful where emergency dispatcher had depression); *Owusu-Ansah v. Coca-Cola Co.*, 715 F.3d 1306, 1311 (11th Cir. 2013) (exam lawful where employee banged fist on table and said someone was “going to pay for this”); *Brownfield v. City of Yakima*, 612 F.3d 1140 (9th Cir. 2010) (exam lawful where police officer exhibited emotional responses on numerous occasions); *Williams v. Motorola, Inc.*, 303 F.3d 1284, 1290-91 (11th Cir. 2002) (exam lawful where employee was hostile, made threats, and was insubordinate); *Krocka v. City of Chicago*, 203 F.3d 507, 515 (7th Cir. 2000) (exam was reasonable, even responsible, where police officer was experiencing mental health issues); *Watson v. City of Miami*

*Beach*, 177 F.3d 932 (11th Cir. 1999) (exam lawful where employer perceived officer to be mildly paranoid, hostile, or oppositional); *Watt v. City of Crystal*, 2015 WL 7760166 (D. Minn. 2015) (employer’s requirement that police officer provide periodic status reports from therapist were psychologist determined officer needed to continue therapy to be able to safely perform job). An employer is not required to “forgo a fitness-for-duty examination [of a police officer] to wait until a perceived threat becomes real or questionable behavior results in injuries.” *Watson*, 177 F.3d at 935

Likewise, such exams and inquiries are consistent with business necessity because ensuring a safe and secure workplace is necessary, particularly for a local government charged with serving the public.<sup>2</sup> *Id.*; *Conroy v. New York State Dept. of Corr. Servs.*, 333 F.3d 88, 97 (2nd Cir. 2003); *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1283 (7th Cir. 1995) (“a safe workplace is a paradigmatic necessity of operating a business”); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1119 (11th Cir. 1993). This is particularly true for police officers because “police departments place armed officers in positions where they can do tremendous harm if they act irrationally.” *Watson*, 177 F.3d at 935.

Employers are entitled to send employees to independent medical providers rather than relying on treating providers, especially in cases where the employee poses a

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<sup>2</sup> Employers who do nothing to respond to information indicating workplace violence expose themselves to potential liability, not to mention tragedy. *See, e.g., Yunker v. Honeywell, Inc.*, 496 N.W.2d 419 (Minn. App. 1993) (in wrongful death action brought against employer after employee shot and killed co-worker, court determined employer owed duty to murdered employee).

potential safety risk. *Wisbey*, 612 F.3d at 673; *Tice v. Ctr. Area Transp. Auth.*, 247 F.3d 506, 517-518 (3rd Cir. 2001). Employers may send employees to exams even where there are no other prior incidents indicating an employee has a propensity for workplace violence. *Owusu-Ansah*, 715 F.3d at 1311.







TABLE OF CONTENTS

I. FEDERAL USERRA CASES..... 2  
*Achterberg v. Albaugh, LLC*, 5:16-CV-06097-DGK, 2017 WL 5163242, at \*1 (W.D. Mo. Nov. 7, 2017)  
*Scudder v. Dolgencorp LLC*, 4:16-CV-00297-BD, 2017 WL 3581582, at \*1 (E.D. Ark. Aug. 18, 2017)  
*Quiles v. Union Pac. R.R. Co., Inc.*, 8:16CV330, 2017 WL 1592360, at \*1 (D. Neb. Apr. 28, 2017)  
*Mace v. Willis*, 259 F. Supp. 3d 1007, 1014 (D.S.D. 2017)

II. MINNESOTA USERRA CASE ..... 7  
*Breaker v. Bemidji State Univ.*, 899 N.W.2d 515 (Minn. Ct. App. 2017)



**Session 211 – Veterans Law Update.**

**Patricia Y. Beety, League of Minnesota. (With special thanks to Joe Marek, LMC Law Clerk, for his excellent work on these case summaries).**

**I. FEDERAL USERRA CASES**

**Duty to Retrain; Reprisal**

***Achterberg v. Albaugh, LLC, 5:16-CV-06097-DGK, 2017 WL 5163242, at \*1 (W.D. Mo. Nov. 7, 2017).***

**FACTS:** Albaugh operates an herbicide manufacturing facility in St. Joseph, Missouri. Achterberg is a member of the U.S. Army Reserves. On February 2, 2015, she began working as lab technician at Albaugh. Shortly after she began employment, Achterberg received orders from the U.S. Army to report for 111 days of training in Texas. Achterberg worked through March 8, 2015, before leaving for her Army assignment. She returned to work on July 6, 2015.

During Achterberg’s leave, her supervisors never mentioned that Achterberg was a poor performer or that they considered terminating Achterberg. Two days after Achterberg returned to work, she recorded a laboratory sample as “out of specification”, which required reporting to her supervisor. It is disputed as to whether Achterberg notified her supervisor about the out of specification result the day she recorded it, or the next day.

On July 16, 2015, Achterberg was terminated from her assignment at Albaugh. Albaugh maintains she was fired because she failed to report the out of specification lab result. During a deposition, one of Achterberg’s supervisors testified he believed Achterberg was terminated for releasing out of specification product. It is against Albaugh’s policy and its standard operating procedures to release product that tests out of specification. Achterberg maintained she did not release out of specification product and Defendants have not put forth any evidence that she did.

Achterberg filed a two-count lawsuit alleging: (1) violations of USERRA, 38 U.S.C. § 4301, et seq.; and (2) wrongful termination in violation of public policy, on the premise that two years earlier, a similarly situated employee under the same supervisor was merely given a written warning as discipline for the same conduct which resulted in Achterberg’s termination. Albaugh moved for summary judgment on both claims.

**ISSUE:** Could a reasonable jury find Plaintiff’s military service played a contributing factor in Defendant’s motivation to terminate Plaintiff?

**RULE: (1)** Under the contributing factor standard, it is immaterial whether the defendant had other non-discriminatory motives for its actions: if the plaintiff’s protected activity was even one contributing factor in the employer’s decision to take an act of reprisal against the plaintiff, then there was an unlawful retaliation. **(2)** If a service member is absent from work for more than ninety days, then upon her return to work . . . “the employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.” 20 C.F.R. § 1002.197(b).

**HOLDING: Employer’s motion for summary judgment was denied, the court holding that there was factual dispute and a reasonable jury could find military service was motivating factor in employee’s termination.** Achterberg argued a reasonable jury could find that her military service contributed to her

termination because: (1) the timing and duration of her military service interrupted her ability to learn the job; and (2) she was not properly retrained after she returned to work, which ultimately caused the conduct she was terminated for. Achterberg left for military duty after working at Albaugh for approximately four weeks and was absent for almost four months, four times the amount of time she had worked at Albaugh. The alleged infraction which Achterberg was terminated for occurred two days after returning to the job. Because the court found a dispute of fact as to whether Defendants properly retrained Achterberg in the short amount of time after she returned to her position, a reasonable jury could find these facts support a finding that Achterberg's military service was a contributing factor in Albaugh's decision to terminate her.

### **Application for Reemployment; Resignation**

***Scudder v. Dolgencorp LLC, 4:16-CV-00297-BD, 2017 WL 3581582, at \*1 (E.D. Ark. Aug. 18, 2017).***

**FACTS:** Scudder was a sergeant in the Arkansas National Guard when he began working at Dollar General in June of 2013. In September of 2013, while Scudder was still active in the National Guard, Dollar General promoted him to store manager. In April of 2014, Scudder provided Dollar General with his military orders indicating that he was being deployed to active duty.

While on leave, Scudder sustained injuries during military action. He remained deployed with his unit through December of 2014. At that time, his commanders assigned him to a unit for medical transition out of the military. He remained in that status at Fort Leonard Wood, Missouri from December, 2014 through February, 2016. While at Fort Leonard Wood, Scudder sent his orders for continuing military leave to Dollar General. He sought and was approved for leave through April 1, 2016.

Dollar General's leave coordinator, Jessica Morentin, contemporaneously documented her March 31, 2016 phone conversation with Mr. Scudder, including her understanding that Scudder intended to resign from Dollar General. Based on Morentin's belief that Scudder told her on their phone call that he did not intend to return to work at Dollar General and wanted to resign, Dollar General's HR Shared Services Department processed the separation of Scudder's employment, effective April 5, 2016. On April 11, 2016, Scudder replied to an exit survey email indicating something to the effect of he loved working for the company and had difficulties contacting HR during his leave. However, Scudder never expressly demanded reemployment to his Store Manager position at Benton Parkway. Scudder also applied and was reject~~ed~~ from a position with a different Dollar General store. Shortly after, Scudder was approved for total disability by SSDI.

Scudder then sued Defendant Dolgencorp LLC d/b/a/ Dollar General Stores alleging a violation of the reemployment and anti-discrimination provisions under USERRA. Scudder filed a motion for partial summary judgment on the issue of liability. Dollar General filed a cross-motion for summary judgment on both of Mr. Scudder's USERRA claims.

**RULE:** (a) Subject to subsections (b), (c), and (d) and to section 4304, any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if: (1) the person (or an appropriate officer of the uniformed service in which such service is performed) has given

advance written or verbal notice of such service to such person's employer;(2) the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years; and (3) except as provided in subsection (f), the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e). 38 U.S.C.A. § 4312.

**ISSUE:** Did Scudder's reply email constitute an application for reemployment under subd. A, paren. 3 of § 4312?

**HOLDING: Employee did not make valid demand for reemployment and effectively waived his USERRA rights by evincing intent to resign, rather than return to position after being injured during military service.** Scudder claimed that his email response to the exit survey and his application for the a different Dollar General store were sufficient applications for reemployment to meet the requirements under the statute. The court disagreed, finding that Scudder had indeed indicated his inability to return to work during his conversations with Morentin, reasonably leading Dollar General to believe Scudder did not intend to return to his position. Further, neither Scudder's email reply nor his application for a different position at a different store clearly requested reemployment in his previous position.

The court relied on Eighth Circuit precedent in holding that resignation waives a service member's right to reemployment. Based on the undisputed facts that Scudder communicated his intent to resign, admitted in deposition that he understood (prior to resignation) that he could no longer perform the essential functions of the job due to his injuries, and the ALJ's findings in his SSDI hearing that supported the same, it was reasonable to find that Scudder effectively resigned from his position and waived his right to reemployment.

#### **Arbitration Agreement; Waiver of Judicial Forum**

***Quiles v. Union Pac. R.R. Co., Inc.*, 8:16CV330, 2017 WL 1592360, at \*1 (D. Neb. Apr. 28, 2017).**

**FACTS:** Union Pacific hired Quiles in February, 2014. Quiles is a member of the United States Marine Corps Reserve. Quiles was deployed to active duty on or about May 12, 2015. While deployed, Greg Workman was hired by Union Pacific and assumed most of Quiles's job responsibilities. Quiles returned to work on October 19, 2015. He learned he had been demoted and said this demotion violated USERRA.

After successfully interviewing for the position in another department, the Director of Human Resources blocked his transfer. Quiles received multiple performance reviews in which his military service absence was referenced in a negative manner, along with a below expectations rating. On December 18, 2015, plaintiff filed a complaint of discrimination and violation of USERRA with the Department of Labor Veterans Employment Training Service. During the investigation, plaintiff received a letter of reprimand for refusing to attend a meeting and placed on a performance review plan. On March 29, 2016, his employment was terminated. The Department of Labor investigation concluded on April 22, 2016, and the findings indicated plaintiff's claims had merit.

**ISSUE:** Is Plaintiff required to arbitrate his USERRA claims in connections with an agreement with required employee to arbitrate all claims arising out of their employment with Union Pacific?

**RULE:** USERRA requires an employer to provide to persons entitled to rights and benefits under USERRA a written notice of rights, benefits and obligations of such persons and such employers under USERRA. This includes any agreement that would modify an employee's rights under USERRA such as an arbitration agreement.

**HOLDING:** The purported agreement to arbitrate was not valid. USERRA requires an employer inform an employee of any rights under USERRA that would be modified by consenting to an arbitration agreement. Defendant contended that Quiles agreed to submit to arbitration any claims arising from or relating to his employment with Union Pacific. Defendant stated an arbitration agreement was formed when Quiles accepted a stock award granted to him in 2015, and did not object to the arbitration provision within it. Quiles contended that he did not access the stock grant agreement and thus he did not ever accept the arbitration agreement. In addition, Quiles argued that a performance bonus could not transform his employment status into one of a contract, including his stock award. Applying concepts of contract law, the court agreed with Quiles that no agreement to arbitrate was formed simply by passive acceptance of a performance bonus.

Even had a valid arbitration agreement existed, UP's arbitration agreement failed to mention USERRA. Section 4334 of USERRA requires an employer to "provide to persons entitled to rights and benefits under USERRA a notice of rights, benefits and obligations of such persons and such employers under USERRA." The burden was on UP to show written notice and prove the employee knew of the specific rights he would lose by agreeing to arbitration. Thus, any arbitration agreement would not have been enforceable because it did not constitute a clear waiver of the employee's right to bring his claims in a judicial forum under the USERRA. There was no knowing or voluntary agreement or waiver by Quiles in this case.

### **Part-Time Positions; Prompt Reemployment**

***Mace v. Willis*, 259 F. Supp. 3d 1007, 1014 (D.S.D. 2017).**

**FACTS:** Willis owns Kickbox, Dakota LLC, a business which offers kickboxing training. Mace was hired as a part-time employee of Kickbox and at the time of her hiring was enlisted in the South Dakota National Guard. Kickbox was aware of her military obligations upon hiring Mace in April 2016. Mace generally worked 15 hours per week at Kickbox. Upon her hiring, Mace notified Kickbox that she would be obligated to complete three weeks of Guard training in Alaska from late June to early August 2016 and that she would not be available to work during that time. Mace supplied Kickbox with the necessary information to confirm her obligation. During her three week absence, Kickbox's manager took Mace off the work eligibility list. Kickbox also hired two new part-time employees at a lower rate of pay than what Mace had been making to fill in for Mace while she had been on leave.

When Mace returned, she called her manager to inquire why she was unable to log in to her online work schedule to view her assigned hours. Mace's manager informed Mace that she had been removed from the work eligibility list during her absence, new employees had been hired and there were no hours to assign her for the month of August, as the monthly schedule had already been filled. Mace informed her manager that Kickbox's actions violated federal law and she intended to speak with her unit commander and an attorney regarding her rights. At no time did Kickbox offer to place Mace back on

the schedule, either in the month of August or in the future. Only after another part-time employee of Kickbox quit later in the month of August did Kickbox reach out to Mace, apologize for the “miscommunication” and offer to put Mace back on the schedule.

**ISSUE:** Did Kickbox’s initial failure to put Mace back on the assigned work schedule violate the reemployment provisions of USERRA?

**RULE:** Section 4312 provides for nearly strict liability for failure or refusal to promptly reemploy a returning service member to his or her former employment. The only exceptions to liability are (1) if the service member fails to give proper notice before leaving and upon return or (2) if the employer demonstrates that the employer's circumstances have changed so that it is impossible or unreasonable to reemploy the service member. *See* 38 U.S.C. § 4312(a) & (d).

**HOLDING: Employer found liable for willful violation of § 4312. Employer not liable for discrimination claim under § 4311.** Neither party disputed that Mace gave proper notice prior to and upon return from her military training in Alaska. Kickbox argued that because it had removed Mace’s name from the scheduling program, had hired replacement employees, and had already completed the month of August’s schedule, it was unreasonable to reemploy Mace at the time of her request. The court disagreed, finding that the protections of USERRA would be meaningless if an employer could simply replace the absent service member and use that fact to deny the service member reemployment upon return. Under USERRA, “an employer may not refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee.

Kickbox further argued that Mace’s claim was premature, as Kickbox offered to reinstate her a few weeks after her return. The court also found this argument unpersuasive, as Kickbox’s offer to reemploy Mace was only made after another employee had quit and litigation was being contemplated. USERRA requires an employer to promptly reemploy the returning service member upon request, which Mace had made the day she returned. “Prompt reemployment” means as soon as practicable under the circumstances of each case. The court held that the delay between Mace’s request and Kickbox’s actual offer to rehire her was not prompt under the meaning of the statute, as no unusual circumstance prevented Kickbox from adding Mace back into the schedule. The court further found the Kickbox’s actions were “willful”, as even after Kickbox was put on notice that it’s actions violated federal law, it continued to refuse to offer Mace reemployment until the time at which another employee unexpectedly quit.

Regarding Mace’s discrimination claim under § 4311, the court found that Mmace had produced no evidence of discriminatory animus toward service members to show it was a motivating factor in her termination. Kickbox’s proffered reasons were sufficient to convince the court that it would have made the same decision regarding an employee who was absent for three weeks, regardless of their military status.

## **II. MINNESOTA USERRA CASE**

### **Res Judicata; Sovereign Immunity**

#### ***Breaker v. Bemidji State Univ.*, 899 N.W.2d 515 (Minn. Ct. App. 2017)**

**FACTS:** Breaker was a faculty member at Bemidji State University (BSU). In 2005, the U.S. Army Reserve called Breaker into active military duty. In 2008, Breaker notified BSU that he intended to return to work. BSU informed Breaker that his prior positions had been eliminated and offered him a temporary fixed-term teaching position. Breaker declined because the position was “at a lesser rate of pay, status, seniority, opportunity, and in a different location than the one that [he] held prior to his military service.”

In 2011, Breaker sued BSU in state court, claiming BSU intentionally inflicted emotional distress by failing to rehire Breaker in a position similar to that which he held before deployment. (*Breaker I*). Breaker did not seek relief under USERRA. BSU moved for judgment on the pleadings alleging that Breaker’s claim was not legally sufficient, which the court granted and dismissed Breaker’s claims.

After the Minnesota Legislature waived state sovereign immunity from USERRA claims, Breaker sued BSU in 2016, and asserted two USERRA claims. First, that BSU failed to rehire him into a “position of like seniority, status and pay” in violation of 38 U.S.C. § 4312–13 (2016), and second, BSU took adverse employment action against him on the basis of his military status in violation of 38 U.S.C. § 4311 (2016).

BSU moved to dismiss the complaint with prejudice, arguing that res judicata barred Breaker's USERRA claims. The district court determined “that nothing prevented [Breaker] from bringing his USERRA claims” in *Breaker I*. The district court therefore concluded that res judicata barred Breaker's claims and dismissed the complaint. Breaker appealed.

**ISSUE:** Did Breaker have a full and fair opportunity to litigate his USERRA claims in *Breaker I*, despite the fact that the state had not yet waived its sovereign immunity from USERRA claims?

**RULE:** Res judicata bars a subsequent claim if: (1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter. Res judicata applies equally to claims actually litigated and to claims that could have been litigated in the earlier action.

**HOLDING: Employee was not barred by res judicata for USERRA claim which could have been plead in prior action but would have otherwise been barred by sovereign immunity.** Breaker argued that BSU, as an arm of the state, was protected by sovereign immunity from USERRA claims thus preventing Breaker from fully litigating the issue. BSU argues that, at the time *Breaker I* was dismissed, no binding Minnesota precedent recognized state sovereign immunity from USERRA claims, and USERRA expressly permitted suits against state employers in state courts. After an extensive review of immunity abrogation on the state and federal levels, the court sided with Breaker. Sovereign immunity barred private damages actions against state employers for USERRA violations until the state waived its immunity in April 2012, which occurred after *Breaker I* was dismissed. Breaker therefore lacked a full and fair opportunity to litigate his USERRA claims in *Breaker I*. The court’s decision had no bearing on the merits of Breaker's claims only that the state was not entitled to dismissal on res judicata grounds.