wiley

PRESS RELEASE

Wiley Files Two *Amicus* Briefs Supporting Challenge to State Sovereign Immunity in Supreme Court Employment Discrimination Case

February 8, 2022

Washington, DC – On February 7, Wiley, a preeminent Washington, DC law firm, filed separate *amicus* briefs in the U.S. Supreme Court on behalf of Professor Jeffrey M. Hirsch and the Reserve Organization of America (ROA) supporting a challenge to state sovereign immunity by a former military member who alleges employment discrimination. The case, *Torres v. Texas Department of Public Safety*, is set for oral argument on March 29, 2022.

The petitioner, Le Roy Torres, served as an Army reservist for 18 years. During that time, he was employed as a state trooper for the Texas Department of Public Safety (the "Department"). In November 2007, he was called to active duty and deployed to Iraq. While serving in Iraq, Torres suffered lung damage after being exposed to burn pits and was honorably discharged. Upon returning to Texas, he notified the Department of his intent to be reemployed but explained that his lung damage prevented him from performing all the duties he had previously performed as a state trooper. The Department declined Torres' request for an accommodation and offered him a temporary position as a state trooper. The Department informed Torres that he would be fired if he did not report for duty. Because he was unable to perform the duties of a state trooper, Torres resigned.

Torres filed suit in Texas state court against the Department under the Uniformed Services Employment and Reemployment Rights Act (USERRA), which expressly provides a private cause of action against employers, including states, that take adverse actions against military

Related Professionals

Lukman Azeez
Partner
202.719.3551
lazeez@wiley.law

Scott A. Felder
Partner
202.719.7029
sfelder@wiley.law

Elizabeth Fisher
Associate
202.719.4526
eefisher@wiley.law

Theodore A. Howard
Partner
202.719.7120
thoward@wiley.law

Richard A. Simpson
Partner, Deputy General Counsel
202.719.7314
rsimpson@wiley.law

Practice Areas

Issues and Appeals

Litigation

service members because of their military service. The Texas Department of Public Safety moved to dismiss, arguing that sovereign immunity barred Torres' lawsuit. The trial court denied the motion, but the court of appeals reversed. The court of appeals held that Congress lacks authority to abrogate state sovereign immunity via legislation enacted pursuant to its Article I powers, including its war powers.

The *amicus* brief filed on behalf of Professor Hirsch, a legal scholar with expertise in sovereign immunity, argues that the states surrendered their sovereign immunity with respect to war powers under the "plan of the Convention" when they ratified the Constitution. Indeed, the brief argues that the states surrendered their immunity in war-related matters even under the earlier Articles of Confederation. The Constitution simply affirmed that earlier alienation. The states accordingly have no sovereign immunity defense to assert against actions brought under legislation enacted pursuant to Congress' war powers, regardless of whether Congress purports to abrogate that immunity or not.

The Hirsch *amicus* brief was written by Richard A. Simpson, a partner in Wiley's Issues and Appeals, Litigation, and Insurance practices, and Insurance associate Elizabeth E. Fisher, along with co-counsel F. Andrew Hessick of the University of North Carolina School of Law, assisted by law student Sarah Benecky.

The *amicus* brief filed on behalf of the ROA likewise argues that the states surrendered sovereign immunity with respect to military matters when they ratified the Constitution. The ROA *amicus* brief highlights that states asserting a sovereign immunity defense against actions brought under USERRA erodes the United States' warfighting capabilities because it directly impacts the military's ability to recruit and retain Reservists when service members are denied the ability to remedy adverse employment actions by state employers upon returning from service. It also argues that the only other option for service members denied adequate reemployment opportunities – namely, a request that the U.S. Department of Justice seek enforcement against the state – is ineffective for the vast majority of service members.

The ROA *amicus* brief was written by Theodore A. Howard, Wiley's Pro Bono Partner; Scott A. Felder, a partner in Wiley's Government Contracts and Intellectual Property practices; and Wiley associates Lukman S. Azeez, Harsh Sancheti, and Nicole C. Hager, along with Jonathan Sih of the Reserve Organization of America.