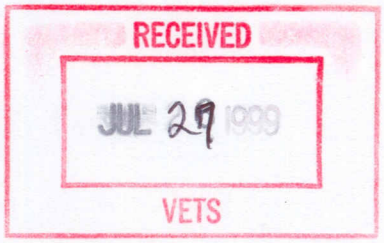
U.S. Department of Labor

Office of the Assistant Secretary for Veterans' Employment and Training
Washington, D.C. 20210



July 22, 1999

DIRECTOR'S MEMORANDUM NO. 37-99

MEMORANDUM FOR: REGIONAL ADMINISTRATORS AND DIRECTORS FOR VETERANS' EMPLOYMENT AND TRAINING

FROM: JOSEPH W. HORTIZ, JR.
Acting Director, Operations and Programs

SUBJECT: Effect of the Supreme Court Decision in Alden v. Maine on USERRA Program

BACKGROUND:

The Supreme Court's recent decision in Alden v. Maine, 97 U.S.L.W. 3683 (U.S. June 23, 1999), impacts the private enforcement of USERRA rights by employees of a State. For VETS, the decision means that in most cases, a State may not be sued by an individual asserting rights under USERRA in a private action in State court without the State's consent. The decision has no impact on USERRA actions filed by the Department of Justice against a State.

The 1998 USERRA amendments described in DM 13-99 provided that an individual could bring a USERRA action against a State in State court. 38 U.S.C. § 4323(b)(2). This amendment was prompted by a 1996 Supreme Court decision, known as the "Seminole decision," in which the Court held that an individual could not sue an unconsenting State in Federal court (Seminole Tribe of Florida v. The State of Florida, 517 U.S. 44 (1996)). With the Alden decision, in most cases, an individual is now unable to bring suit under USERRA in either Federal or State court against a State that does not give its consent to be sued. However, neither Alden nor Seminole apply to political subdivisions of a State, which may still be sued in a private action in Federal court under USERRA.

The provision in the 1998 amendments dealing with cases in which the U.S. Attorney General decides to represent an individual referred by VETS is not affected by Alden. If the Attorney General represents a USERRA claimant, the suit is filed in Federal district court and is brought in the name of the United States as the plaintiff. 38 U.S.C. §§ 4323(a)(1), (b)(1).

ACTION:

This decision does not have any impact on VETS investigative activities under USERRA. However, in advising claimants of their rights and options in unresolved cases *against a State as the employer*, certain points should be addressed.

Advise claimants that they have the right to have VETS refer unresolved cases to the U.S. Attorney General for consideration of representation. This option has never changed. However, in accord with the 1998 USERRA amendment, should the Attorney General represent the claimant, the ensuing action would not be brought in the name of the individual as the plaintiff, but rather in the name of the United States for the benefit of the individual.

Should a claimant choose to pursue a private action against a State as employer, he or she should be advised that, although the 1998 USERRA amendment provides that such action may be brought in State court, the Alden decision will preclude such actions in most cases. Exceptions are cases where States have consented to be sued in State court, and possibly actions in State or Federal court for *prospective* injunctive relief (but not money damages) against State officials. The claimant should also be advised to consult with an attorney to determine if he or she has a viable private action for enforcement of USERRA against the State involved.

ADDITIONAL INFORMATION:

Questions on this DM should be directed to Rob Wilson at (202) 693-4717 or Nick Dawson at (202) 693-4711.

EXPIRATION DATE: None