

Avoiding sovereign immunity when suing the state for employment violations, Part 1

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State sovereign immunity bars lawsuits against the state of Louisiana. Even if no party asserts the defense and even on appeal, the court *sua sponte* can dismiss a case on these grounds. Employment-law treatises do not discuss sovereign immunity or, if they do, provide little or no advice specific for Louisiana.

In this article, I state whether state sovereign immunity bars suing a state of Louisiana department or agency for violations of employment laws. Please update citations before using, and contact me about any errors at D83@cox.net.

Title VII claims alleging discrimination or retaliation because of race, color, national origin, gender, or religion:

- Plaintiff can sue state agency in state or federal court.¹
- Plaintiff can sue state official acting in official capacity in state or federal court for monetary and prospective damages.²
- Plaintiff cannot file in state or federal court against state official in individual capacity.^{3,4}

Americans with Disabilities Act (employment, Title I):

- Plaintiff cannot sue state agency in state or federal court.⁵
- Plaintiff can sue state official acting in official capacity in federal court for prospective relief such as reinstatement.⁶
- Plaintiff cannot file in state or federal court against state official in individual capacity.⁷



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ADA (public facilities, Title II):

- Plaintiff can sue state agency in state or federal court regarding access to judicial services or programs.⁸
- Plaintiff can sue state official acting in official capacity in federal court for prospective relief.⁹
- Plaintiff cannot file in state or federal court against state official in individual capacity.¹⁰

Rehabilitation Act, § 504:

- Plaintiff can sue state agency in state or federal court.¹¹
- Plaintiff can sue state official acting in official capacity in federal court for prospective relief such as reinstatement.¹²
- Plaintiff cannot file in state or federal court against state official in individual capacity.¹³

Age Discrimination in Employment Act:

- Plaintiff cannot sue state agency in state or federal court.¹⁴
- Plaintiff can sue state official acting in official capacity in federal court for prospective relief such as reinstatement.¹⁵
- Plaintiff cannot file in state or federal court against state official in individual capacity.¹⁶

Claims that use Louisiana statutes barring employment discrimination because of race, color, national origin, gender, religion, disability, age, pregnancy, sickle cell trait, and genetic information.

Unlike federal law, retaliation claims are limited to complaints made regarding age or sickle cell discrimination.¹⁷ A stunted version of a retaliation statute is Louisiana's whistleblower statute at 23:967.

- Plaintiff cannot sue state agency in federal court.¹⁸
- Plaintiff can sue state agency in state court.¹⁹
- Plaintiff cannot sue state official acting in official or individual capacity in state or federal court.²⁰

Family and Medical Leave Act self-care provision:

- Plaintiff cannot sue state agency in state or federal court.²¹
- Plaintiff can sue state official acting in official capacity for prospective relief such as reinstatement.²²
- Plaintiff can sue state official acting in individual capacity for monetary damages.²³

FMLA family-care provision:

- Plaintiff can sue state agency in state or federal court.²⁴
- Plaintiff can sue state official acting in official capacity in federal court for prospective relief such as reinstatement.²⁵
- Plaintiff can sue state official acting in individual capacity for monetary damages.²⁶

Fair Labor Standards Act:

- Plaintiff cannot sue state agency in federal court.²⁷

- Plaintiff can sue state agency in state court arguing that the state waived its sovereign immunity because it is an employment-contract-based claim.²⁸
- Plaintiff can sue state official acting in official capacity in federal court for prospective relief such as reinstatement.²⁹
- Plaintiff can sue state official acting in individual capacity for monetary damages if employee fails to follow agency policy versus no claim if employee follows policy.³⁰

1981 actions:

- Plaintiff cannot sue state agency in state or federal court.³¹
- Plaintiff can sue state official acting in official capacity for prospective relief such as reinstatement.³²
- Plaintiff can sue state official acting in individual capacity for monetary damages³³ but must assert claim under §§ 1981-1983.

§ 1983 actions:

- Plaintiff cannot sue state agency in state or federal court.³⁴
- Plaintiff can sue state official acting in official capacity for prospective relief such as reinstatement.³⁵
- Plaintiff can sue state official acting in individual capacity for monetary damages.³⁶

Equal Pay Act:

- Plaintiff can sue state agency in state or federal court.³⁷

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- Plaintiff can sue state official acting in official capacity.³⁸

Title IX:

- Plaintiff can sue state agency in state or federal court.³⁹
- Plaintiff can sue state official acting in official capacity.⁴⁰

Wage claim, 93 – La. R.S. 23:631 et seq.:

- Plaintiff cannot sue state agency in federal court.⁴¹
- Plaintiff can sue state agency in state court.⁴²

United Services Employment and Reemployment Rights Act:

- Plaintiff cannot sue state agency in federal court.⁴³
- Plaintiff can sue state agency in state court.⁴⁴

Endnotes

1. *Raj v. LSU*, 12-30225 (5th Cir.2013), 714 F.3d 322, 327-29; *Ussery v. La. ex rel. La. Dep’t of Health & Hosps.*, 97-30545 (5th Cir. 8/5/1998), 150 F.3d 431, 434-35; *Fitzpatrick v. Bitzer*, 75-251 (6/28/1976), 427 US 445, 456.
2. Lindemann, Barbara T., Lindemann, Paul Grossman, and C. Geoffrey Weirich. *Employment Discrimination Law*, § 22.II.E.2.b, 2-61 (5th ed. Bloomberg BNA 2012) and references therein.
3. *Harvey v. Blake*, 89-2215 (5th Cir. 10/1/1990), 913 F.2d 226, 227.
4. *Franklin v. City of Slidell*, 12-1940 (La.2013), 936 F. Supp. 2d 691, 703.
5. *Reed-Salsberry v. State, through the Dep’t of Pub. Safety & Corr.*, 51,104 (S.D.Tex. 2nd Cir. 2/15/2017), 216 So. 3d 226, writ denied, 2017-494 (La.2017), 221 So. 3d 81; *Bd. of Trs. v. Garrett*, 99-1240 (2/21/2001), 531 U.S. 356, 374; *Jones v. Louisiana Dept. of Health & Hosps.*, 15-69971 (E.D. La 6/9/2016), 2016 US Dist LEXIS 75908, at *4-5.
6. *Garrett*, 531 U.S. at 373, n 8; *Daigle v. Louisiana Dept. of Social Servs.*, 01-2154 (E.D. La 1/31/2002), 2002 US Dist LEXIS 2436, at *8 9; *Robinson v. Bd. of Supervisors of Louisiana State Univ. & Agric. & Mech. Coll.*, 17 6956 (E.D. La 9/13/2017), 2017 US Dist LEXIS 147934, at *5-6.
7. *Franklin*, 936 F. Supp. 2d at 703; *Bellow v. Bd. of Sup. LSU*, 12-1529 (E.D. La. 2012), 913 F. Supp. 2d 279, 285-8.
8. *Tennessee v. Lane*, 02-1667 (5/17/2004), 541 U.S. 509; *United States v. Georgia*, 04-1203, 04-1236 (1/10/2006), 546 U.S. 151; *Hale v. King*, 07-60997 (5th Cir. 5/26/2011), 642 F.3d 492, 497-498; *Arce v. Louisiana*, 16 14003 (E.D. La 11/16/2017), 306 F. Supp. 3d 897, 929.
9. *McCarthy v. Hawkins*, 03-50608 (5th Cir. 8/11/2004), 381 F.3d 407, 414; *Cooper v. Kliebert*, 14-507, 2014 U.S. Dist. LEXIS 175435, at *9 (M.D. La. 12/19/2014).
10. *Castro Ortiz v. Fajardo*, 00-1083 (DPR 2/22/2000), 133 F. Supp. 2d 143, 150-151 (citing numerous cases).
11. *August v. Mitchell*, 00-3756 (E.D. La. 2002), 205 F. Supp. 2d 558, 561 n.5; *Miller v. Tex. Tech Univ. Health Scis. Ctr.*, 02-30369 (5th Cir. 8/15/2005) 421 F.3d 342, 349.
12. *McCarthy*, 381 F.3d at 414 n.8; *Cooper*, 2014 U.S. Dist. LEXIS

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- 175435, at *9.
13. *Castro Ortiz*, 133 F. Supp. 2d at 150-151.
 14. *Raj v. LSU*, 714 F.3d at 327-29; *Kimel v. Fla. Bd. of Regents*, 98-791, 98-796 (1/11/2000), 528 U.S. 62, 91.
 15. *Bellow*, 913 F. Supp. 2d at 285-8; *Fernandez v. Texas A & M Univ. Sys.*, 17-387 (S.D. Tex 6/4/2018), 2018 US Dist LEXIS 93668, at *4.
 16. *Bellow*, 913 F. Supp. 2d at 285-8.
 17. *Robinson*, 2017 US Dist LEXIS 147934, at *5-6.
 18. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *Hughes v. Savell*, 902 F.2d 376, 378 79 (5th Cir. 1990); *Reyes v. Sazan*, 97-31264 (5th Cir. 2/17/1999), 168 F.3d 158, 162.
 19. La. R.S. 23:302(2).
 20. *Pennhurst*, 465 U.S. at 106; *Hughes*, 902 F.2d at 378-79; *Reyes*, 168 F.3d at 162.
 21. *Holliday v. Bd. of Sup. LSU*, 2014-0585 (La.2014), 149 So. 3d 227, 2014 La. LEXIS 2249; *Nelson v. Univ. of Texas*, 07-10660 (5th Cir. 2008), 535 F.3d 318, 324; *Nevada Dept. of Human Resources v. Hibbs*, 01-1368 (2003) 538 US 721, 740.
 22. *Nelson*, 535 F.3d at 324; *Knussman v. Maryland*, 95-1255 (D Md 8/2/1996), 935 F. Supp 659, 668-669; however, unable to find state court cases.
 23. *Modica v. Taylor*, 05-50075 (5th Cir. 9/13/2006), 465 F.3d 174, 186-87; *Bellow*, 913 F. Supp. 2d at 285-8.
 24. *Coleman v. Ct. of Appeals*, 10-1016 (3/20/2012), 566 US 30, 43-44.
 25. *Nelson*, 535 F.3d at 324; *Knussman*, 935 F. Supp. at 668-669.
 26. *Modica*, 465 F.3d at 186-87; *Bellow*, 913 F. Supp. 2d at 285 8.
 27. *Alden v. Maine*, 98-436 (1999), 527 U.S. 706; *Coleman v. La. VA Nw. La. War Veterans Home*, 15-2912, (W.D. La. Dec. 11, 2017), 2017 U.S. Dist. LEXIS 216151, at *5-7.
 28. *Palandro v. Bd. of Sup. Univ. of La. Sys.*, 2009-1203 (La.App. 1 Cir. 4/28/10), 38 So. 3d 474, 481.
 29. *La. VA Nw. La. War Veterans Home*, 2017 U.S. Dist. LEXIS 216151, at *5-7; *Henley v. Simpson*, 12-60608 (5th Cir. 6/12/2013), 527 F. App'x 303, 305.
 30. *Parker v. Prairie View A&M Univ.*, 15-1828 (S.D. Tex. 11/10/2015), 145 F. Supp. 3d 702, 704-07 (employee did not follow agency policy); *Henley*, 527 F. App'x at 305 (employee followed agency policy).
 31. *Coleman v. Bd. of Sup. LSU*, 15-35 (M.D. La. 6/23/2015), 2015 U.S. Dist. LEXIS 81130, at *3-4; *Williams v. Louisiana*, 14-154, (M.D. La. 9/11/2015), 2015 U.S. Dist. LEXIS 121625, at *17-18.
 32. *Oden v. Oktibbeha Cty.*, 99-60878 (5th Cir. 3/27/2001), 246 F.3d 458, 464. Unable to find state court cases.
 33. *Oden*, 246 F.3d at 464; *Davis v. Matagorda County*, 18-188 (S.D. Tex 3/4/2019), 2019 US Dist LEXIS 33459, at *36-37; *Felton v. Polles*, 01-60104 (5th Cir. 12/17/2002), 315 F.3d 470, 482-483. Unable to find state court cases.
 34. *Coleman*, 2015 U.S. Dist. LEXIS 81130, at *3-4; *Jones v. Bd. of Sup. Univ. of La. Sys.*, 11-1359 (W.D. La. 2014), 58 F. Supp. 3d 670, 674, *aff'd*, 809 F.3d 231 (5th Cir. 2015); *Quern v. Jordan*, 77-841 (1979), 440 U.S. 332, 338.
 35. *Jones*, 58 F. Supp. 3d at 674; *Hafer v. Melo*, 502 U.S. 21, 27 (1991).
 36. *Hafer*, 502 U.S. at 31.
 37. *Raj*, 714 F.3d at 329 n.4; *Ussery*, 150 F.3d at 435.
 38. *Barfield v. Hopkins*, 96-666 (S.D. Miss 11/20/1997), 984 F. Supp. 491, 497, n 11 citing *Welch v. Laney*, 93-6427 (11th Cir. 7/7/1995), 57 F.3d 1004.
 39. *Pederson v. LSU*, 94-30680 (5th Cir. 6/1/2000), 213 F.3d 858, 876.
 40. *Carmichael v. Galbraith*, 12-11074 (5th Cir. 6/19/2014), 574 F.App'x 286, 289, n 5.
 41. *Pennhurst*, 465 U.S. at 106; *Griffith v. Louisiana*, 11-245 (E.D. La. 2011), 808 F. Supp. 2d 926, 2011 U.S. Dist. LEXIS 88755, *dismissed, in part*, 2013 U.S. Dist. LEXIS 10994 (E.D. La. 1/28/ 2013); *Hughes*, 902 F.2d at 378-79.
 42. *Ashley v. State*, 51041 (La.App. 2 Cir. 11/16/16), 209 So. 3d 978, 982.
 43. *McIntosh v. Partridge*, 07-20440 (5th Cir. 8/8/2008), 540 F.3d 315, 321.
 44. *Id.*

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Avoiding sovereign immunity when suing the state for employment violations, Part 2

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In last month's article, I discussed whether sovereign immunity bars employees from suing the state of Louisiana for the violation of several employment laws. This month I explain in more detail how plaintiffs may avoid dismissal of claims due to sovereign immunity.

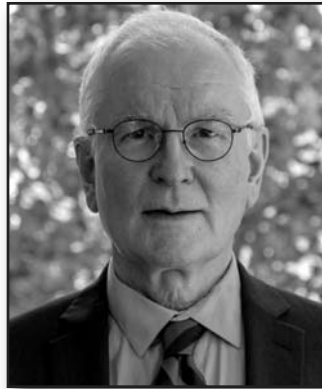
Sovereign immunity law depends on the words of the 11th Amendment and judge-made law.¹ The 11th Amendment's text bars only diversity lawsuits against a state in federal court. In 1890 the Supreme Court expanded its scope by barring not just out-of-state plaintiffs but also in-state plaintiffs from suing the state.²

It took another hundred years to further strengthen sovereign immunity (and prevent relief for injured citizens). In 1996, the Supreme Court held that Congress no longer abrogated state sovereign immunity through the use of the Interstate Commerce Clause, but could only rely on Section 5 of the 14th Amendment.³ Things continue to worsen.

In the past, the state lost its sovereign immunity when, as a defendant, it removed a lawsuit from state court to federal court. This changed in 2005 regarding Texas claims⁴ and in 2019 regarding Louisiana claims⁵ so that no loss of sovereign immunity occurs upon removal.

Sovereign immunity applies to in-state and out-of-state plaintiffs, diversity or federal-question jurisdiction, and bars all state law claims from being heard in federal court.⁶

The first rule in suing the state, therefore, is not to sue in federal court. State law claims die there,⁷ and Louisiana's



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constitutional waiver of sovereign immunity does not work there. Federal common law requires the state waiver be explicit regarding federal courts. Louisiana's waiver is not,⁸ and, as a result, Louisiana's consent to Fair Labor Standards Act claims applies only in state court.⁹

Sovereign immunity bars suit against a state department or agency regardless of state or federal

court jurisdiction for the federal Americans with Disabilities Act Title I,¹⁰ ADA Title II regarding claims other than access to judicial services or programs,¹¹ the Family and Medical Leave Act's self-care provision,¹² Age Discrimination in Employment Act,¹³ § 1981,¹⁴ and § 1983.¹⁵ Congress has not successfully abrogated sovereign immunity for these laws.

Congress has abrogated sovereign immunity in the federal Title VII (race, color, national origin, gender, or religion),¹⁶ ADA Title II regarding access to judicial services or programs,¹⁷ FMLA's family-care provision,¹⁸ Equal Pay Act,¹⁹ Uniformed Services Employment and Reemployment Rights Act,²⁰ Rehabilitation Act,²¹ and Title IX.²²

A Louisiana state agency has no sovereign immunity against claims filed under the Rehabilitation Act and Title IX provided the agency at issue received federal financial aid.²³ Because of statutory and sovereign immunity issues, plaintiffs must sue the state for USERRA violations in state court.²⁴

Even if sovereign immunity bars employment lawsuits against a state agency, some suits may still occur if the federal government sues the state, the plaintiff sues a state official, or the state is sued in



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state court using state discrimination laws. The federal Equal Employment Opportunity Commission, for example, can sue the state for the violation of federal discrimination laws (EEOC). The secretary of labor can sue the state for violations of FLSA and FMLA regulations.²⁵

A state is not considered a state for sovereign immunity purposes if the plaintiff sues a state official in her official or individual capacity.²⁶ State officials, however, still retain qualified immunity.²⁷

Sometimes the law itself bars suits against state officials because the statute only allows defendant employers and not persons. Louisiana discrimination and wage laws²⁸ require employer defendants, not individuals.

If the plaintiff sues the state official in his official capacity under the *Ex Parte Young* doctrine, that plaintiff must only sue for prospective relief such as reinstatement. Although the court cannot award money damages, settlement for money could occur since employers resist reinstating fired employees.

These suits are allowed in claims for ADA Title I²⁹ and Title II,³⁰ FMLA,³¹ FLSA,³² ADEA,³³ Equal Pay Act,³⁴ Title IX,³⁵ § 1981,³⁶ and § 1983.³⁷

Similarly, some suits are allowed if a state official is sued in her individual capacity. This applies to claims under FMLA,³⁸ FLSA,³⁹ § 1981,⁴⁰ and § 1983.⁴¹

A plaintiff can sue a state agency in state court for violation of state discrimination laws.⁴² Courts often interpret these laws using case law from federal discrimination law. There are, however, retaliation claims available under state law only for complaints alleging age or sickle cell disease discrimination.⁴³

A plaintiff could instead use the state whistleblower law at 23:967, but this law requires proof of discrimination while the federal laws require only that the employee had a reasonable belief that the employer was engaged in unlawful employment practices.⁴⁴

The state of Louisiana has waived sovereign immunity for FLSA. The court in *Palandro v. Bd. Sup. Univ. La. Sys.*⁴⁵ found that the state's consent to suits in contract provided in the Louisiana Constitution⁴⁶ applies to FLSA claims because an employment contract for wages is involved. North Carolina similarly waives its sovereign immunity for FLSA claims.⁴⁷

Although employment contracts are not easily formed in Louisiana — employment handbooks are not contracts, for example⁴⁸ — Louisiana law is clear that an enforceable contract exists regarding an employer's promise to employee for wages.⁴⁹ Baton Rouge attorney J. Arthur Smith III argues in an ongoing lawsuit that since the state waives its sovereign immunity for claims based on personal injury, it should waive sovereign immunity for employment law claims because the Louisiana First Circuit Court found that wrongful termination is a personal injury.⁵⁰

Regarding previously mentioned changes in how courts treat removal to federal courts, a defendant's sovereign



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immunity against ADA and ADEA claims that were present in state court will now be present in federal court. Just as before, sovereign immunity that was ineffective in state court (for example, FLSA) will remain ineffective in federal court.⁵¹

What practical effect does sovereign immunity have on suits against the state of Louisiana filed in state court?

Imagine a lawsuit against a Louisiana state agency filed in state court alleging discrimination in every protected category under Title VII, ADA, ADEA, and the state equivalents of those laws. Also, imagine this plaintiff, a biblical Job, also files retaliation claims for each protected category and alleges violations of FMLA self-care and family-care provisions, FLSA, Title IX, Rehabilitation Act, Equal Pay Act, § 1981, and § 1983. The plaintiff has no preference whether a federal discrimination claim or its state equivalent claim is heard by the court.

What effects would sovereign immunity have on this mother of all lawsuits?

Two claims would be dismissed on sovereign immunity grounds, §1981 and FMLA's self-care provision. The § 1983 claim is subject to sovereign immunity, but it would be dismissed because the claim requires a defendant who is a person. If the FMLA claim alleged failure to provide leave on account of a pregnancy, the state pregnancy law is more

powerful than FMLA because the state law applies to newly hired or veteran employees (and requires fewer employees).⁵²

Otherwise, to prevail under these three laws, the plaintiff would have to have sued the state agency official with authority to reinstate (official capacity) and for monetary damages (individual capacity).

The other claims in either their federal or state-equivalent forms would have survived. The ADEA and ADA claims would have been dismissed, but their state equivalents would remain. The disability-retaliation claim under the Rehabilitation Act remains, provided the state agency received federal financial assistance.⁵³ These results would be the same if the state removed the case to federal court.

For a nation that rebelled against a king and formed a government of "We the People," sovereign immunity is un-American. As I have shown in this article, measures can be used to neutralize this doctrine that bars relief to those injured by government's bad actors.

Contact me for comments and reports of errors at D83@cox.net.

Endnotes

1. *Bd. of Comm. Port of New Orleans v. Splendour Shipping & Enterprises Co.*, 273 So.2d 19, 25 (1973).
2. *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).
3. *Seminole Tribe v. Florida*, 94-12 (3/27/1996), 517 U.S. 44, 66-67.
4. *Meyers v. Texas*, 02-50452 (5th Cir. 5/19/2005), 410 F.3d 236, 254-255.
5. *Pegues v. Bd. of Supervisors*, 18-2407 (E.D. La 4/9/2019), 2019 US Dist LEXIS 61030, *7-8, n. 49.
6. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *Reyes v. Sazan*, 97-31264 (5th Cir. 2/17/1999), 168 F.3d 158, 162.
7. *Id.*
8. *Atascadero State Hosp. v. Scanlon*, 84-351 (6/29/1985), 473 U.S. at 241; La. Const. Art. XII, § 10(A).
9. *Id.*; *Palandro v. Bd. Sup. Univ. La. Sys.*, 2009 1203 (La. App. 1 Cir 4/28/10), 38 So. 3d 474, 481.
10. *Reed Salsberry v. State, through the Dep't of Pub. Safety & Corr.*, 51,104 (La. App. 2 Cir. 2/15/2017), 216 So. 3d 226, writ denied, 2017-494 (La. 2017), 221 So. 3d 81; *Bd. of Trs. v. Garrett*, 99-1240 (2001), 531 U.S. 356, 374.
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15. *Coleman*, 2015 U.S. Dist. LEXIS 81130, at *3-4; *Jones v. Bd. of Sup. Univ. of La. Sys.*, 11-1359 (W.D. La. 2014) 58 F. Supp. 3d 670, 674, *aff'd*, 809 F.3d 231 (5th Cir. 2015); *Quern v. Jordan*, 77-841 (1979), 440 U.S. 332, 338.
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 17. *Tennessee*, 541 U.S. 509; *Georgia*, 546 U.S. 151; *Hale*, 642 F.3d 492, 497-498. Find, also, abrogation in *Frame v. City of Arlington*, 08-10630 (5th Cir. 9/15/2011), 657 F3d 215, 240 (no sovereign immunity whether city required to provide wheelchair users' access to city sidewalks); *Arce v. Louisiana*, 16-14003 (E.D. La 11/16/2017), 306 F. Supp. 3d 897, 929 (no sovereign immunity regarding sign language interpreter needed for person to understand his probation officer).
 18. *Coleman v. Ct. of Appeals*, 10-1016 (3/20/2012), 566 US 30, 43-44.
 19. *Raj*, 714 F.3d at 329 n.4; *Ussery*, 150 F.3d at 435.
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 24. *McIntosh*, 540 F.3d at 321.
 25. *Coleman v. La. VA Nw. La. War Veterans Home*, 15-2912, (W.D. La. 12/11/2017), 2017 U.S. Dist. LEXIS 216151, *5-7; *Knussman v. Maryland*, 95-1255 (D Md 8/2/1996), 935 F. Supp. 659, 668-669.
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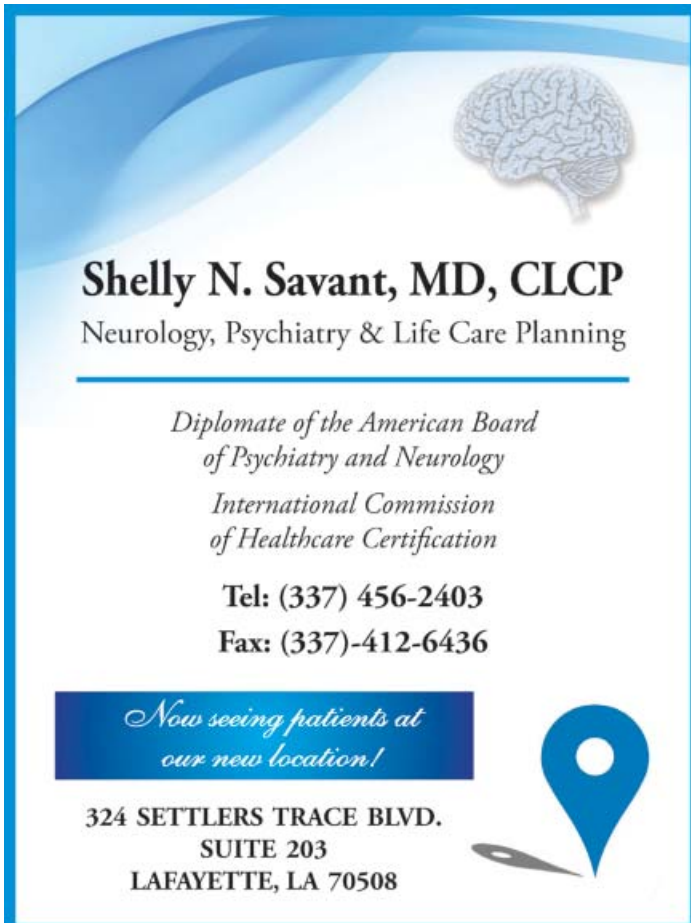
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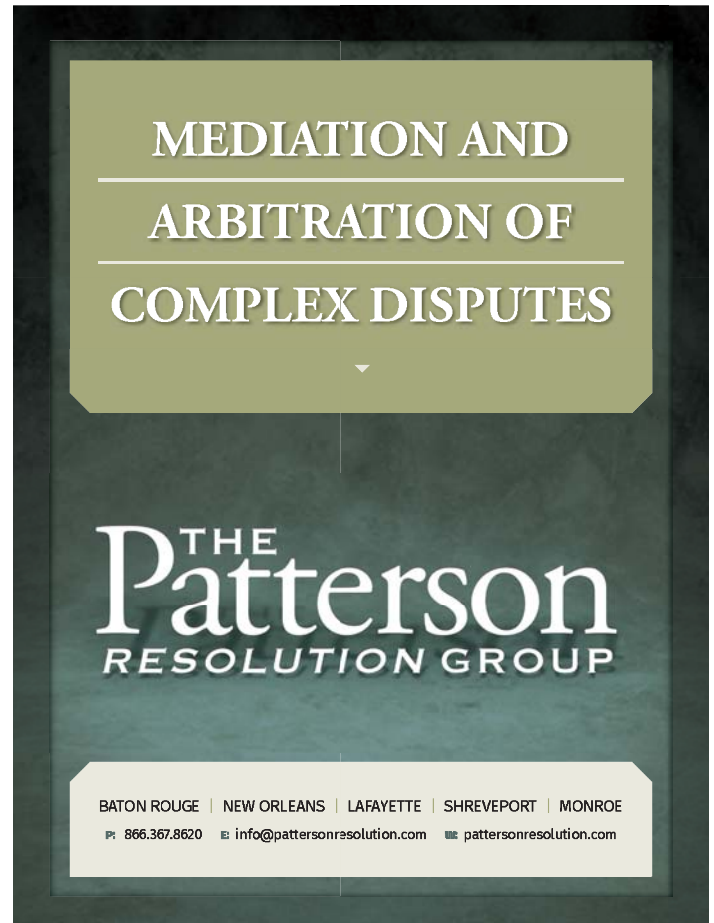
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