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More on Successor in Interest

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In Law Review 79 (June 2003), I addressed the situation of Charles Coffman. I did not use his name in the article, as it is my practice not to use names in these Law Reviews, but now that this is a published court of appeals case (one step below the Supreme Court), it is appropriate to use his name and acknowledge that the court of appeals decision addresses the precise situation about which I wrote in Law Review 79. However, the court of appeals did not agree with my analysis. In these articles, I endeavor to push the envelope for the veteran or Reserve Component member—a court is not always going to agree.

The case is *Coffman v. Chugach Support Services, Inc.*, 411 F.3d 1231 (11th Cir. 2005). Here are the facts, as set forth in the published appellate decision. In October 1997, the Air Force awarded the Base Operating Support (BOS) contract for Tyndall Air Force Base, in Florida, to Del-Jen, Inc. (DJI). That same month, DJI hired Mr. Coffman as a Hazardous Materials Specialist.

Mr. Coffman remained employed by DJI until November 2001, when he was recalled to active duty for a year (until November 2002) in the Air Force Reserve. Mr. Coffman gave proper notice of his mobilization to DJI. In October 2002, while Mr. Coffman was still on active duty, the contract between the Air Force and DJI expired and was not renewed. The Air Force awarded the new BOS contract to Chugach Support Services, Inc. DJI became a subcontractor to Chugach for some of the functions that it had formerly performed as the prime contractor.

Mr. Coffman, the only DJI employee on active duty at the time of the contract renewal, was aware of the impending Chugach takeover of the BOS contract, and he sent Chugach a letter and resume. Chugach sent in a transition team to interview the 100 DJI employees, including Mr. Coffman, and Chugach hired 97; Mr. Coffman was not hired.

When Mr. Coffman was released from active duty in November 2002, he applied for reemployment with both DJI and Chugach, as I advised him to do. He was not hired by Chugach, but he did return to DJI, in a job much inferior to the job he had held before. The person DJI initially hired to perform Mr. Coffman's duties during his military service, was then hired by Chugach when it took over the contract.

In Law Review 79, I wrote, "[I]t is reasonably clear that, at least as to the BOS contract at that base, [Chugach] is the successor in interest to [DJI]." I took the position that, under USERRA, it is not necessary to show a merger or transfer of assets in order to impose the obligation to reemploy upon the "successor" employer. Unfortunately, the 11th Circuit did not agree with me on this important point.

"While we agree with Coffman that a determination of successor liability under USERRA requires an analysis of the Leib factors as stated by Congress, such an analysis is unnecessary and improper when no merger or transfer of assets even transpired between the two subject companies. Generally, one of the fundamental requirements for consideration of the imposition of successor liability is a merger or transfer of assets between the predecessor and successor companies. … In the present case, indisputably, there was no merger or transfer of assets between Del-Jen and Chugach. … Because there is no predecessor-successor relationship between Del-Jen and Chugach, Chugach is not the successor in interest or successor employer to Del-Jen and, as such, owed no duty under sections 4312 and 4313 of USERRA to reemploy Coffman. Accordingly, we conclude that the district court properly granted summary judgment in favor of Chugach as to Coffman's reemployment claim."

As I have explained in several previous articles, section 4311 of USERRA makes it unlawful for a prospective employer to deny initial employment (as well as retention in employment or a promotion or benefit) because of the applicant's membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform future service. Section 4311(c) provides that the plaintiff is only required to show that one of these protected factors was a motivating factor (not necessarily the sole reason) for the employer's decision.

Mr. Coffman made an alternative claim under section 4311 of USERRA. Even if Chugach is not the successor in interest to DJI, it is unlawful for Chugach to deny Mr. Coffman initial employment at Chugach. It seems to me that Mr. Coffman had some pretty good evidence in support of his section 4311 claim. There was a close proximity in time between Mr. Coffman's military service and the Chugach hiring decision. At the time that Chugach interviewed Mr. Coffman and decided not to hire him, Mr. Coffman was still on active duty and approaching the end of his one-year recall. Also, Chugach interviewed all 100 DJI employees and hired 97 of them. Mr. Coffman was the only DJI employee on active duty at the time of the takeover. Despite these facts, the district court held that Mr. Coffman had not presented sufficient evidence to survive the employer's summary judgment motion on this count (or any count) of Mr. Coffman's complaint. The appellate court affirmed the summary judgment.

In this litigation, Mr. Coffman was represented by private counsel, an ROA member. That attorney contacted me last year and asked me to file an amicus curiae (friend of the court) brief, on behalf of ROA, in support of Mr. Coffman's position in the 11th Circuit. I have been involved with ROA amicus briefs in the 4th Circuit and the 5th Circuit, but I did not have time to file such a brief within the time available.

Where do we go from here? This narrow reading of USERRA's mention of successor liability is binding on district courts in the 11th Circuit (Florida, Georgia, and Alabama). The case will be accorded "persuasive authority" status in the other circuits. Perhaps we need a statutory amendment making it clear that a new contractor who has hired most of the old contractor's employees has successor obligations under USERRA.

The views expressed in this article are the personal views of the author, and not necessarily the views of the Department of the Navy, the Department of Defense, or the U.S. Government.