LAW REVIEW 738

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CATEGORY: USERRA-Enforcement
Successor in Interest-Continued

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In Law Review 0634 (October 2006), I discussed in detail the unfortunate case of *Coffman v. Chugach Support Services Inc*., 411 F.3d 1231 (11th Cir. 2005). Mr. Coffman, an Air Force Reservist, was employed by Del Jen Inc. (DJI), which had the Base Operating Support (BOS) contract at Tyndall AFB, Fla. Mr. Coffman was called to active duty for a year, and while he was away DJI lost the BOS contract to Chugach Support Services. Of the 100 DJI employees working on the BOS contract, 97 were hired by Chugach, including the woman DJI had hired as a temporary replacement for Mr. Coffman during his military service. Mr. Coffman applied to Chugach, but he was not hired or reemployed.

Mr. Coffman sued Chugach under the Uniformed Services Employment and Reemployment Rights Act (USERRA), contending the firm was the successor in interest to DJI and obligated to reemploy him, just as DJI would have been if it still had the BOS contract. The District Court granted Chugach's motion for summary judgment, holding that there was no material issue of fact and that Chugach was entitled to judgment as a matter of law. The Court of Appeals affirmed.

The District Court and the Court of Appeals held that a merger or transfer of assets between the old employer and the new employer is the *sine qua non* (without which nothing) of a finding that the new employer is the successor in interest to the old employer. There was no such merger or transfer of assets in the case. DJI still exists, but it lost the BOS contract at Tyndall AFB to Chugach. As to the workforce of approximately 100 employees performing BOS services at Tyndall, Chugach is the successor in interest, in my view, but I am not on the Court of Appeals.

A Law Review reader has brought to my attention a more recent case criticizing *Coffman* as poorly reasoned and declining to follow the holding of *Coffman* that you cannot hold the new employer responsible as the successor in interest unless there has been a merger or transfer of assets. *Cobb v. Contract Transport Inc*., 452 F.3d 543 (6th Cir. 2006) is not a USERRA case, but I think that really does not matter. The successorship issue arises under many laws, and the 6th Circuit holding in *Cobb* is clearly inconsistent with the 11th Circuit holding in *Coffman*.

Cobb arose under the Family Medical Leave Act (FMLA), a federal statute enacted in 1993. As I explained in Law Review 54, the FMLA gives an employee the right to time off from work (generally without pay) for the birth or adoption of a child or for the serious illness of the employee or a member of the employee's family. To have the right to FMLA leave, an employee must have worked for the employer for at least a year and must have worked at least 1,250 hours for that employer during the year prior to taking FMLA leave. Ronald Cobb began working for Byrd Trucking (BT) in July 2000. BT had a contract with the U.S. Postal Service (USPS) to carry mail by truck between Denver and Philadelphia, and Mr. Cobb worked exclusively on that contract. In June 2003, almost three years after Mr. Cobb began working, Contract Transport Inc. (CTI) underbid BT for the USPS contract. Mr. Cobb and the other BT employees went to work for CTI on the Denver-Philadelphia route.

In December 2003, Mr. Cobb needed emergency surgery to remove his gall bladder, and he needed time off from work for recuperation. After he recovered, he sought to return to work for CTI, but the company refused to put him back on the payroll. Mr. Cobb sued, contending that CTI's refusal violated the FMLA. CTI contended that Mr. Cobb did not have rights under the FMLA because he had only been working for CTI for five months at the time he wanted to take leave. Mr. Cobb contended that CTI was the successor in interest to BT and that he had FMLA rights because he had been working for BT-CTI for more than three years. The U.S District Court for the Eastern District of Kentucky granted CTI's motion for summary judgment, rejecting Mr. Cobb's argument that CTI was the successor in interest to BT. Like the 11th Circuit in *Coffman*, the District Court held that a merger or transfer of assets is the *sine qua non* to a finding that the new employer is the successor in interest to the old employer.

Mr. Cobb appealed, and the U.S. Court of Appeals for the 6th Circuit reversed. The 6th Circuit held, contrary to the 11th Circuit in *Coffman*, that a merger or transfer of assets is not necessary for a finding of successor liability. When one company takes over a contract and a function and the workforce that goes with it from another company, the new company performing the function and employing the group of employees is the successor in interest to the old company. The old company still exists and still does business elsewhere, but as to that group of employees and that function, the new company inherits the obligations of the old company under USERRA, the FMLA, and other laws.

I have heard from a Reservist whose situation is remarkably similar to Mr. Coffman's. This Reservist was employed by a company that had a contract with the U.S. Centers for Disease Control in Atlanta. While the Reservist was on active duty in Iraq, his employer's contract with the U.S. government expired, and the contract was awarded to a different company. When the Reservist was released from active duty and applied for reemployment with the new company, that company refused to reemploy him and contends that it is not obligated to do so, because it is not the successor in interest to the company that employed the Reservist in the first place. Unfortunately, Georgia (along with Alabama and Florida) is located in the 11th Circuit. *Coffman* is a binding Circuit precedent that will be applied by the District Court and the 11th Circuit itself, thus making it difficult if not impossible for the Reservist to prevail.

This is a common situation, especially in U.S. government contracting. We can try to fix this problem through a series of cases, hopefully culminating in the Supreme Court granting *certiorari* (discretionary review) to resolve the conflict among the circuits on this important legal issue. I believe that the issue is ripe for the Supreme Court to intervene. The 7th Circuit has observed, [The issue of successor liability is dreadfully tangled, reflecting the difficulty of striking the right balance between the competing interests at stake] (*Upholsterers International Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1325 (7th Cir. 1990)).

But resolving this issue through the courts, and ultimately the Supreme Court, will take many years, and the outcome is by no means certain. I reiterate my suggestion, first voiced in Law Review 0634, that we need Congress to enact an amendment to USERRA to overrule *Coffman*.