LAW REVIEW 1039

Successor in Interest Continued

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1.1.1.9--Successor in Interest

***Hamovitz v. Santa Barbara Applied Research, Inc.,* 2010 WL 1337742 (W.D. Pa. Mar. 31, 2010).**

The United States District Court for the Western District of Pennsylvania recently declined to grant the employer-defendant's motion for summary judgment in a case arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The principal issue in this case is whether Maytag Aircraft Corp. (one of two defendants in this case) is the successor in interest to the company that employed Arnold Hamovitz before he was called to active duty.

Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), of 1940. Under the VRRA and USERRA, a person who leaves a civilian job for voluntary or involuntary service in the uniformed services (anything from five hours to five years) has the right to reemployment by the pre-service employer, provided that the person meets the relevant eligibility criteria. Under USERRA, the person must have given the pre-service employer prior oral or written notice, must not have exceeded the five-year limit on the duration of the period or periods of service (certain kinds of service are exempted from the computation of the limit), must have been released from the period of service without having received a punitive or other-than-honorable discharge, and must have made a timely application for reemployment.

Section 4303 of USERRA (38 U.S.C. 4303) defines 16 terms used in this law, including the term "employer." That definition includes "any *successor in interest* to a person, institution, organization, or other entity referred to in this subparagraph." 38 U.S.C. 4303(4)(A)(iv) (emphasis supplied). USERRA does not define the term "successor in interest," but that term comes up frequently in employment litigation, not just under USERRA.

There exist three basic successor in interest scenarios under USERRA:

1. Joe Smith works for the XYZ Corporation. He is called to active duty and gives proper notice to XYZ. While he is on active duty, the ABC Corporation buys out XYZ, and most of the XYZ employees go to work for ABC. They are working at the same location, making the same products, with most of the same supervisors, but the sign on the building now says ABC rather than XYZ. ABC clearly is the successor in interest to XYZ. If Joe makes a timely application for reemployment with ABC and meets the other USERRA eligibility criteria, ABC has the legal obligation to reemploy him.
2. Mary Jones works for the UVW Corporation and leaves that job for military service, after giving proper notice to UVW. While Mary is on active duty, UVW merges with the DEF Corporation, and the new combined company is called DEF-UVW. If Mary makes a timely application for reemployment with DEF-UVW and meets the eligibility criteria, DEF-UVW has the legal obligation to reemploy her.
3. Bob Williams works for the GHI Corporation, which had a contract with a federal agency to perform a function or group of functions in support of that agency. Bob left his job for military service and gave proper notice to GHI. While Bob was on active duty, the GHI contract with the federal agency expired on Sept. 30, 2009, at the end of the fiscal year. The agency awarded the new contract to the RST Corporation. Of the 100 employees of GHI, 98 of them were hired by RST, at the same location to do the same work.

It is this third scenario that is controversial. Is RST the successor in interest to GHI? GHI has not gone out of business and still has other contracts at other locations, but I contend that RST is the successor in interest due to near complete employee transference. If Bob had remained continuously employed, instead of leaving for military service, he almost certainly would have been hired by RST after GHI lost the contract.

In the federal judicial system, above the 93 district courts and below the Supreme Court, there are 11 numbered Circuit Courts of Appeals, plus the District of Columbia Circuit and the Federal Circuit. The 11th Circuit sits in Atlanta and includes Georgia, Florida, and Alabama.

In a USERRA case decided in 2005, the 11th Circuit held that a merger or transfer of assets is the *sine qua non* ("without which nothing") of a finding that Company B is the successor in interest to Company A. *Coffman v. Chugach Support Services, Inc.,* 411 F.3d 1231, 1232 (11th Cir. 2005). I discuss *Chugach* and its implications in Law Review 0634 (Oct. 2006). You can find more than 600 articles at www.roa.org/law_review. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. Category 1.1.1.9 contains several articles about how USERRA applies to successors in interest.

Federal district courts in Georgia, Florida, and Alabama are required to apply the *Chugach* precedent—a binding precedent of that circuit. District courts in other circuits are not required to follow a Court of Appeals precedent from another circuit, but such precedents will be cited and considered. The United States District Court for the Eastern District of Louisiana (in the 5th Circuit) has rejected the *Chugach* precedent and has found that there can be a finding of successorship without a merger or transfer of assets. *Murphree v. Communications Technologies, Inc.,* 460 F. Supp. 2d 702, 704 (E.D. La. 2006). I discuss *Murphree* in Law Review 0723 (May 2007).

Section 4331 of USERRA (38 U.S.C. 4331) gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The Department of Labor (DOL) published proposed USERRA regulations in September 2004, for notice and comment. After considering the comments received and making a few adjustments, DOL published the final regulations in the *Federal Register* on Dec. 19, 2005, some months after the 11th Circuit decided *Chugach.*

The DOL USERRA Regulations set forth the factors that are to be considered in determining whether a new company is the successor in interest to the veteran's pre-service employer. Under those regulations, it is *not* necessary to show that there has been a merger or transfer of assets. *See* 20 C.F.R. 1002.35. In *Hamovitz,* the Judge Terrence V. McVerry held that the USERRA regulations are entitled to deference on statutory construction questions of this nature, citing *Chevron USA, Inc. v. NRDC, Inc.,* 467 U.S. 837, 845 (1984) and *National Cable Telecomm. Ass'n v. Brand X Internet Services,* 545 U.S. 967, 983 (2005). *Hamovitz* slip opinion at pages 4-5.

Judge McVerry turned down the employer's motion for summary judgment and also the plaintiff's motion for summary judgment. He concluded that there remain material issues of fact that preclude summary judgment for either party. This case will proceed to trial, unless the parties agree to a settlement. We will keep the readers informed of important developments in this case.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Service Members Law Center) at swright@roa.org or 800-809-9448, ext. 730.