LAW REVIEW 1041

USERRA Liability of the Successor in Interest

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1.1.1.9—USERRA Applicability to Successor in Interest

***Leib v. Georgia-Pacific Corp.,* 925 F.2d 240 (8th Circuit 1991).**

If you are called to active duty for many months, you may find that things have changed upon your return. The company that you worked for when you were called to the colors may have merged with or been taken over by another company. Your employer may have lost its government contract, and the new contractor may have hired most or all of your colleagues. In such a situation, the new company may be the *successor in interest* to the company that employed you before your military service and may have inherited the obligation to reemploy you upon your return from service.

If the pre-service employer still exists, albeit not at the location where you worked, I suggest that you apply for reemployment with that company as well. It costs about $4 to send a certified letter. I suggest that you send a certified letter to each individual or company that may have obligations to you with respect to your reemployment. It is better to waste $4 than to lose out on your right to reemployment because you failed to apply to the right person or entity.

This 1991 decision by the United States Court of Appeals for the 8th Circuit is the leading case on imposing reemployment obligation on the successor in interest to the pre-service employer. The 8th Circuit is headquartered in St. Louis and includes Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

Leib was decided under the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. In 1994, Congress enacted a long-overdue complete rewrite of the VRRA, and the new law is called the Uniformed Services Employment and Reemployment Rights Act (USERRA). The new law's legislative history mentions *Leib* with approval: "This provision [USERRA's definition of 'employer'] would also have the effect of placing liability on a successor in interest, as is true under current law. The Committee [House Committee on Veterans' Affairs] intends that the multi-factor analysis used by the court in *Leib v. Georgia-Pacific Corp.,* 925 F.2d 240 (8th Cir. 1991) be the model for successor in interest issues. However, the successor's notice or awareness of a reemployment rights claim at the time of merger or acquisition should not be a factor in this analysis. In actual practice, it is possible that the successor would not have actual notice that one or more employees are absent from employment because of military responsibilities and a returning serviceperson should not be penalized because of that lack of notice." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2454.

Before he enlisted in the Air Force in December 1983, Brian Leib worked for St. Regis Corporation at its corrugated container/folding carton manufacturing plant in Dubuque, Iowa. In July 1984, while Mr. Leib was on active duty, Georgia-Pacific Corporation purchased the plant from St. Regis. In December 1987, Mr. Leib was released from active duty and made a timely application for reemployment with Georgia-Pacific at the Dubuque plant. Although he met the eligibility criteria for reemployment under the VRRA, he was not reemployed. Georgia-Pacific contended that it had no obligation to reemploy him and denied that it was the successor in interest to St. Regis.

Mr. Leib filed a formal complaint with the Department of Labor (DOL), contending that Georgia-Pacific had violated his VRRA rights. DOL investigated Mr. Leib's complaint and found it to be meritorious. After trying unsuccessfully to persuade Georgia-Pacific to reemploy Mr. Leib, DOL referred the case file to the Department of Justice (DOJ), and DOJ filed suit on behalf of Mr. Leib in the United States District Court for the Northern District of Iowa.

Georgia-Pacific filed a motion for summary judgment, which the district court granted. "In granting Georgia-Pacific's summary judgment motion, the district court held that the only relevant factor was

whether there was continuity in the identity of ownership and control between Georgia-Pacific and St. Regis. Because there was no common ownership, the [district] court concluded Georgia-Pacific was not a successor in interest under the veterans' reemployment statute. We are presented on appeal with the issue of the proper legal standard for determining when a company is a 'successor in interest' under the veterans' reemployment rights statute." *Leib,* 925 F.2d at 242.

DOL and DOJ appealed to the 8th Circuit, on behalf of Mr. Leib. The appellate court reversed the summary judgment and remanded the case to the district court. After citing DOL's *Veterans' Reemployment Rights Handbook* and its *VRRA Legal Guide and Case Digest,* as well as several Supreme Court and 8th Circuit cases, the *Leib* decision sets forth the factors that should be considered in determining whether the new company is the successor in interest to the old company: "The test for successor liability cited in *Smegal* [*Smegal v. Gateway Foods of Minneapolis, Inc.,* 819 F.2d 191, 193 (8th Cir.), *cert. denied,* 484 U.S. 928 (1987)] includes consideration of whether there is (1) substantial continuity of the same business operations, (2) use of the same plant, (3) continuity of work force, (4) similarity of jobs and working conditions, (5) similarity of supervisory personnel, (6) similarity in machinery, equipment, and production methods, and (7) similarity of products or services. … These same factors, with the addition of whether the successor had notice of the employee's claim and the ability of the predecessor to provide relief, have been applied in Title VII cases brought by employees to remedy charges of discrimination. *See EEOC v. McMillian Bloedel Containers, Inc.,* 503 F.2d 1086, 1094 (6th Cir. 1974)." *Leib,* 925 F.2d at 247.

In *Leib,* the 8th Circuit quoted and cited *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946) for the proposition that the reemployment statute is to be "liberally construed for those who left private life to serve their country." *Leib,* 925 F.2d at 245. Applying this liberal construction to the successor in interest question, *Leib* rejected the Georgia-Pacific argument (accepted by the district court) that the focus should be solely on continuity of ownership and control between the old company (St. Regis) and the new company (Georgia-Pacific). *Id.*

Section 4331 of USERRA (38 U.S.C. 4331) gives the Secretary of Labor the authority to promulgate regulations about the application of this law to state and local governments and private employers. DOL published proposed USERRA regulations in the *Federal Register* in September 2004. After considering the comments received and making a few adjustments, DOL published the final regulations in December 2005. The regulations are now available in the Code of Federal Regulations (C.F.R.), at 20 C.F.R. Part 1002.

"USERRA's definition of 'employer' [38 U.S.C. 4303(4)] includes a successor in interest. Generally, an employer is a successor in interest where there is a substantial continuity of operations, facilities, and workforce from the former employer. The determination of whether an employer is the successor in interest must be made on a case-by-case basis using a multi-factor test that considers the following: [The factors listed are very similar to the *Leib* factors quoted above.]." 20 C.F.R. 1002.35.

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.