LAW REVIEW 1230

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DOJ Sues UAL to Enforce USERRA Pension Rights of Air Guard Member

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1.3.1.2—Character and Duration of Service

1.3.2.3—Pension Credit for Service Time

1.4—USERRA Enforcement

1.8—Relationship between USERRA and other Laws/Policies

***LaTourrette v. United Airlines, Inc.,* Case No. 1:12-cv.00635, United States District Court for the District of Colorado (complaint filed March 13, 2012).**

On March 13, 2012, the Department of Justice (DOJ) filed suit against United Airlines (UAL) in the United States District Court for the District of Colorado. Although DOJ is providing legal representation free of charge, the named plaintiff in this lawsuit is TenEyck LaTourrette, a member of the Air National Guard and a UAL pilot. LaTourrette's UAL employment has been interrupted by three periods of active military service, and he has met the eligibility criteria under the Uniformed Services Employment and Reemployment Rights Act (USERRA) for each of these military periods and has returned to work at UAL after each period.[1]

LaTourrette began his UAL career in May 1998, as a student flight officer. After he completed his UAL pilot training he was promoted to co-pilot. LaTourrette apparently had no military status when hired by UAL. In about December 2000, he enlisted in the Colorado Air National Guard. He received orders to report to active duty in the Air Force on July 2, 2001, for four years of active duty. He gave proper notice to UAL before reporting to active duty. After the terrorist attacks of September 11, 2001, his orders were changed and he was placed on contingency orders for wartime duty. As an F-16 pilot, he served both within the United States and in Iraq and Korea.

LaTourrette was released from active duty in late November 2006 and returned to work at UAL, as a co-pilot, almost immediately. He met the USERRA eligibility criteria for reemployment in that he left his civilian job to perform service in the uniformed services and gave prior notice to his employer. His period of service exceeded five years, but a substantial part of his service was exempt from USERRA's five-year limit under section 4312(c) of USERRA, 38 U.S.C. 4312(c).[2] He was released from active duty without a disqualifying bad discharge, and he made a timely application for reemployment.

LaTourrette was called back to active duty from November 2007 to February 2008 and from April to May 2010. He met the USERRA eligibility criteria for these two periods of duty as well.

Under the Collective Bargaining Agreement (CBA) between UAL and the Air Line Pilots Association (ALPA), a UAL pilot is guaranteed payment for a certain minimum number of

flight hours per month. At various relevant times, the guaranteed number of hours has been 70 and 75 hours. A pilot who works fewer than the guaranteed number of hours is paid for the guaranteed number. A pilot who works hours beyond the guarantee is paid for the number of hours worked.

The CBA also requires UAL to make payments to two pilot pension funds, called the B Fund and the C Fund. The employer is required to pay 9% of a pilot's UAL earnings into the B Fund and an additional 6% into the C Fund. The CBA also provides that when a pilot is away from work for a military leave of absence (MLOA) and returns to UAL, the airline is to make up missed employer contributions to these funds *based on the guaranteed hours* during the pilot's MLOA. The essence of the complaint is that the make-up payments that UAL made for each of the three military periods were insufficient to meet the employer's obligations under USERRA.

Congress enacted USERRA in 1994, as a complete rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. In its first case construing the VRRA, the Supreme Court enunciated the "escalator principle" when it held, "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946).

Section 4318 of USERRA (38 U.S.C. 4318) explicitly applies the escalator principle to pension entitlements through a civilian job. When an employee leaves a job for service and then returns to the job after service, and meets the USERRA eligibility criteria, the employer must treat that individual *as if he or she had been continuously employed* in determining when the individual qualifies for the civilian pension and also in determining the amount of the individual's pension.

In a situation like this, where the employer is required to contribute to the individual employee's pension account a percentage of the individual's earnings, the amount that the employer is required to contribute after the individual returns to work is computed based on *what the individual would have earned from the civilian employer* if his or her employment with that employer had not been interrupted by uniformed service. If the imputed earnings cannot be determined with reasonable certainty, the employer's required contribution is computed based on the employee's average compensation during the last 12 months before the period of uniformed service. *See* 38 U.S.C. 4318(b)(3).

In its complaint on behalf of LaTourrette, DOJ has alleged that the average number of hours per month that LaTourrette worked for UAL during the 12 months preceding each of his three military periods exceeded the minimum number of hours guaranteed to pilots. Thus, by computing the make-up contribution based on the minimum guaranteed compensation UAL violated 38 U.S.C. 4318(b)(3).[3] As a remedy for this violation, the complaint seeks a court order directing UAL to make additional make-up contributions to LaTourrette's B Fund and C Fund accounts and to pay interest because of the lateness of these contributions.

In *Fishgold,* the Supreme Court held: "No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the act." *Fishgold,* 328 U.S. at 285. Under section 4302 of USERRA (38 U.S.C. 4302), this statute is *a floor and not a ceiling* on the rights of an individual like LaTourrette. The CBA can give him *greater or additional rights* but it cannot take away his statutory rights under USERRA.

In accordance with section 4322(a) of USERRA [38 U.S.C. 4322(a)], LaTourrette filed a written complaint with the Department of Labor (DOL), alleging that UAL had violated USERRA. After an investigation of the facts and a legal analysis by the Solicitor of Labor, DOL agreed with LaTourrette's claim that UAL had violated USERRA. DOL communicated with UAL, urging the company to come into compliance by making additional contributions to LaTourrette's B Fund and C Fund accounts. After UAL ignored these communications, DOL informed LaTourrette of the results of its investigation, in accordance with 38 U.S.C. 4322(e). LaTourrette requested that DOL refer the case to DOJ for consideration of litigation on his behalf, and DOL referred the case as requested. DOJ agreed with DOL and LaTourrette that his USERRA rights had been violated, so DOJ filed this lawsuit on March 13, 2012, in accordance with 38 U.S.C. 4323(a)(1).

I want to congratulate DOL and DOJ for moving swiftly on this case. Only 14 months elapsed between LaTourrette's written complaint to DOL and the filing of the lawsuit in the federal district court. I am aware of other cases that have taken years.

Under section 4323(a)(1) of USERRA [38 U.S.C. 4323(a)(1)] as currently written, the named plaintiff in this case is LaTourrette, not the United States, although DOJ is providing free legal representation. Section 4323(a)(1) provides that the named plaintiff will be the United States if the defendant employer is a state, but if the defendant employer is a private employer the individual service member or veteran is the named plaintiff.

As I explained in Law Review 1178 (October 2011), Assistant Attorney General Ronald Weich sent identical letters to the Speaker of the House and the President of the Senate (the Vice President) on September 20, 2011, proposing amendments to USERRA designed to improve USERRA enforcement. One of the DOJ suggestions was that the United States should be the named plaintiff in every case where DOJ is providing free legal representation. In Law Review 1178, I endorsed that DOJ suggestion. I believe that the *LaTourrette* case is a good illustration of the kind of case where this DOJ suggestion would be most useful.

I believe that there are scores if not hundreds of other UAL pilots whose USERRA rights have been violated in exactly the same way that LaTourrette's rights were violated, but the complaint that has been filed has only one plaintiff. Because this is a case with a single individual plaintiff, DOJ is limited to seeking relief for that one person. If UAL litigates this case and loses, as I predict that it will, the airline will be required to make additional payments to LaTourrette's accounts, but the airline will be under no obligation to make payments to other pilots similarly situated. You will say, "But surely if the airline is held to have violated the law it will make all the other pilots whole." I say, *"Don't count on it."* Making all the pilots whole will cost UAL millions of dollars. The company will not pay in the absence of a court order, and in the *LaTourrette* case as presently configured the court can only order UAL to pay Mr. LaTourrette.

If the named plaintiff were the United States, DOJ would be free to seek and undoubtedly would seek broad relief for all affected UAL pilots and injunctive relief requiring UAL to comply with USERRA going forward.

As I explained in Law Review 0844 (October 2008), DOJ brought a *class action* suit against American Airlines (AA) in 2006, on behalf of three named pilots and a class of 350 other pilots similarly situated. DOJ alleged that a policy of AA violated USERRA and short-changed pilots who were Reserve Component members, with respect to sick leave and vacation. The case settled in 2008. AA agreed to change its policies in order to come into

compliance with USERRA. The 353 pilots received $345,772 for lost vacation and sick leave benefits, and AA also agreed to restore certain sick leave credits, with an additional value of about $215,000.

I do not know whether DOL and DOJ are aware of the names of other affected UAL pilots or whether any consideration has been given to making this case a class action. It may be that they don't know the names of any others because LaTourrette is the only affected person who has been willing to come forward and make a written complaint.

If you are a pilot for UAL or a recently retired pilot, and if you left your UAL job for voluntary or involuntary military service during the decade prior to late 2010, I want to hear from you. I am here during regular business hours and until 10 pm Eastern Time on Thursdays. My telephone number is 800-809-9448, extension 730. My e-mail is SWright@roa.org.

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[1] All of the facts stated in this article come directly from the complaint. I have no independent information about the facts of this case.

[2] Even when you add LaTourrette's two additional periods of military service, he is still within the five-year limit. Please see Law Review 201 for a definitive discussion of what counts and what does not count toward exhausting an individual's five-year limit. At www.servicemembers-lawcenter.org you will find 730 articles about USERRA and other laws that are particularly pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function to facilitate finding articles about very specific topics.

[3] UAL corrected its policy in late 2010, and going forward the make-up contributions are based on what the individual probably would have earned rather than the minimum number of hours. UAL made no effort to apply this new policy retroactively to LaTourrette and other affected pilots.