

## **LAW REVIEW 1261**

**June 2012**

### **DOJ Settles USERRA Suit Filed Against United Airlines**

**By Captain Samuel F. Wright, JAGC, USN (Ret.)**

1.3.2.3—Pension Credit for Service Time

1.4—USERRA Enforcement

1.8—Relationship between USERRA and other Laws/Policies

On June 9, 2012, the United States Department of Justice (DOJ) announced that it had settled the Uniformed Services Employment and Reemployment Rights Act (USERRA) suit that it had filed against United Airlines (UAL), on behalf of TenEyck LaTourrette, a UAL pilot who is also a member of the Colorado Air National Guard (ANG). Please see [Law Review 1230](#) (March 2012) for a detailed discussion of the lawsuit.<sup>[1]</sup>

LaTourrette has worked for UAL as a pilot since 1998. His UAL career has been interrupted by three periods of military service.<sup>[2]</sup> After each period of service, he met the USERRA eligibility criteria for reemployment.<sup>[3]</sup>

Under the collective bargaining agreement (CBA) between UAL and the Air Line Pilots Association (ALPA), the airline is required to pay an amount equal to 9% of each pilot's UAL earnings into the pilot's "B Fund" retirement account and an additional 6% into the pilot's "C Fund" account. Under section 4318(b) of USERRA [38 U.S.C. 4318(b)], UAL was required to make up for LaTourrette the B Fund and C Fund contributions that he would have received if he had been continuously employed at UAL instead of leaving for these three military service periods. UAL is not required to make and does not make contributions to an individual pilot's accounts during the pilot's military-related absence from work. UAL was required to make up these missed payments when LaTourrette met the [five USERRA eligibility criteria](#) and returned to work, after each period of service.

Under section 4318(b)(3) of USERRA, the make-up employer contributions should have been computed based on the 9% and 6% of what LaTourrette *would have earned* at UAL if his UAL career had not been interrupted by these three service periods. If it is not possible to determine with reasonable certainty what LaTourrette *would have earned*, the computation is to be based on what LaTourrette earned from UAL during the last 12 months before each military service period. See 38 U.S.C. 4318(b)(3)(B).

Under the UAL-ALPA CBA, each UAL pilot is guaranteed a certain number of flying hours per month—at different times the guarantee has been 70 hours or 75 hours. A pilot who works fewer than the guaranteed number of hours in a particular month is paid for the guaranteed hours. A pilot who works more than the guaranteed number of hours (which is the majority of them) is paid for the hours that he or she has worked.

In accordance with the CBA, UAL made payments to LaTourrette's B Fund and C Fund based on the *guaranteed number of hours*. These payments were insufficient because (like most UAL pilots) LaTourrette worked substantially more than the guaranteed number of hours

during the last 12 months of UAL employment before each of his three military service periods. Channel 9, the NBC affiliate in Denver, has reported that the additional UAL payments to LaTourrette's B Fund and C Fund, under the DOJ-UAL settlement, come to about \$6,500.

Under section 4302 of USERRA, the CBA between the employer and the union can give the returning veteran greater or additional rights, beyond the requirements of USERRA, but the CBA cannot take away the veteran's rights under the statute. In its first case construing the 1940 reemployment statute, the Supreme Court held: "No practice of employers or agreements between employers and unions can cut down on the service adjustment benefits that Congress has secured the veteran under the Act." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

As I explained in [Law Review 1230](#), DOJ brought this lawsuit for just one ANG member—TenEyck LaTourrette. That individual has now received what he is entitled to under USERRA. However, UAL has not admitted that these additional B Fund and C Fund payments, which it has now made for LaTourrette, were required by law. Further, UAL has not agreed to make similar payments for other similarly situated UAL pilots. Each pilot needs to assert his or her own rights.

Thomas Jarrard is an attorney in Washington State with a nationwide USERRA practice. He is also a Marine Corps Reservist and a life member of ROA. He and I drafted the *amicus curiae* (friend of the court) brief that ROA filed in the Supreme Court in the case of *Staub v. Proctor Hospital*.[\[4\]](#) His contact information is as follows:

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Thomas is contemplating filing a class action lawsuit against UAL on behalf of all UAL pilots who were shortchanged in their B Fund and C Fund distributions after returning to UAL employment following voluntary or involuntary military service, after the terrorist attacks of September 11, 2001. He already has several potential plaintiffs.

If you left UAL employment for military service between September 2001 and November 2010, and later returned to UAL after completing your service, I suggest that you contact Thomas Jarrard as soon as possible. Of course, you do not have to use Thomas Jarrard. You can retain some other lawyer to sue or threaten to sue UAL, or you can file a formal complaint with the Veterans' Employment and Training Service of the United States Department of Labor, as LaTourrette did.

Each month, as Director of the Service Members Law Center, I receive and respond to upwards of 500 (815 in April 2012) inquiries from service members, military family members, attorneys, employers, congressional staffers, reporters, and others, about military-legal topics, and well over half of the inquiries are about USERRA. I am available

during regular business hours and until 10 p.m. Eastern Time on Thursdays. The point of the Thursday evening availability is to make it possible for Reserve and National Guard personnel to call me from the privacy of their own homes, outside their civilian work hours.

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[1] Please see [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 758 articles about USERRA and other laws that are particularly relevant 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. I initiated this column in 1997, and we add new articles each week.

[2] The first period was four years, from 2001-05. The second period was three months from November 2007 to February 2008. The third period was for two months in April-May 2010.

[3] When LaTourette left his UAL employment for service, he gave UAL prior notice. He has not exceeded the cumulative five-year USERRA limit on the duration of the periods of service, and he was released from the period of service without a disqualifying bad discharge. LaTourette made a timely application for reemployment at UAL, after release from service. Please see [Law Review 0766](#) for a primer on the USERRA eligibility criteria.

[4] Please see [Law Review 1122](#) for a detailed discussion of the important implications of that Supreme Court victory.