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**The Escalator Can Descend**

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***Hogan v. United Parcel Service,* 648 F. Supp. 2d 1128 (W.D. Ky. 2009).**[1]

**Factual background**

Russell C. Hogan was a member of the Air Force Reserve and was employed by United Parcel Service (UPS) as a truck driver. He was called to active duty for Operation Iraqi Freedom[2] and was away from his UPS job from February 2003 to April 2004. It is apparently undisputed that he met the eligibility criteria for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[3]

**Escalator principle**

Because Hogan met the eligibility criteria, he was entitled to be reemployed "in the position of employment in which the person [Hogan] *would have been employed* if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status, and pay, the duties of which the person is qualified to perform." 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

As is often the case, the "$64,000 question" in this case is *what is the position in which the returning service member would have been employed* but for the period of military service?

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[1] The citation means that you can find this case in Volume 648 of *Federal Supplement, Second Series,* starting on page 1128. This is a decision by Judge Nanette K. Laughrey of the United States District Court for the Western District of Kentucky. A *LEXIS* search of this case shows no subsequent history. Judge Laughrey's decision was apparently not appealed and is now final.

[2] His service may have been voluntary, but that would make no difference under the statute.

[3] Hogan left his UPS job for the purpose of performing voluntary or involuntary uniformed service, and he gave the employer prior oral or written notice. He did not exceed USERRA's cumulative five-year limit on the duration of the periods of service relating to his employment with UPS. He was released from the period of service without having received a disqualifying bad discharge described in section 4304 of USERRA, 38 U.S.C. 4304. After release from service, he made a timely application for reemployment with UPS. Please see Law Review 1281 for a detailed description of these five eligibility conditions. I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 899 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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. We added 122 new articles in 2012 and 77 more so far in 2013.

Section 4313(a)(2)(A) codifies the "escalator principle" enunciated by the Supreme Court in its first case applying the 1940 reemployment statute:[4] "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).[5]

**DOL USERRA regulations**

Section 4331(a) of USERRA [38 U.S.C. 4331(a)] gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed USERRA regulations, for notice and comment, in September 2004. After considering the comments received, DOL made some adjustments and published the final regulations in December 2005. The regulations are published in title 20 of the Code of Federal Regulations, Part 1002 (20 C.F.R. Part 1002). Here is the pertinent subsection:

**"Can the application of the escalator principle result in adverse consequences when the employee is reemployed?**

Yes. The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle."

20 C.F.R. 1002.194 (bold question in original).

**Role of the collective bargaining agreement**

Hogan worked for UPS at its facility in Sedalia, Missouri from 1996 until February 2003, when he was called to the colors. Hogan's employment at UPS was governed by a collective bargaining agreement between UPS and the Teamsters Union. As is explained in Law Review 1025, when a union is voluntarily recognized by the employer or certified by the National Labor Relations Board (NRLB) (after a representation election)[6] the union is considered to be the *exclusive bargaining representative* for all employees in the bargaining unit, as recognized voluntarily by the employer or as determined by the NLRB. The employer has a duty to bargain with the union in good faith, and the bargaining normally results in a *collective bargaining agreement* (CBA) between the union and the employer. The CBA is binding on all employees in the bargaining unit, including those who may have opposed the union.

[4] Congress enacted the Veterans' Reemployment Rights Act (VRRA) in 1940, as part of the Selective Training and Service Act. In 1994, Congress enacted USERRA (Public Law 103-353) as a long-overdue rewrite of the VRRA. Please see Law Review 104 for a comprehensive history of the reemployment statute.

[5] The citation means that you can find the *Fishgold* case in Volume 328 of *United States Reports,* starting on page 275. The particular language quoted can be found at the bottom of page 284 and the top of page 285.

[6] A certification has no end date. The NLRB may have conducted the representation election decades ago, before today's employees were even born.

When there is a union and a CBA, it is generally easy to determine where the returning veteran *would have been employed* if his or her continuous employment with the employer had not been interrupted by military service.[7] While Hogan was on active duty (February 2003 to April 2004), UPS eliminated one of two "feeder driver" positions at its Sedalia facility where Hogan worked before he was called to active duty.[8] When Hogan returned from active duty, UPS reemployed him at its facility in Lenexa, Kansas, which was 105 miles away from his home. Hogan's round-trip commute went from 40 minutes to four hours and 20 minutes, based on the transfer from Sedalia to Lenexa. Hogan worked at Lenexa for several months and then resigned his UPS position based on this most difficult commute.

In its first case construing the reemployment statute, 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 275. Section 4302 of USERRA sets forth the relationship between this federal statute and the CBA:

**"(a)** Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
**(b)** This chapter supersedes any State law (including any local law or ordinance), *contract, agreement*, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit."

38 U.S.C. 4302 (emphasis supplied).

USERRA is a floor and not a ceiling on the rights of a returning veteran like Hogan. The CBA cannot take away Hogan's USERRA rights, but the CBA is very relevant and indeed controlling in determining what *would have happened* to Hogan if he had not been away from UPS job from February 2003 to April 2004. UPS offered evidence, which Judge Laughrey found sufficient, to establish that even if Hogan had not been on active duty at the time his Sedalia position *would have been abolished* in any case and that the Lenexa position is the position that Hogan would have been offered (based on his seniority) if he had been working at the time. Thus, Hogan's USERRA claim is without merit. USERRA does not protect him from an unfavorable transfer that *would have happened anyway* even if he had not been on active duty at the time.

**Hogan's claim under section 4311(a) of USERRA**

Hogan claimed that UPS chose his particular Sedalia position for elimination *because the company was annoyed with him for taking time off from work for military service,* as permitted by USERRA. If Hogan could *prove* that assertion, such conduct by UPS would constitute a violation of section 4311(a) of USERRA, which provides: "A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, *retention in employment,* promotion, or any benefit of employment on the basis of that membership, application for membership, performance of service, application for service, or obligation." 38 U.S.C. 4311(a) (emphasis supplied).

Under section 4311(c), Hogan is not required to prove that his military service and obligation to perform service were *the sole reason* why UPS chose his Sedalia position for elimination. It would be sufficient for Hogan to prove

[7] When there is no union and no CBA, determining where the returning service member *would have been* if continuously employed is more difficult but not impossible.
[8] The other feeder driver in Sedalia had more seniority than Hogan. If Hogan had not been on active duty at the time that UPS abolished one Sedalia position, it is clear that it is Hogan and not the other employee who would have been forced to move.

that his service and obligation constitute *a motivating factor* for the employer's decision. If he were to prove that, the *burden of proof* would shift to UPS to prove that it *would have eliminated the position anyway* even in the absence of such service and obligation.

Hogan needs *evidence*—not just his own opinions and assertions. He need not have a "smoking gun"—he can prove "motivating factor" by circumstantial as well as direct evidence.

Hogan did provide some evidence that his direct supervisors at the Sedalia UPS facility had expressed irritation at Hogan's absences from work for military service. That evidence does not help Hogan, according to Judge Laughrey, because there was no evidence that those supervisors had any role in the decision to eliminate the Sedalia position. The UPS official who made that decision did not know Hogan and was not aware that he was away from work for military duty at the time.

UPS eliminates and creates driver positions all the time, to deal with shifting patterns of demand for package delivery service. Most drivers whose positions were eliminated were not members of the National Guard or Reserve, and most UPS drivers who were away from work for military leave did not find that their positions were eliminated while they were gone, and many drivers who were not Guard or Reserve members suffered from position elimination. There was no evidence of correlation between Guard or Reserve service and position elimination.

**Rule 56 of the Federal Rules of Civil Procedure**

Rule 56 of the Federal Rules of Civil Procedure provides that, after the discovery process has been completed,[9] a party (usually but not always the defendant) can file a *motion for summary judgment.* If the moving party can show that there is *no evidence* from which a reasonable jury could rule for the non-moving party, the judge is to grant the motion for summary judgment, thus ending the case. If Hogan had some evidence (beyond a mere scintilla) from which a jury could find for him, he could have gotten Judge Laughrey to deny the defendant's motion for summary judgment.

Hogan also could have appealed to the United States Court of Appeals for the 6th Circuit.[10] If the Court of Appeals had found that there was evidence that could have supported a verdict for Hogan, it would have overturned the summary judgment and returned the case to the District Court for trial. Hogan apparently did not appeal, and the deadline for doing so has long since passed. This case is over.

The federal court dockets are crowded, and criminal cases get priority because of the criminal defendant's right to a speedy trial. Civil cases sometimes languish for years.[11] Rule 56 provides an important means by which judges can remove from the docket cases that are essentially a waste of time because the non-moving party cannot possibly prevail.

[9] During discovery, Hogan had ample opportunity to obtain information from UPS through depositions, requests for admissions, document production demands, interrogatories, etc., and UPS had a similar opportunity to obtain information from Hogan.

[10] The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

[11] Please see Law Review 1221 (February 2012) for an example of a particularly egregious delay, in the United States District Court for the District of Puerto Rico.