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DOJ Sues Flight Safety Services Corporation to Enforce USERRA Pension Rights of Two Air Force Reservists

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On March 4, 2013, the United States Department of Justice (DOJ) filed suit in the United States District Court for the District of Colorado on behalf of two Air Force Reservists, Michael J. Sipos and Gary D. Smith.[1] The named defendants are Flight Safety Services Corporation (FSSC) and Delaware Resource Group of Oklahoma LLC (DRGO).[2] In accordance with section 4323(a)(1) of the Uniformed Services Employment and Reemployment Rights Act (USERRA), the named plaintiffs are Sipos and Smith, although DOJ is providing free legal representation.[3]

Mr. Sipos' facts

Mr. Sipos began working for FSSC in October 2006, as a KC-10 Extender pilot and instructor at McGuire Air Force Base in New Jersey. FSSC had a contract with the Air Force for the KC-10 Aircrew Training System (KC-10 ATS), wherein Mr. Sipos and other FSSC employees trained Air Force pilots, co-pilots, flight engineers, loadmasters, and maintenance personnel in KC-10 operations.

In November 2006, just a few weeks after he started his FSSC job, Mr. Sipos was called to active duty by the Air Force Reserve. He served on active duty from November 2006 until June 2010. He met the USERRA eligibility criteria for reemployment, in that he left his job for the purpose of service and gave the employer prior notice. He was released from the period of service without having exceeded the cumulative five-year limit and without having received a disqualifying bad discharge. After release from active duty, he made a timely application for reemployment at FSSC.[4]

FSSC has and at all relevant times has had a defined contribution pension plan for its employees—a plan that is called a 401(k) plan, referring to section 401(k) of the Internal Revenue Code. The individual employee is

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[1] Unfortunately, neither Smith nor Sipos is a member of ROA, although Mr. Sipos is certainly eligible. (Mr. Smith is apparently an enlisted reservist.) We are working on signing up Mr. Sipos. Anybody know him?
[2] All of the facts in this article come directly from the complaint. I have no personal information about this case.
[3] If the employer-defendant had been a state government, the named plaintiff would be the United States, in accordance with the final sentence of section 4323(a)(1) of USERRA, 38 U.S.C. 4323(a)(1).
[4] Please see Law Review 1281 for a detailed description of the USERRA eligibility criteria. I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 906 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 to the website each week. We added 122 new articles in 2012, and we have added another 84 so far in 2013.

permitted to contribute[5] up to 8% of his or her salary, and the employer (FSSC) matches half of that employee contribution (4%). There is an account for each employee participant, and the employee contributions and employer matches go into that account. Money in these accounts is invested in diversified, safe investments. The amount of money available for the employee's retirement depends upon the amount of money put in plus the performance of the investments.

During the brief time between his hiring by FSSC and his call to the colors in November 2006, Mr. Sipos signed up for the 401(k) plan at the full amount (8%). During the 43 months that he was on active duty (November 2006 until June 2010), Mr. Sipos did not contribute to his 401(k) plan at FSSC, and the company did not make matching contributions, during the time that Mr. Sipos was away from work for military service. The company was not required to accept contributions from Mr. Sipos or to make matching contributions unless and until Mr. Sipos returned from active duty and was "reemployed under this chapter."[6]

Upon reemployment in June 2010, Mr. Sipos was entitled to start making up the missed employee contributions—the contributions that he would have made to the 401(k) account if he had remained continuously employed in the civilian job during the 43-month period that he was on active duty. He was required to make up the missed contributions during the 5-year period that began on the date of his reemployment.[7]

Upon reemployment, Mr. Sipos agreed to contribute $202.81 per pay period[8] for 130 pay periods[9] with FSSC paying a match of $101.40 per pay period, on his make-up contributions. Mr. Sipos made make-up contributions between December 3, 2010 and June 30, 2011.

In or around June 2011, as a condition of renewal of the KC-10 ATS contract with the Air Force, FSSC agreed to subcontract a portion of the contract to a minority-owned company. FSSC chose DRGO, a company owned by Native Americans.[10] Under the subcontract between FSSC and DRGO, DRGO agreed to hire incumbent KC-10 ATS instructors like Mr. Sipos.

On or about July 14, 2011, FSSC "administratively terminated" Mr. Sipos' employment and the next day he became an employee of DRGO. He continued performing the same duties, at the same location, and under the same working conditions, as when he was employed directly by FSSC. FSSC retained control of Mr. Sipos' employment opportunities as an employee of DRGO. FSSC's site manager continued to supervise Mr. Sipos' daily activities, just as he had done when Mr. Sipos worked for FSSC directly. The FSSC site manager continued to evaluate the work performance of the former FSSC employees who now work for DRGO, and the site manager continued to be responsible for discipline. There was a substantial continuity of business operations at McGuire AFB between FSSC and DRGO.

As Mr. Sipos was transformed from an FSSC employee to a DRGO employee, FSSC terminated all of his benefits, including his participation in the FSSC 401(k) plan. Thus, Mr. Sipos was unable to continue making make-up contributions to the FSSC 401(k) plan. On September 27, 2011, Mr. Sipos contacted the FSSC 401(k) plan

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[5] Under the IRC, the employee contribution is referred to as an "elective deferral." This means that the 8% is taken off the top of the employee's salary, before federal and state income taxes are applied to the salary. Thus, the contribution is pre-tax, but when the employee retires and starts drawing out this money the pay-out is considered to be taxable income.

[6] 38 U.S.C. 4318(b)(2).

[7] 38 U.S.C. 4318(b)(2).

[8] These make-up contributions are on top of the ongoing contributions that he was to make, like any employee. Both the make-up contributions and the ongoing contributions are made from pre-tax dollars.

[9] The 130 pay periods amount to almost exactly five years.

[10] As is explained in Law Review 186 (September 2005), by Courtney Jakowatz, Esq., Native American tribes, as employers, are at least arguably exempted from USERRA. But DRGO is not a tribe—it is a minority business enterprise that is entitled to certain preferences in federal contracting, but it is certainly not exempt from USERRA.

administrator, seeking to make a lump sum catch-up contribution that would count toward the contributions he missed while on active duty.[11] The plan administrator told Mr. Sipos that the plan would not accept a lump sum catch-up contribution.

Mr. Smith's facts

Mr. Smith began working for FSSC at Westover Air Reserve Base in Massachusetts, as a loadmaster instructor for the C-5 Galaxy aircraft. At all relevant times, FSSC has had a contract with the Air Force for the C-5 Aircrew Training System (ATS), which is used to train C-5 pilots, co-pilots, flight engineers, loadmasters, and maintenance personnel. The contract was virtually identical to the contract for the KC-10 ATS described for Mr. Sipos.

Like Mr. Sipos, Mr. Smith is an Air Force Reservist. He was called to active duty and served from October 2004 until December 2010, with a short break in July-August 2008. Although his active duty period exceeded six years, he was apparently within the five-year limit under section 4312(c) of USERRA, 38 U.S.C. 4312(c). Part of his active duty period was involuntary and does not count toward his limit with respect to FSSC.[12] Mr. Sipos returned to work at FSSC in January 2011, shortly after he left active duty in December 2010. He met the USERRA eligibility criteria for reemployment.

FSSC's 401(k) plan for employees on the C-5 ATS is identical to the plan for KC-10 ATS employees, as described above for Mr. Sipos. On February 11, 2011, Mr. Smith signed a "military leave catch-up contribution form" in which he agreed to make-up contributions. There were to be 130 make-up contributions (one per pay period for five years). Each contribution was to be in the amount of $254.55, and FSSC was to match 50% of each contribution, with 130 matches of $127.27 each. Mr. Smith was only able to make two make-up contributions before FSSC pulled the rug out from under him by means of a subcontract with FRGO, much as FSSC did with Mr. Sipos.

In or around March 2011, as a condition of renewal of the C-5 ATS contract with the Air Force, FSSC entered into a subcontract with DRGO, a company that is entitled to preference in federal contracting because it is owned by Native Americans. The arrangement between FSSC and DRGO with respect to the C-5 ATS contract was virtually identical to the FSSC-DRGO arrangement with respect to the KC-10 ATS contract, as described above with respect to Mr. Sipos.

As the successor in interest to FSSC, DRGO is responsible for USERRA compliance in the case of Mr. Sipos and Mr. Smith.

USERRA imposes the reemployment obligation on the *employer* of the returning veteran. Section 4303 of USERRA defines 16 terms used in this law, and "employer" is one of the defined terms. USERRA's long definition of "employer" 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).

As enacted in 1994, USERRA included the "successor in interest" in the definition of "employer," but USERRA did not define the term "successor in interest." In 2010, Congress amended USERRA by adding a definition of "successor" as follows:

"(D)

[11] Making the catch-up contributions in a lump sum, using after-tax money, would deprive Mr. Sipos of the tax advantage of making the contributions with pre-tax money. Nonetheless, it was still to Mr. Sipos' advantage to make the contributions, in order to obtain the employer matches.

[12] Please see Law Review 201 (October 2005) for a detailed discussion of USERRA's five-year limit.

(i) Whether the term 'successor in interest' applies with respect to an entity described in subparagraph (A) for purposes of clause (iv) of such subparagraph shall be determined on a case-by-case basis using a multi-factor test that considers the following factors:

(ii) Substantial continuity of business operations.

(iii) Use of the same or similar facilities."

(III) Continuity of work force.

(IV) Similarity of jobs and working conditions.

(V) Similarity of supervisory personnel.

(VI) Similarity of machinery, equipment, and production methods.

(VII) Similarity of products or services.

(ii) The entity's lack of notice or awareness of a potential or pending claim under this chapter at the time of a merger, acquisition, or other form of succession shall not be considered when applying the multi-factor test under clause (i)."

38 U.S.C. 4303(4)(D).

Successor in interest is an important consideration in employment law generally, not just USERRA. Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. The VRRA did not specifically mention successors in interest, but this legal theory was utilized to impose VRRA liability on the successor employer. In order to remove any doubt on this question, those who drafted USERRA included "successor in interest" in USERRA's definition of "employer."

There are two kinds of successors—transactional successors and functional successors. Applying USERRA and other laws to transactional successors is not controversial. Applying this law to functional successors is more difficult but nonetheless feasible.

As to transactional successors, let us take the hypothetical but realistic Joe Smith. Joe was a pilot for Northwest Airlines and an officer in the Air Force Reserve. Joe left his Northwest Airlines job for active duty in the Air Force. Joe meets the USERRA eligibility conditions for reemployment in that he gave prior notice to Northwest Airlines, he has not exceeded the five-year limit, he served honorably and did not receive a bad discharge, and he made a timely application for reemployment after he was released from active duty.

While Joe was on active duty, Northwest Airlines merged with Delta, and the new combined airline is called Delta. After he was released from active duty, Joe applied for reemployment at Delta. Delta is clearly the successor in interest to the former Northwest Airlines. This application is not controversial. Delta would almost certainly not deny that it is the successor to Northwest and that it is obligated to reemploy a guy like Joe.

For a more controversial application of the successor in interest principles, I invite your attention to *Coffman v. Chugach Support Services, Inc.,* 411 F.3d 1231 (11th Circuit 2005).[8] I discuss *Coffman* in detail in Law Reviews 79, 0634, and 0847.

Charles S. Coffman, an Air Force Reservist, worked for Del-Jen, Inc. (DJI), the company that had the Base Operating Support (BOS) contract with the Air Force for Tyndall Air Force Base in Florida. Coffman was called to active duty for a year, and he gave proper notice to DJI, his civilian employer. DJI hired a woman for the job that Coffman had temporarily vacated and informed her that her position was temporary and that when Coffman returned from active duty he would most likely be returning to his pre-service job and displacing her.

While Coffman was on active duty, the Air Force contract with DJI expired, and the service awarded the new BOS contract to Chugach Support Services (CSS). Of the 100 DJI employees on the Tyndall AFB BOS contract, CSS hired 98 of them. This included the woman that DJI had hired to replace Coffman on a temporary basis, but it did not include Coffman.

When Coffman returned from active duty, he made a timely application for reemployment with CSS, and he met the USERRA eligibility criteria. CSS denied that it was the successor in interest to DJI and refused to reemploy Coffman. Coffman sued CSS in the United States District Court for the Northern District of Florida, which granted summary judgment for CSS. Coffman appealed to the 11th Circuit, which affirmed the summary judgment.

The District Court and the 11th Circuit held that there can be no finding of successor in interest in the absence of a merger or transfer of assets. These courts rejected the argument that a "functional successor" can be a successor in interest for purposes of USERRA and other employment laws. The 6th Circuit (Kentucky, Michigan, Ohio, and Tennessee) has accepted the "functional successor" theory in a similar context. *See Cobb v. Contract Transport, Inc.,* 452 F.3d 543 (6th Cir. 2006). *See also Murphree v. Communications Technologies, Inc.,* 2006 WL 3103208 (E.D. La. 2006).

Section 4303 of USERRA (38 U.S.C. 4303) defines 16 terms used in this statute, including the term "employer." Section 4303(4) defines the term "employer." The statutory 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). Until 2010, USERRA did not define the term "successor in interest."

On October 13, 2010, President Obama signed into law the Veterans' Benefits Act of 2010 (VBA-2010), Public Law 111-275. Section 702 of VBA-2010 amended section 4303(4) of USERRA by adding a new subsection (D), as follows: "(D)(i) Whether the term 'successor in interest' applies with respect to an entity described in subparagraph (A) for purposes of clause (iv) of such subparagraph shall be determined on a case-by-case basis using a multi-factor test that considers the following factors: (I) Substantial continuity of business operations. (II) Use of the same or similar facilities. (III) Continuity of work force. (IV) Similarity of jobs and working conditions. (V) Similarity of supervisory personnel. (VI) Similarity of machinery, equipment, and production methods. (VII) Similarity of products or services.

(ii) The entity's lack of notice or awareness of a potential or pending claim under this chapter at the time of a merger, acquisition, *or other form of succession* shall not be considered when applying the multi-factor test under clause (i)." 38 U.S.C. 4303(4)(D) (emphasis supplied).

There does not appear to be any legislative history (committee reports, floor debates, etc.) on section 702 of VBA-2010, but the inclusion of the "or other form of succession" language means that there can be a finding of successor in interest without a merger or acquisition. It is clear that the intent of section 702 was to overrule *Coffman.* This clarification is important, because there have been other cases like Mr. Coffman's case, including this case.

Applying these standards to DRGO, it is clear that DRGO is the successor in interest to FSSC with respect to the KC-10 ATS contract and the C-5 ATS contract.[13] Thus, DRGO is responsible for complying with USERRA with respect to Mr. Sipos and Mr. Smith, and DOJ was correct to include DRGO as a defendant in this lawsuit.

FSSC is responsible for USERRA compliance with respect to Mr. Sipos and Mr. Smith as their joint employer, along with DRGO.

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

One section of the Secretary's USERRA Regulations explains in detail the application of the "joint employer doctrine" under USERRA:

"Can one employee be employed in one job by more than one employer?

Yes. Under USERRA, an employer includes not only the person or entity that pays an employee's salary or wages, but also includes a person or entity that has control over his or her employment opportunities, including a person or entity to whom an employer has delegated the performance of employment-related responsibilities. For example, if the employee is a security guard hired by a security company and he or she is assigned to a work site, the employee may report both to the security company and to the site owner. In such an instance, both employers share responsibility for compliance with USERRA. If the security company declines to assign the employee to a job because of a uniformed service obligation (for example, National Guard duties), then the security company could be in violation of the reemployment requirements and the anti-discrimination provisions of USERRA. Similarly, if the employer at the work site causes the employee's removal from the job position because of his or her uniformed service obligations, then the work site employer could be in violation of the reemployment requirements and the anti-discrimination provisions of USERRA."

20 C.F.R. 1002.37 (bold question in original).

Applying these principles to this case, it is clear that even after the subcontract from FSSC to DRGO, the former FSSC employees (including Mr. Sipos and Mr. Smith) who were transformed from FSSC employees to DRGO employees were subject to a great deal of FSSC control over the employment. As the joint employer of Mr. Sipos and Mr. Smith, FSSC was responsible for complying with USERRA, even after the subcontract. DOJ was correct to include FSSC as a defendant in this case, along with DRGO.

Mr. Sipos and Mr. Smith properly complained to DOL-VETS about USERRA violations by FSSC and DRGO.

On November 7, 2011, Mr. Sipos filed a written complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), alleging that FSSC and DRGO had violated his rights under section 4318 of USERRA, with respect to making catch-up contributions to his FSSC 401(k) plan after returning to work following military service. On October 31, 2011, Mr. Smith filed a very similar complaint with DOL-VETS, concerning alleged USERRA violations by FSSC and DRGO. These two complaints were filed properly, in accordance with section 4322(a) of USERRA, 38 U.S.C. 4322(a).

[13] In the usual order of things, the transition from the original employer to the successor in interest occurs during the period of military service of the returning veteran. In this case, the transition occurred after Mr. Sipos and Mr. Smith returned from active duty and returned to work, but during the five-year period for them to make the catch-up contributions to their section 401(k) plans. It is clear that USERRA applies the same way in either case.

Action by DOL-VETS and DOJ on the Sipos-Smith complaints

DOL-VETS investigated these two complaints and found them to be meritorious, in accordance with section 4322(d). DOL-VETS then made reasonable efforts to persuade FSSC and DRGO to come into compliance with USERRA, in accordance with that same subsection, but the companies would not budge. In accordance with section 4322(e), DOL-VETS then advised Mr. Sipos and Mr. Smith of the results of the DOL-VETS investigation and of their right to request referral to DOJ.

Mr. Sipos and Mr. Smith then requested that DOL-VETS refer their USERRA case files to DOJ, and the files were referred, in accordance with section 4323(a)(1) of USERRA. DOJ reviewed the case files and agreed with the DOL-VETS assessment that the cases were meritorious. DOJ filed suit against FSSC and DRGO on March 4, 2013, just 16 months after Mr. Sipos and Mr. Smith complained to DOL-VETS.

In past "Law Review" articles, I have been critical of DOL-VETS and DOJ for slowness and lack of vigor in enforcing USERRA. I want to acknowledge improvement when I see it, in this case at least. DOL-VETS did not accept at face value the employer assertions that "we did nothing wrong" and DOJ moved out smartly and filed suit.

We will keep the readers informed of developments in this important case.