LAW REVIEW 16032[1]

April 2016 Important New USERRA Pension Case

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Update on Sam Wright

1.3.2.3—Pension credit for military service time
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***Duffer v. United Continental Holdings, Inc.*, 2016 U.S. Dist. LEXIS 41514 (N.D. Ill. March 29, 2016.**

Mark Duffer is a Lieutenant Colonel in the Marine Corps Reserve (USMCR). On the civilian side, he is a pilot for United Air Lines (UAL). He has filed suit against United Continental Holdings (UCH) in the United States District Court for the Northern District of Illinois (Chicago). In his lawsuit, he claims that his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) have been violated, especially with respect to his pension entitlements. This case is a putative class action. That means that Duffer will represent all similarly situated pilots if the judge approves.[3]

In October 2010, UAL merged with Continental Airlines (CAL), and the new combined airline is called UAL. Duffer was away from his airline job several times, before and after the merger, for USMCR training and service. Most of his military periods were short (measured in days), but a handful of periods were long (measured in months).

After the merger, the Air Line Pilots Association (ALPA) negotiated a new combined Collective Bargaining Agreement (CBA) covering three groups of pilots:

a. Pre-merger UAL pilots.
b. Pre-merger CAL pilots.
c. Pilots hired after the merger.

Because UAL and CAL pilots had not received a pay raise in the Relevant Time Period (RTP) leading up to the merger, the new UAL (post merger) agreed to set aside $400 million for retroactive pay for pre-merger UAL and CAL pilots, for work during the RTP. Because the pre-merger UAL pilots were more numerous than the pre-merger CAL pilots, $225 million was allocated for the the UAL group and the

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1 I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1400 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially 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. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1200 of the articles.

2 BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. From 2009 to 2015, I served as the Director of the Service Members Law Center (SMLC) as a full-time employee of ROA. Please see Law Review 15052 (June 2015) concerning the accomplishments of the SMLC.

3 The judge is Judge John Robert Blakey of the United States District Court for the Northern District of Illinois. He was appointed by President Obama and confirmed by the Senate in 2014.

remaining $175 million for the CAL group. Duffer was away from his CAL job for military service during part of the RTP, and the same is true for the other former CAL pilots that Duffer seeks to represent, if this case is approved for class action treatment.

As I have explained in Law Review 15116 (December 2015) and other articles, Duffer (or any employee) is entitled to an *unpaid but job-protected* leave of absence from his civilian job for uniformed service, as defined by USERRA, and he is entitled to prompt reemployment by the pre-service employer, after he is released from the period of service, provided he meets five simple conditions:

- Left a civilian position of employment (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
- Gave the employer prior oral or written notice.
- Has not exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment.[4]
- Was released from the period of service without having received a disqualifying bad discharge from the military.[5]
- After release from the period of service, was timely in reporting back to work or applying for reemployment.[6]

It is apparently undisputed that Duffer meets these conditions for each of the periods when he was away from his airline job for uniformed service. The same is likely true for all of the other pilots in the class that Duffer seeks to represent.

Because Duffer met the five conditions, he was entitled to be treated *as if he had been continuously employed* by the airline during each of the periods when he was away from his civilian job for uniformed service, under section 4318 of USERRA. Here is the entire text of that section:

§ 4318. Employee pension benefit plans

a) (1) (A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.

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4 As is explained in Law Review 201 (August 2005) and other articles, there are five exceptions to the five-year limit. That is, there are five kinds of service that do not count toward exhausting the person's limit.

5 Under section 4304 of USERRA, 38 U.S.C. 4304, a person who has received a punitive discharge by court martial (called a bad conduct discharge or a dishonorable discharge for an enlisted member or a dismissal for an officer), or a person who has been administrative discharged “under conditions other than honorable,” or a person who has been “dropped from the rolls” of a uniformed service is not entitled to reemployment.

6 After a period of service of fewer than 31 days, the person must report for work at the start of the first full work period on the first calendar day after the completion of the period of service and the time required for safe transportation from the place of service to the person's residence, plus eight hours for rest. 38 U.S.C. 4312(e)(1)(A). After a period of service of 31-180 days, the person must apply for reemployment within 14 days after release from service. 38 U.S.C. 4312(e)(1) (C). After a period of service of 181 days or more, the person must apply for reemployment with 90 days. 38 U.S.C. 4312(e)(1)(D).

(B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.

(2) (A) A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.

(B) Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.

(b) (1) An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated-

- by the plan in such manner as the sponsor maintaining the plan shall provide; or
- if the sponsor does not provide-
    - to the last employer employing the person before the period served by the person in the uniformed services, or
    - if such last employer is no longer functional, to the plan.

(2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)

(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.

(3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)

(B) shall be computed-

(A) *at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or*

(B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period riod

• (c) Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.[7]

Under section 4318(b)(3)(A), the airline was required to make contributions to Duffer's pension plan account upon his reemployment. The airline was required to contribute the standard percentage (16%) of what Duffer *would have earned* from the airline if he had remained continuously employed, instead of being away for service, at the time. CAL and UAL have not done this. Instead, they have computed the make-up contribution based on Duffer's average rate of compensation during the 12-month period preceding his period of uniformed service, in accordance with section 4318(b)(3)(B).

In Duffer's situation, and typically in these cases, it is to the returning service member's advantage to use the primary computation method under section 4318(b)(3)(A) rather than the alternative method under section 4318(b)(3)(B). The plain language of the statute shows that the alternative method is to be used *only* if the "would have earned" figure cannot be determined with "reasonable certainty."
At a unionized airline like CAL or UAL, it is definitely feasible to determine with reasonable certainty what the service member would have earned from the airline if he or she had remained continuously employed by the airline during the short or long period when he or she was away from work for service. At a unionized airline, seniority governs the individual employee's hourly rate of pay and the number of hours that he or she would have worked in a particular month.

At a unionized airline, there is a seniority roster, based on date of hire. Let us assume that Mary Jones is one spot above Duffer on the roster and Bob Smith is one spot below. How many hours did Jones and Smith work during the days, weeks, or months that Duffer was away from work for service? And what hourly rate of pay did they receive? By looking at what happened to Jones and Smith, it is possible to compute a reasonable estimate of what Duffer would have received The estimate need not be accurate to the last dollar. Only "reasonable" certainty is required. In his scholarly decision, Judge John Robert Blakey seemed to understand and accept this point, at least preliminarily.
Duffer and the other former CAL pilots are receiving supplemental payments for the hours they worked during the RTP. The payments that Duffer is receiving are reduced by the days that he did not work because of uniformed service. The airline need not pay this money to Duffer in cash, but in computing his *imputed earnings* (what he would have earned if he had remained continuously employed), the airline must make contributions to Duffer's pension account based on these missed RTP payments.

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[7] 38 U.S.C. 4318 (emphasis supplied).

The airline has sought to require Duffer and other similarly situated to provide documentation (military orders, etc.) for short periods of uniformed service (fewer than 31 days at a time).As I have explained in detail in Law Review 16027 (April 2016), such documentation generally does not exist and cannot lawfully be required for these short tours of duty.

The defendants argued that the Railway Labor Act (RLA) preempts a USERRA claim of this nature. Judge Blakey correctly rejected that argument, citing *McKinney v. Missouri-Kansas-Texas Railroad Co.,* 357 U.S. 265, 268-70 (1958) and *Kidder v. Eastern Airlines, Inc.,* 469 F. Supp. 1060, 1063 (S.D. Fla. 1978).

In his scholarly opinion, Judge Blakey granted the defendants' motion for summary judgment on some minor points but denied it on the heart of the case. We will keep the readers informed of developments in this important case.