LAW REVIEW 16054[1]
June 2016

Retroactive Pay Increase and Section 4318 of USERRA

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Update on Sam Wright

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Q: I am a recently retired Lieutenant Colonel in the Air National Guard (ANG) and a life member of the Reserve Officers Association (ROA). I am the guy who asked the questions in Law Review 16053, the immediately preceding article in this series.

Most of my pension issues with United Air Lines (UAL), under the Uniformed Services Employment and Reemployment Rights Act (USERRA), have been resolved, with the assistance of the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). Now, I have a new USERRA pension issue, and DOL-VETS has found "no merit" to my claim. Let me explain the issue.

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1500 "Law Review" articles about 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 1300 of the articles.

[2] BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 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, and for six years (2009-15) I was the Director of ROA's Service Members Law Center (SMLC). Please see Law Review 15052 (June 2015) concerning the accomplishments of the SMLC. I have been dealing with USERRA and the predecessor reemployment statute for 34 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed new reemployment statute that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On October 13, 1994, President Bill Clinton signed into law Public Law 103-353, USERRA. The new law enacted in 1994 was 85% the same as the Webman-Wright draft. I have also dealt with the reemployment statute as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice at Tully Rinckey PLLC, and as SMLC Director. After ROA disestablished the SMLC last year, I returned to Tully Rinckey PLLC, this time in an of counsel role. To arrange for a consultation with me or another Tully Rinckey PLLC attorney, please call Ms. JoAnne Perniciaro (the firm's Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

Let's take two UAL pilots, and let's call them Mary Jones and Joe Smith (me). They began their UAL careers together in the same new hire class in January 2000. Just 20 months later, 19 terrorists seized four airliners and crashed them into three buildings and a field and murdered almost 3,000 of our fellow Americans, on September 11, 2001. The terrorist attacks resulted in reduced demand for airline tickets. At UAL and most other major airlines, it was necessary to reduce the number of scheduled flights and the number of pilots on the payroll. It was necessary to "furlough" (lay off temporarily) thousands of pilots.

At UAL and other unionized airlines, furloughs are based strictly on seniority, and so are recalls from furlough. The most junior pilots are among the first to be furloughed and the last to be recalled from furlough. Both Jones and Smith were furloughed in October 2002 and recalled to work four years later, in October 2006.

A UAL pilot on furlough does not lose the UAL seniority and longevity[3] that he or she had before being furloughed, but until recently a pilot did not continue accruing additional seniority while furloughed. Thus, as of January 2016 both Jones and Smith had 12 years (not 16 years) of UAL seniority, since they had not been credited with seniority for the four years that they were out on furlough.

Under the Collective Bargaining Agreement (CBA) between UAL and ALPA, a pilot receives hourly compensation for work, and the hourly rate depends in part on the pilot's UAL seniority. Each additional year of seniority results in additional compensation for each hour of UAL work.

Under the CBA, UAL and the union have established a defined contribution pension plan. There is an account in each pilot's name. UAL contributes to the pilot's account 16% of the pilot's UAL earnings, and this money is invested during the pilot's UAL career. In retirement, the pilot receives the benefit of this individual account in his or her name. The amount of money in the account at retirement depends upon the amount of money put into the account by UAL during the pilot's career, as well as the performance of the investments.

Jones is not a member of a Reserve Component of the armed forces, but Smith is a Lieutenant Colonel in the Air National Guard (recently retired). Like Jones, Smith was away from his UAL job on furlough for four years (October 2002 to October 2006).

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[3] At UAL, "seniority" governs the individual pilot's rank among all pilots, with respect to getting the schedule that he or she bids for and for purposes of furlough (when furloughs are necessary) and recall from furlough. "Longevity" refers to the length of time that the individual pilot has been on the payroll at the airline. Longevity affects the pilot's hourly rate of pay. Each additional year of longevity means additional compensation for each hour of work. For ease of reference, "seniority" will be used throughout this article and it should be deemed to include both the UAL concept of seniority and the UAL concept of longevity.

Early this year (2016), UAL and ALPA entered into an agreement that changes the way that furlough time is treated for UAL seniority purposes. Under this new agreement, the UAL pilots who were furloughed in the years after the September 11 terrorist attacks now receive seniority credit for their furlough time. They receive the extra money going forward, and they also receive retroactive payments for the four-year period running from February 2012 to February 2016.

Hundreds of UAL pilots who were furloughed in the early years of this century received retroactive payments this year, for the extra pay for all the hours that they worked during the 2012-16 window period. They received the money in cash, and they also received additional payments to their pension plan accounts, representing 16% of the additional payments. Both Jones and Smith received these additional payments, but Smith was back on active duty for all of calendar year 2013 and received no retroactive payments for that year.

With all of this as background, let's get to the USERRA issue. Smith received no additional payments for calendar year 2013 because he was away from his UAL job for military duty for the entire year. I recognize that UAL is not required to pay him the cash—he did not work that year. But the UAL contributions to Smith's pension account in January 2014, when he returned to work after military service, were based on what Smith *would have earned* in calendar year 2013 if he had remained at his UAL job instead of going on active duty. I think that under section 4318 of USERRA UAL is now required to make an additional payment to Smith's pension account based on this additional imputed compensation for calendar year 2013.

UAL has said that it will not make such an additional pension contribution for Smith and the other pilots who are similarly situated—there are at least several dozen of them. UAL insists that it met its USERRA obligations when it made the computation of imputed 2013 earnings for Smith in January 2014 and made the 16% contribution based on that figure. UAL insists that USERRA does not require the company to recompute the imputed 2013 earnings based on the 2016 change in the method of computing UAL seniority. What do you think?

A: I agree with you that UAL is required to recompute Smith's 2013 imputed earnings and to make an additional contribution to Smith's pension account. Let me explain my reasoning. This gets complicated.

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act. There have been 16 United States Supreme Court decisions under the VRRA and one (so far) under

USERRA.[4] USERRA's 1994 legislative history refers to the continuing importance and vitality of the VRRA case law in interpreting the provisions of USERRA:

> The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act [USERRA], remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed." *See Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977).[5]

In *Fishgold,* 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.[6]

Most of the subsequent Supreme Court VRRA cases are about applying the escalator principle to myriad situations. It has never been the case that the escalator principle only applies to circumstances as they exist at the moment that the veteran returns to work after military service. Several of the cases involve applying the escalator principle to circumstances arising many years after the veteran's return to work—circumstances that could not have been anticipated when the veteran returned to work. For example, I invite the reader's attention to *Accardi v. Pennsylvania Railroad Company.*[7]

Pasquale J. Accardi, Jacob Grubesick, Alfred J. Seevers, Anthony J. Vassallo, Abraham S. Hoffman, and Frank D. Pryor (the plaintiffs) were hired as tugboat firemen by the Pennsylvania Railroad in 1941 and 1942 and left their jobs to enter active duty during World War II. All were honorably discharged at the end of the war and reemployed by the railroad as tugboat firemen. In accordance with the "escalator principle" enunciated by the Supreme Court in *Fishgold,* each

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[4] Please see Category 10.1 of our Law Review Subject Index. You will find a case note on each of these 17 Supreme Court decisions.

[5] House Report No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2452.

[6] *Fishgold,* 328 U.S. at 284-85.

[7] 383 U.S. 225 (1966). The citation means that you can find this case in Volume 383 of *United States Reports,* and the decision starts on page 225.

returning veteran received the seniority he had before he was called to the colors plus the additional seniority he would have received had he remained continuously employed.

In the 1950s, diesel tugboats replaced steam-powered tugboats, and the position of fireman (the employee who shoveled coal onto the fire) became obsolete. The railroad sought to abolish the position of fireman, and a strike ensued in 1959. In 1960, the union and the railroad settled the strike. The settlement agreement provided for firemen with more than 20 years of seniority to remain employed if they wished. Firemen with less than 20 years of seniority, and those with more than 20 years of seniority who wished to leave, were given a severance payment as compensation for the loss of employment.

Under the agreement, a formula determined the amount of each employee's severance payment. The formula credited months of "compensated service" for the railroad. Mr. Accardi and the other five plaintiffs were not given credit for the time (approximately three years) when they were away from work for World War II active duty. As a result, each plaintiff's severance payment was $1,242.60 less than it would have been if the military service time had been credited. The parties stipulated that if it were held that these plaintiffs were entitled to that military service credit, the amount of the judgment for each should be $1,242.60.

The District Court held that the plaintiffs were entitled to have their military service time included in computing the amount of "compensated service" in the severance pay formula. The Court of Appeals reversed, holding that the severance pay did not come within the concepts of "seniority, status, and pay" protected by the reemployment statute.[8] The Supreme Court granted *certiorari*[9] and reversed the Court of Appeals.

In *Accardi,* the Supreme Court stressed the breadth of the escalator principle, as follows:

> The term "seniority" is nowhere defined in the Act, but it derives its content from private employment practices and agreements. This does not mean, however, that employers and unions are empowered by the use of transparent labels and definitions to deprive a veteran of substantial rights guaranteed by the act. As we said in *Fishgold v. Sullivan Corp., supra,* "No practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." *Fishgold,* at 285. The term "seniority" is not to be limited by a narrow, technical definition but must be given a meaning that is consonant with the intention of Congress as expressed in the 1940 act. That intention was to preserve for

[8] *Accardi v. Pennsylvania Railroad Co.,* 341 F.2d 72 (2nd Cir. 1965).

[9] When you have lost in the Court of Appeals, your final appellate step is to ask the Supreme Court for a writ of *certiorari* (discretionary review). At least four of the nine justices must vote for *certiorari,* or the decision of the Court of Appeals is final.

> the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country. In this case there can be no doubt that the amounts of the severance payments were based primarily on the employees' length of service with the railroad.[10]

In addition to the "escalator principle" codified in section 9(c)(2) of the Act at the time the Supreme Court decided *Accardi,* there is another pertinent section. At the time the Court of Appeals and the Supreme Court decided *Accardi,* section 8(c) of the VRRA provided as follows: "Any person who is restored to a position in accordance with the [reemployment statute]… shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces."

Section 4316(b)(1) of USERRA (the current reemployment statute) includes similar language:

> Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be-- (A) deemed to be on furlough or leave of absence while performing such service; and (B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.[11]

In its decision, the Court of Appeals relied on the furlough or leave of absence clause in finding that Mr. Accardi and the other plaintiffs were not entitled to credit for their military service time in computing the amount of their severance payments. Other employees who had been away from work on furlough or leave of absence at some time during their careers as tugboat firemen did not get credit for those months in their 1960 severance payments, so these plaintiffs were not entitled to severance payment credit for the months that they were away from work for military service, so the Court of Appeals held.

The Supreme Court rejected this argument, holding that benefits under the furlough or leave of absence clause are *in addition to* not instead of benefits under the escalator principle.[12] This principle remains important today, in the post-September 11 world. I have seen many examples of employers arguing, "We are not required to give Mr. Smith (the returning veteran) seniority and pension credit for the time that he was away for service because we do not give such credit

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[10] *Accardi,* 383 U.S. at 229-30.
[11] 38 U.S.C. 4316(b)(1). I address this "furlough or leave of absence clause" in Law Reviews 41, 58, and 158.
[12] *Accardi,* 338 U.S. at 231.

to employees who are away from work for other kinds of leaves of absence." The *Accardi* precedent clearly shows that these employer arguments are without merit.

Finally, the Supreme Court forcefully rejected the railroad's argument that the veteran's seniority rights expire one year after reemployment:

> Since the Court of Appeals held that the provisions of § 8 (b)(B) did not apply to separation allowances it found it unnecessary to decide an alternative ground which the railroad contended should cause reversal. That contention was that since the agreement between the railroad and the union was entered into more than one year after petitioners were restored to their employment, the act has no application to any rights created by the agreement. This argument rested on that part of § 8 (c) which provides that a veteran who is restored to employment "shall not be discharged from such position without cause within one year after such restoration." The District Court rejected the contention as having no merit. We agree with the District Court and believe this contention to be so wholly without merit that the case need not be remanded to the Court of Appeals for its decision on the point. In *Oakley v. Louisville & N. R. Co.,* 338 U.S. 278, 284, we said: "The expiration of the year did not terminate the veteran's right to the seniority to which he was entitled by virtue of the act's treatment of him as though he had remained continuously in his civilian employment; nor did it open the door to discrimination against him, as a veteran. . . . His seniority status . . . continues beyond the first year of his reemployment . . . ." What we said there governs this case. The District Court was correct in rejecting this contention of the railroad.[13]

In the 1966 Supreme Court case, the employer (Pennsylvania Railroad) gave Mr. Accardi and the other veterans seniority credit for their military service time in 1945, when World War II ended and these veterans returned to work for the railroad. The issue of seniority for the severance pay system only arose 15 years later, in 1960, when technological change rendered the fireman position obsolete and the severance pay system was established. The Supreme Court held that the employer was required to consider Mr. Accardi's World War II active duty period in computing his entitlement to severance pay upon losing his tugboat fireman job.

Applying the *Accardi* precedent to the situation at hand, I think that it is clear that UAL is required to treat Lieutenant Colonel Smith *as if he had been continuously employed* at UAL during calendar year 2013, when he was away from his civilian job because he was called to the

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[13] *Accardi,* 338 U.S. at 232-33. The "special protection" clause was intended to give additional benefits to the returning veteran for the first year after his or her return to work. During that period, the veteran cannot be fired, except for cause. This clause protects the returning veteran from the bad faith or pro forma reinstatement. The end of the special protection period was never intended to mark the end of the veteran's rights under the escalator principle.

colors. UAL was required to treat Smith as continuously employed not only in January 2014 (when he returned to work) but also in February 2016 (when UAL and ALPA changed the method of computing seniority and UAL made retroactive payments to pilots who had been furloughed after the September 11 terrorist attacks).

I urge UAL to compute the additional pay that Lieutenant Colonel Smith *would have received* for 2013 if he had been working for UAL for the entire year, instead of being on active duty at the time, and then contribute 16% of that amount to Smith's pension plan account, and to do the same for all the other UAL pilots who are similarly situated.

Q: I filed a formal written claim with DOL-VETS on this issue, contending that UAL violated section 4318 of USERRA when it refused to make an additional payment to my individual pension account, representing 16% of the additional amount of pay that I would have received for 2013 if I had not been away from work for military service for that entire year. The additional payment that I contend should have been made amounts to $950.

DOL-VETS investigated my claim and recently advised me that it has completed its investigation and has found "no merit" to my claim. What is my next step? What effect will a court give to the DOL-VETS determination of "no merit."

A: What we have here is a "pure question of law." The facts are not really in dispute. The question is: Under these largely undisputed facts, is UAL required to make the additional $950 payment to your individual pension account? The DOL-VETS investigator responsible for your case is not an attorney. Her disagreement with your legal theory will not be given any weight by the judge, if you file suit.

Let me explain the USERRA enforcement mechanism. A person claiming that his or her USERRA rights have been violated is permitted to file a written complaint against the employer with DOL-VETS.[14] The agency is then required to investigate the complaint.[15] Upon completing its investigation, DOL-VETS is required to notify the complainant of the results of the investigation and of the complainant's options.[16]

DOL-VETS has apparently completed its investigation and has notified you of the results—that it found your complaint to be without merit. You can request (in effect insist) that DOL-VETS refer your case to the United States Department of Justice (DOJ).[17] If DOJ agrees that your case has

[14] 38 U.S.C. 4322(a) and (b).
[15] 38 U.S.C. 4322(d).
[16] 38 U.S.C 4322(e).
[17] 38 U.S.C. 4323(a)(1).

merit, it can represent you in filing suit and prosecuting the suit against the employer, in the appropriate United States District Court.[18]

If you request referral to DOJ, the case file will almost certainly be referred with a negative recommendation, based on the DOL-VETS determination of "no merit." It is most unlikely but not impossible that DOJ would find merit and proceed to represent you, despite the negative recommendation from DOL-VETS.

If DOJ turns down your request for representation, or if you opt not to request referral to DOJ, or if you had never filed a complaint with DOL-VETS in the first place, you can file suit against a private employer in federal district court.[19] If you proceed with private counsel and prevail, the court may award you reasonable attorney fees, expert witness fees, and litigation expenses.[20]

Q: What is a class action lawsuit?

A: A class action lawsuit involves many plaintiffs (at least several dozen) who have the same claim involving the same legal theory and largely the same facts. In your case, it is not economically feasible to bring a lawsuit over $950. But if there are many individuals with essentially the same claim, a class action lawsuit may be appropriate.

Note: I want to hear from UAL pilots who are affected by this issue. I am trying to determine if there are enough pilots affected, and enough money at stake, to make a class action suit against UAL practicable. You can reach me by e-mail at SWright@roa.org or by telephone at (800) 809-9448, extension 730.

[18] Id.
[19] 38 U.S.C. 4323(a)(3).
[20] 38 U.S.C. 4323(h)(2).