LAW REVIEW 16060[1]
July 2016

FedEx Violated USERRA in the Computation of a Bonus

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
Update on Sam Wright

1.3.2.2—Continuous accumulation of seniority-escalator principle
1.4—USERRA enforcement

Huhmann v. FedEx Corp.,* 2015 U.S. Dist. LEXIS 147598 (S.D. Cal. April 9, 2015) (*Huhmann I).

Huhmann v. FedEx Corp.,* 2015 U.S. Dist. LEXIS 141366 (S.D. Cal. October 16, 2015) (*Huhmann II).

Huhmann v. FedEx Corp.,* 2015 U.S. Dist. LEXIS 141372 (S.D. Cal. October 16, 2015) (*Huhmann III).

Facts

These are three scholarly but unofficially published decisions by Judge Cynthia Bashant of the United States District Court for the Southern District of California (San Diego). She was

[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. For six years (2009-15), I was 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. I have been dealing with the Veterans' Reemployment Rights Act (VRRA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA) 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 VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law Public Law 103-353, 108 Stat. 3153, USERRA, as a long-overdue rewrite of the VRRA, which was originally enacted in 1940, as part of the Selective Training and Service Act. The 1994 version of USERRA was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA 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 (TR), and as the SMLC Director. After ROA disestablished the SMLC last year, I returned to TR, this time in an "of counsel" role. To arrange for a consultation with me or another TR attorney, please call Ms. JoAnne Perniciaro (the firm's Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

appointed by President Obama and confirmed by the Senate in 2014. She has an AB from Smith College in 1982 and a JD from the University of California, Hastings College of Law, in 1986.

Dale Huhmann is a Lieutenant Colonel in the Air Force Reserve. He retired in September 2006. Huhmann was hired by FedEx, as a pilot, on July 1, 2001. He worked as the Second Officer (SO)[3] in 727 aircraft. In early 2003, he was selected for FedEx training to be the FO of MD-11 aircraft, a much larger and more complex aircraft. He was scheduled to start MD-11 FO training on February 19, 2003, but he did not train with that class because he returned to active duty in the Air Force 12 days earlier, on February 7, 2003. He remained on active duty until August 31, 2006.[4] He then waited almost 90 days to apply for reemployment at FedEx.[5]

In November 2006, Huhmann met the five conditions for reemployment under USERRA. He left his FedEx job for the purpose of performing service in the uniformed services, and he gave FedEx prior oral or written notice. His cumulative periods of uniformed service after July 2001 (when he began his FedEx employment) did not exceed the five-year limit. He served honorably and was released from active duty without having received a disqualifying bad discharge from the Air Force. After he was released from active duty, he made a timely application for reemployment.

Huhmann was entitled to reemployment at FedEx, and he returned to work on December 1, 2006. Three days later (December 4, 2006), he began the MD-11 FO training—the same class that he had been scheduled to start on February 19, 2003. He did well in the training and successfully completed it 80 days later, on February 22, 2007. At that point, he became an MD-11 FO, earning a substantially higher hourly rate of pay.

At FedEx, as at major airlines, a pilot's hourly rate of pay depends upon his or her role and the size and complexity of the aircraft type. The Captain earns substantially more than the FO, and the FO earns more than the SO. A pilot on a large and complex aircraft, like the MD-11, earns more than a pilot on a smaller aircraft, like the 727.

Under an agreement between FedEx and the Air Line Pilots Association (ALPA), FedEx pilots received a special bonus based on their FedEx employment during the "Amendment Period" (AP) that began on June 1, 2004 and ended on October 30, 2006. Huhmann was away from his FedEx job for military service during the entire AP.[6]

---

[3] Most large aircraft have two pilots in the cockpit, called the Captain (in the left seat) and the First Officer (FO) in the right seat. A few older aircraft, including the 727, have a third pilot, who is called the SO.

[4] Of his 42 months on active duty, he spent much of that time in combat in Iraq and Afghanistan.

[5] After a period of service of 181 days or more, the returning service member has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

[6] During the final two months of the AP (September and October of 2006), Huhmann was off active duty but waiting to apply for reemployment. Under USERRA's "escalator principle" (discussed further below), he was entitled upon reemployment to be treated as if he had been continuously employed in the civilian job for the

Under the agreement between FedEx and ALPA, and also under USERRA, periods of military duty during the AP were treated as active FedEx employment, for purposes of calculating the bonus. Each pilot's bonus was determined by the pilot's highest crew status during the AP. Because Huhmann was a 727 SO before he left his FedEx job for military service, his bonus was computed on that basis and the bonus came to $7,400.

Huhmann's legal theory

In its first case construing the VRRA (the 1940 reemployment statute), the Supreme Court enunciated the "escalator principle" when it held that the returning service member "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."[7] The escalator principle is codified in sections 4313(a) and 4316(b) of USERRA.[8]

Under the escalator principle, Huhmann is entitled to be treated as continuously employed during time that he was away from work for service. If it is "reasonably certain" that he would have completed the MD-11 FO training and would have been promoted from a 727 SO to an MD-11 FO, but for his military service, he was entitled, upon reemployment, to be treated as an MD-11 FO, rather than a 727 SO, in computing the amount of his bonus. The Department of Labor (DOL) USERRA Regulations define "reasonable certainty" as follows:

> A reasonable certainty is a high probability that the employee would have received the seniority or seniority-based right or benefit if he or she had been continuously employed [in the pre-service civilian job]. The employee does not have to establish that he or she would have received the benefit as an absolute certainty. The employee can demonstrate a reasonable certainty that he or she would have received the seniority right or benefit by showing that other employees with seniority similar to that which the employee would have had if he or she had remained continuously employed received the right or benefit. The employer cannot withhold the right or benefit based on an

---

entire period that he was away from work for military service, and this includes the period (up to 90 days) after he was released from the period of service and while he was waiting to apply for reemployment. USERRA's legislative history addresses this issue as follows: "Section 4303(12) would define 'seniority' to mean longevity in employment, including the period of employment prior to military service, the time between leaving the job and entering military service, the period of military service, *and the time between discharge or release from military service and reemployment."* House Committee Report, April 28, 1993 (emphasis supplied). This is H.R. Report No. 103-64, part 1. This report is reprinted in its entirety in Appendix B-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 664 of the 2016 edition of the *Manual.* Please see Law Review 60 (December 2002) concerning the application of the escalator principle to the period between release from active duty and return to the civilian job. Please see Law Review 16044 (May 2016) concerning *The USERRA Manual.*

[7] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). In that same case, the Court held that the reemployment statute is to be "liberally construed for the benefit of he who laid aside his civilian pursuits to serve his country in its hour of great need." Id. at 285.

[8] 38 U.S.C. 4313(a), 4316(b).

assumption that a series of unlikely events could have prevented the employee from gaining the right or benefit.[9]

USERRA's legislative history addresses the "reasonable certainty" issue as follows:

> The Committee [House Committee on Veterans' Affairs] intends to affirm the interpretation of "reasonable certainty" as a "high probability." (*See Schilz v. City of Taylor, Michigan,* 825 F.2d 944, 946 (6th Cir. 1987)), which has sometimes been expressed in percentages. *See Montgomery v. Southern Electric Steel Co.,* 410 F.2d 611, 613 (5th Cir. 1969) (90% success of probationary employees becoming permanent meets reasonable certainty test); *Pomrening v. United Air Lines, Inc.,* 448 F.2d 609, 615 (7th Cir. 1971) (86% pass rate of training class meets reasonable certainty test.)[10]

USERRA's legislative history demonstrates that the pre-1994 case law under the 1940 law is still relevant in interpreting and applying 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 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, 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).[11]

Applying the reasonable certainty test, Huhmann argued (through counsel) that he would have started the MD-11 FO training on February 19, 2003, but for being called to the colors on February 7, 2003. When he completed his active duty and returned to work at FedEx in late 2006, he started the MD-11 FO training and completed it successfully in just 80 days. Thus, Huhmann argued, it is reasonably certain that he would have successfully completed the MD-11 FO training in approximately the same amount of time if he had started the training on February 19, 2003, as originally scheduled. Thus, Huhmann argued, it is reasonably certain that

---

[9] 20 C.F.R. 1002.213. The citation is to title 20 of the Code of Federal Regulations, section 1002.213. Section 4331 of USERRA, 38 U.S.C. 4331, gives DOL the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed regulations, for notice and comment, in the *Federal Register* in September 2004. After considering the comments received and making a few adjustments, DOL published the final regulations in December 2005. The regulations were added to the Code of Federal Regulations in 2006.

[10] H.R. Report No. 103-65, Part 1—see footnote 5 above. This paragraph can be found on page 675 of the 2016 edition of *The USERRA Manual.*

[11] Id. at page 659 of the 2016 edition. In her scholarly opinion, Judge Bashant cited *Pomrening,* among other cases.

he would have completed the MD-11 FO training and would have been promoted to MD-11 FO sometime in May 2003, but for his military service.

Huhmann argued that his bonus should be computed based on the pay of an MD-11 FO during the AP. Computing the bonus that way would result in a bonus of $17,700. Thus, Huhmann argued that he was entitled to an additional payment of $10,300 ($17,700 minus $7,400).

Huhmann filed a formal USERRA complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). That agency conducted an investigation and agreed with Huhmann's version of the facts, his legal theory, and his computation. DOL-VETS concluded that FedEx owed Huhmann an additional $10,300 and so advised both Huhmann and FedEx. The company disagreed with the DOL-VETS conclusion and refused to pay. This lawsuit resulted.

The MD-11 FO training is difficult and complex, and some pilots fail. Nonetheless, Huhmann argued that the fact that he did well in the training and completed it successfully in just 80 days in 2006-07, after his active duty period, means that it is reasonably certain that he would have successfully completed the training in approximately the same amount of time if he had started the training on February 19, 2003, as originally scheduled.

The judge agreed with Huhmann's legal theory.

In *Huhmann I,* Judge Bashant held that Huhmann is entitled to use his post-service completion of the MD-11 FO training to establish the reasonable certainty that he would have completed the training successfully in approximately the same amount of time in 2003, but for his military service. She ordered FedEx to pay Huhmann $10,300, plus interest and attorney fees. In *Huhmann II,* she denied FedEx's motion for reconsideration.

USERRA's enforcement section provides:

> The court may require the employer to pay the person [successful USERRA plaintiff] an amount equal to the amount referred to in subparagraph (B) [$10,300 in this case] as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter [USERRA] was willful.[12]

Huhmann sought liquidated damages, but Judge Bashant declined to find willfulness and declined to award liquidated damages.

In a USERRA case, as in employment law cases generally, the successful plaintiff is normally entitled to pre-judgment interest on the back pay award. Pre-judgment interest is intended to

[12] 38 U.S.C. 4323(d)(1)(C).

compensate the plaintiff for the lost opportunity to earn interest on the money, during the interim period, and the loss in value of the money, because of inflation. In *Huhmann III,* Judge Bashant computed the pre-judgment interest at $217.52 and ordered FedEx to pay that amount. Because of the actions of the Federal Reserve, interest rates have been held at historically tiny levels (far below 1%) since the economy crashed in the fall of 2008.

Also in *Huhmann III,* Judge Bashant awarded Huhman $227,585 in attorney fees, based on section 4323(h)(2), which provides:

> In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.[13]

It may seem anomalous that the attorney fee exceeds the plaintiff's recovery by more than $217,000, but there is no requirement that the attorney fee bear a reasonable relationship to the plaintiff's recovery. Congress decided that USERRA claimants need effective legal representation to vindicate their USERRA rights, and section 4323(h)(2) had the desired effect in this case. Moreover, it should be noted that FedEx could have avoided this major expense by complying with USERRA in the first place, or even by accepting the DOL-VETS recommendation to pay Huhmann the $10,300.

Kudos to Huhmann's attorney

I congratulate attorney Brian Lawler for his imaginative, diligent, and effective representation of Lieutenant Colonel Huhmann. Brian is an attorney in San Diego, and he represents USERRA plaintiffs in cases around the country, with great success. He is a Lieutenant Colonel in the Marine Corps Reserve and a life member of ROA. During the six years that I was the Director of the Service Members Law Center (2009-15), I frequently referred USERRA clients to him. Brian is the author of Law Reviews 13108 (August 2013) and 14091 (December 2014). His e-mail address is BLawler@pilotlawcorp.com.

This case is not over.

FedEx filed a timely appeal to the United States Court of Appeals for the 9th Circuit, the federal appellate court that sits in San Francisco and hears appeals from district courts in California and several other western states. We will keep the readers informed of developments in this interesting and important case.

[13] 38 U.S.C. 4323(h)(2).