LAW REVIEW 16094[1]
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New USERRA Lawsuit Filed against UAL over Pension Contributions, Sick Time Accrual, and Vacation Accrual

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Update on Sam Wright

1.1.1.9—USERRA applies to successors in interest
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1.3.2.2—Continuous accumulation of seniority—escalator principle
1.3.2.3—Pension credit for service time
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***Moss v. United Airlines, Inc.,* Case No. 1:16-cv-08496 (N.D. Ill.).**

On August 30, 2016, attorney Brian J. Lawler[3] (along with several other attorneys) filed the subject lawsuit in the United States District Court for the Northern District of Illinois.[4] The named plaintiff is

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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 these articles. More than 1000 of the articles are about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and related laws. As is explained in Law Review 15067 and other laws, Congress enacted USERRA (Public Law 103-353, 108 Stat. 3162) and President Bill Clinton signed it into law 10/13/1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA—Public Law 76-783, 54 Stat. 885). The STSA is the law that led to the drafting of more than ten million young men (including my late father) for World War II. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35).

[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 the Service Members Law Center (SMLC), as a full-time employee of ROA. I invite the reader's attention to Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. I have been dealing with the VRRA and 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. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. 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 (DOD) 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, and as SMLC Director. Since ROA disestablished the SMLC last year, I have continued the work of the SMLC as a volunteer and ROA member. I am available by telephone at (800) 809-9448 extension 730 and by e-mail at SWright@roa.org.

Michael Moss, a Lieutenant Colonel in the Marine Corps Reserve (USMCR).[5] Moss was hired by United Airlines (UAL) as a pilot in February 2000. He was furloughed[6] by the airline in 2009 and called back to active work in January 2012. Moss returned to active duty on January 29, 2012 and served continuously on active duty until March 1, 2013.

Moss was commissioned a Second Lieutenant in March 1992 and remained on active duty for more than seven years, until he was released from active duty in November 1999 and affiliated with the USMCR. He was hired by UAL as a pilot in February 2000 and worked continuously for the airline until he was furloughed in September 2009.

In the complaint, attorney Brian Lawler and Moss' other attorneys have asked the court to certify this case as a class action, with Moss as the lead named plaintiff. It will be necessary for these attorneys to convince the judge that this case is appropriate for class action treatment, in that the number of plaintiffs is sufficient to meet the "numerosity" requirement—that there are so many persons affected that it would not make sense to require each person to bring his or her own lawsuit. Further, the attorneys will need to show the judge that this case meets the "commonality" requirement—that the members of the proposed class have common issues of fact and law, so that it makes sense to handle this case as a class action. And the attorneys will need to show the judge that Moss is an appropriate lead plaintiff, in that his situation is largely in common with that of class members generally. Finally, the attorneys will need to show the judge that they (the attorneys) are qualified to bring a case of this kind.

If the judge approves the motion to treat this case as a class action, the members of the class will be notified, typically by mail. Each class member will have a limited but reasonable time to opt out of the class action. A class member can opt out if he or she disagrees with the premises of the lawsuit or if he or she prefers to bring his or her own lawsuit. Typically, very few if any class members opt out.

UAL and Continental Air Lines (CAL) were entirely separate until the merger process began in October 2010. At that point, UAL and CAL became subsidiaries of United Continental Holdings

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[3] Brian J. Lawler is a Lieutenant Colonel in the Marine Corps Reserve and a life member of ROA. He is the author of Law Review 13108 (August 2013) and Law Review 14091 (December 2014). He is an attorney in San Diego with a nationwide practice focusing on USERRA. When I was the SMLC Director, Brian Lawler was one of a handful of attorneys to whom I frequently referred potential clients with USERRA clams. Brian Lawler is available by e-mail at BLawler@pilotlawcorp.com or by phone toll-free at (866) 512-2465.

[4] That particular district court was chosen because United Airlines (UAL) has its corporate headquarters in Chicago. USERRA provides that a suit against a private employer can be filed in the United States District Court for any district where the employer maintains a place of business. 38 U.S.C. 4323(c)(2).

[5] The facts in this article come directly from the complaint filed in court on August 30, 2016. I have no personal knowledge of these facts.

[6] In the airline industry, being dropped from the payroll temporarily because of poor business conditions of the employer is called a "furlough." In most other industries, this situation is called a "layoff."

(UCH), until the merger process was completed in March 2013. At that point, the two separate airlines merged into a single entity, which adopted the UAL name.

Both UAL pilots and CAL pilots were represented by labor unions. There were separate collective bargaining agreements (CBAs) governing the UAL pilots and the CAL pilots. Those separate CBAs remained in effect until December 15, 2012, when the United Pilot Agreement covering both groups was approved.

Moss was employed by UAL from February 2000 until 2009, when he was furloughed. In January 2012, he was recalled from furlough and assigned to CAL, then a subsidiary of UCH until the merger was completed in March 2013. Moss worked for CAL for only a few days until January 29, 2012, when he was recalled to active duty by the USMCR. Moss was released from active duty on March 1, 2013, and he was reemployed by UAL just as the merger was being finalized.

In this lawsuit, Moss contends (on behalf of himself and the proposed class that he seeks to represent) that UAL has violated USERRA in three ways, which I will discuss separately.

Accrual of sick time

As I explained in detail in Law Review 16079 (August 2016), on August 15, 2016 the United States Department of Justice (DOJ) filed suit against UAL in the Northern District of Illinois on behalf of Lieutenant Colonel Daniel Fandrei, USAFR, whose situation is remarkably similar to Moss' situation.

USERRA's "furlough or leave of absence" clause ("furlough clause")[7] a person who is away from his or her civilian job (federal, state, local, or private sector) for uniformed service must be treated as though he or she were on furlough or a leave of absence. If other employees of the employer who are on non-military leaves of absence of comparable duration receive a non-seniority benefit, the employee who is away from work for military leave is entitled to the same benefit.

As DOJ alleged in its August 15 lawsuit, and as I explained in detail in Law Review 16079, UAL pilots receive five hours of "sick time" per month worked. Pilots who are away from their UAL jobs for Association Leaves of Absence (ALAs),[8] vacation, sick leave, or jury duty continue accruing five hours of sick time per month while away from work for these non-military reasons, or so DOJ alleged in its August 15 lawsuit. If this is the case, and I believe that it is, UAL has violated the furlough clause by denying this benefit to pilots who are away from work for military leave.

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[7] 38 U.S.C. 4316(b)(1).

[8] Under the CBA between the union and the airline, pilots are entitled to ALAs to do union business under certain circumstances.

The Moss lawsuit is very similar in this respect, with one big difference. The DOJ lawsuit was filed on behalf of one plaintiff, Fandrei, while in the Moss case an attempt is being made to make this a class action case. This is certainly an appropriate case for class action treatment. It should not be necessary to bring hundreds of individual lawsuits to make UAL obey the law.

Vacation accrual

Each individual UAL pilot earns vacation each year. The amount of vacation that the pilot earns depends upon the number of "years of completed service" that he or she has with the airline. In this lawsuit, Moss alleges (on behalf of himself and the class he proposes to represent) that UAL pilots who are away from work for non-military leaves of absence continue receiving "years of completed service" for vacation accrual purposes, but pilots who are away from work for service in the uniformed services are denied this valuable benefit. If this is the case, the airline has violated the furlough clause. This is very similar but not identical to the argument about sick time accrual.

Retroactive payments and section 4318 of USERRA (pensions)

I invite the reader's attention to my Law Review 16054 (June 2016). As I explained in that article, UAL recently changed the way it treats "furlough time" for longevity accrual purposes, affecting the individual pilot's hourly rate of pay significantly. UAL pilots received retroactive payments from the airline for the difference during a "window period." Moss was away from work for most of the window period.

UAL pilots participate in a defined contribution pension plan. The airline contributes 16% of the individual pilot's UAL earnings to an individual pension account in the pilot's name and for his or her benefit. As I explained in detail in Law Review 16054, section 4318 of USERRA[9] requires the employer to treat the returning service member *as if he or she had been continuously employed during the time that he or she was away from work for service,* upon reemployment under USERRA.

USERRA does not require that the airline pay Moss for hours that he did not work, but the employer must make the 16% contributions based on Moss' *imputed earnings—what he would have earned but for his uniformed service.* In this lawsuit, Moss alleges (on behalf of himself and the class that he proposes to represent) that UAL violated section 4318 when it refused to make these pension contributions upon service member pilots returning to work at UAL after periods of uniformed service.[10]

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

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[9] 38 U.S.C. 4318.

[10] I am most pleased that my "Law Review" articles are being used by Reserve Component service members and their attorneys.