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Great New USERRA Victory in the 9th Circuit

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

1.2—USERRA forbids discrimination
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***Huhmann v. Federal Express Corp.,* 2017 U.S. App. LEXIS 21955 (9th Cir. November 2, 2017).**

Background

This is the scholarly, unanimous decision of a three-judge panel of 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 Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana,

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1500 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, 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. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 35 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 USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 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 (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 the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

Nevada, Northern Mariana Islands, Oregon, and Washington. The 9th Circuit affirmed the decision and judgment for the plaintiff by the United States District Court for the Southern District of California.[3] I discuss this case in the District Court in Law Review 16060 (July 2016). Please see that article for a detailed discussion of the facts of the case and the scholarly opinions of Judge Cynthia Bashart of the Southern District of California.

Dale Huhmann was an Air Force Reserve officer when he was hired by Federal Express (FedEx) as a pilot (7/1/2001) and when he was recalled to active duty by the Air Force (2/7/2003). During that 19-month period, he was a Second Officer (SO) on the company's 727 aircraft. At FedEx and other airlines, a pilot's hourly rate of compensation is determined by his or her role and by the size and complexity of the aircraft type. A First Officer (FO) is paid more than an SO, and a Captain more than an FO. Pilots of larger and more complex aircraft (like the MD-11) are paid more than pilots of smaller and less complex aircraft (like the 727).

During his FedEx employment in 2001-03, Huhmann sought to move up from the position of 727 SO to the position of MD-11 FO. Huhmann was selected to participate in a FedEx pilot class that began on 2/19/2003. Huhmann fully expected to be a member of that class, but his expectation was dashed by his call to the colors just 12 days earlier, on 2/7/2003.[4]

Huhmann remained on active duty until 8/31/2006, and then he made a timely application for reemployment at FedEx.[5] Huhmann met the five USERRA conditions for reemployment in the fall of 2006. He left his civilian job to perform uniformed service and gave notice to FedEx. He served honorably and did not receive a disqualifying bad discharge from the Air Force. His 43-month period of service did not exceed the 60-month (five year) limit under USERRA.[6] He made a timely application for reemployment.

Huhmann returned to work for FedEx on 12/1/2006. Three days later, he began the FedEx class to qualify for the MD-11 FO position—the same class that he was scheduled to start on 2/19/2003. He did well in the class and qualified for the better position just 80 days later, on 2/22/2007. At that point, he started earning a substantially higher rate of pay.

While Huhmann was away from work for military service, the collective bargaining agreement (CBA) between FedEx and the Air Line Pilots Association (ALPA) expired, and the company and

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[3] *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).*

[4] Readers will recall that the United States invaded Iraq in March 2003. Many Reserve and National Guard personnel were recalled to active duty during that period.

[5] The deadline to apply for reemployment after a period of service of 181 days or more is 90 days after the date of release from service. 38 U.S.C. 4312(e)(1)(D).

[6] 38 U.S.C. 4312(c).

union negotiated a new CBA. As an incentive to the pilots to ratify the new agreement, FedEx offered to pay and did pay a special bonus to each pilot. The amount of each pilot's bonus was determined as a percentage of his or her FedEx earnings during the "Amendment Period" (AP) that ran from 6/1/2004 until 10/30/2006. Huhmann was away from his job for service during the entire AP.

Huhmann was paid the bonus, but his bonus was computed based on what he would have earned as an SO on 727 aircraft. As so computed, his bonus came to $7,400. Huhmann claimed, and Judge Bashant ruled, that Huhmann was entitled to a bonus based on what he would have earned as an MD-11 FO. The MD-11 FO bonus came to $17,700. Huhmann claimed that he was entitled to an additional payment of $10,300, representing the difference between what he should have been paid and what he was paid. Judge Bashant awarded him $10,300, plus interest and attorney fees.

Judge Bashant correctly applied the "foresight-hindsight" test enunciated by the Supreme Court in VRRA case law. As a matter of foresight, Huhmann was selected for the FedEx class for promotion, and he clearly would have started that class on 2/19/2003 but for his call to the colors. As a matter of hindsight, Huhmann enrolled in that class immediately after he returned to work and completed the class successfully in just 80 days. Thus, it is reasonable to conclude that Huhmann would have been an MD-11 FO, rather than a 727 SO, during the AP, but for having been called to active duty.

FedEx appealed

FedEx filed a timely appeal to the 9th Circuit. The case was assigned to a three-judge panel.[7] The panel decision affirmed Judge Bashant on the "foresight-hindsight" test, as follows:

> FedEx next argues that even if the reasonable certainty test is relevant to a Section 4311 claim, the district court erred in its factual determination that Huhmann satisfied the test. We find that the district court did not clearly err when it determined that Huhmann was reasonably certain to have achieved the MD-11-FO status had he not left for his military service.
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> In *Tilton v. Missouri Pacific Railroad Co.* the Supreme Court defined a two-part framework for applying the reasonable certainty test:
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> [W]e conclude that Congress intended a reemployed veteran who, upon returning from military service, satisfactorily completes his interrupted training, to enjoy the seniority

[7] The panel consisted of Judge Carlos T. Bea and Judge Andrew D. Hurwitz of the 9th Circuit and Judge J. Frederick Mott of the District of Maryland (sitting by designation). Judge Bea wrote a scholarly decision, and the other two judges joined in a unanimous panel decision.

> status which he would have acquired by virtue of continued employment but for his absence in military service. This requirement is met if, as a matter of foresight, it was reasonably certain that advancement would have occurred, and if, as a matter of hindsight, it did in fact occur. 376 U.S. at 181. FedEx concedes that Huhmann satisfied the hindsight prong of this test because he successfully completed training as a MD-11-FO after returning from military leave. But FedEx asserts that Huhmann "cannot satisfy [the foresight prong] as advancement to an MD-11 First Officer crew position was not based on the mere passage of time," but rather on skill, ability, [*18] and the discretion of the flight instructors. FedEx notes that the Supreme Court has held that the reasonable certainty test was not satisfied when promotion depended "not simply on seniority or some other form of automatic progression . . . . [But] is dependent on fitness and ability and the exercise of a discriminating managerial choice." *McKinney v. Mo. Kan. Tex. R.R. Co.*, 357 U.S. 265, 272, 78 S. Ct. 1222, 2 L. Ed. 2d 1305 (1958).
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> It is undisputed that Huhmann had been accepted into the MD-11-FO training program before being called up for military service. This suggests that his promotion turned on whether he would successfully complete the training program. While it is true that some pilots fail the MD-11-FO training program, that fact alone is not sufficient to render the district court's conclusion that Huhmann was reasonably certain to have passed the training (as a matter of foresight) clearly erroneous: the relevant standard is "reasonable certainty" not "absolute certainty." Given Huhmann's diverse and long experience as a military and civilian pilot, his past job performance, the multiple opportunities given to candidates in MD-11-FO training to pass modules they initially fail, and the fact that he was accepted into and scheduled to begin this training before being mobilized, the district court's conclusion that Huhmann was reasonably certain as a matter of foresight to complete successfully MD-11-FO training was cogent and logical. At the very least, the district court's conclusion on this point was not "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009).[8]

The 9th Circuit panel also considered and rejected FedEx's argument that the Railway Labor Act (RLA) required that Huhmann's claim be considered by an arbitrator, not a federal district judge:

> FedEx first argues that this case should have been decided by an arbitrator. FedEx is an air carrier subject to the Railway Labor Act (RLA), which mandates arbitration of "minor disputes," including disputes over the meaning of language within a collective bargaining agreement. 45 U.S.C. § 153; *see Wolfe v. BNSF Ry. Co.*, 749 F.3d 859, 863 n.1 (9th Cir. 2014); *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 253, 114 S. Ct. 2239, 129 L. Ed. 2d 203 (1994). FedEx argues that because the Bonus Letter was treated as part of the CBA by FedEx and ALPA and because analyzing the Bonus Letter is necessary to adjudicate Huhmann's rights, Huhmann's claim was a minor dispute. FedEx is incorrect,

[8] *Huhmann,* No. 15-56744, 2017 U.S. App. LEXIS 21855, at 16-19.

because the right awarded by USERRA neither arises out of the CBA nor relies on an interpretation of it.

The Supreme Court has explained "that the RLA's mechanism for resolving minor disputes does not pre-empt causes of action to enforce rights that are independent of the CBA . . . . '[M]inor disputes' subject to RLA arbitration are those that involve duties and rights created or defined by the CBA." *Hawaiian Airlines, Inc.*, 512 U.S. at 256-58 (citation omitted). Interpreting *Norris*, our court recognized that "[a] claim is preempted by the RLA only when the...claim involves duties and rights created or defined by a CBA and is therefore dependent on the interpretation of a CBA...In contrast, a...cause of action is not pre-empted by the RLA if it involves rights and obligations that exist independent of the CBA." *Wolfe*, 749 F.3d at 863-64 (internal quotation marks and citation omitted).

The basis on which Huhmann made his claim was the independent legal right under USERRA to be returned to the position and status at FedEx he would have enjoyed had he not left for military service. By statute — and not by either the language of the CBA or its interpretation — FedEx is not allowed to use Huhmann's failure to qualify for MD-11-FO status to justify paying him a lower bonus if that failure to qualify was due to Huhmann's military service. The meaning of the Bonus Letter — and the attendant bonuses owed to individuals based on their status at the time of the signing of the CBA — is not in dispute. The only question is whether the undisputed terms of the Bonus Letter do not respect the independent rights granted to Huhmann under USERRA, as the Bonus Letter does not properly account for the status owed to an individual who has left for military service; i.e., it does not account for situations like Huhmann's, where but-for a military leave, he would have attained a qualification which mandated a higher bonus. Even assuming the Bonus Letter is part of the CBA, since the terms of the Bonus Letter do not require interpretation, the right Huhmann seeks to vindicate is based solely on the USERRA statute. The dispute is not a minor dispute under the RLA.[9]

This case is not necessarily over.

FedEx can apply to the 9th Circuit for rehearing en banc. If that application is granted, there will be new briefs and a new oral argument before all the active (not senior status) judges of the 9th Circuit. If the company chooses not to apply for rehearing en banc, or if the 9th Circuit denies the application, or if the 9th Circuit grants rehearing en banc and then affirms the panel decision, FedEx's final step is to apply to the Supreme Court for a writ of certiorari. Certiorari is granted if at least four of the nine Justices vote for certiorari in a conference to consider certiorari petitions. Certiorari is denied in more than 99% of the cases where it is sought. If certiorari is granted, there will be new briefs and a new oral argument and a decision by the Supreme Court. If certiorari is denied, the Court of Appeals decision becomes final.

[9] *Huhmann,* at 9.

I think that it is most unlikely that the 9th Circuit would grant rehearing en banc, and the prospects for a successful certiorari petition are even more remote. We will keep the readers informed of future developments in this case, if there are any future developments.

Kudos for Huhmann's attorney

I congratulate attorney Brian Lawler for his imaginative, diligent, and successful representation of Dale Huhmann. Brian is a Lieutenant Colonel in the Marine Corps Reserve and a life member of ROA. He is an attorney in San Diego, and he has a nationwide USERRA practice. He is the author of several articles in this "Law Review" series and many other published articles.

UPDATE AUGUST 2018

This 9th Circuit decision is now published in *Federal Reporter, Third Series.* The citation is *Huhmann v. Federal Express, Inc.,* 874 F.3d 1102 (9th Cir. 2017).

Federal Express has complied with the 9th Circuit's order, paying the plaintiff and his attorney, as ordered by the court. This case is now over.