

New USERRA Class Action Lawsuit against American Airlines

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1.3.2.3—Pension credit for service time

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1.8—Relationship between USERRA and other laws/policies

***James P. Scanlan v. American Airlines Group, Inc.*, 2019 U.S. Dist. LEXIS 56293 (E.D. Pennsylvania April 2, 2019).**

This is a very recent preliminary decision by Judge Harvey Bartle III of the United States District Court for the Eastern District of Pennsylvania. Judge Bartle graduated from law school at the University of Pennsylvania and then served in the United States Army Reserve from 1966 until 1972. He was appointed to the court by President George H.W. Bush in 1991 and took senior

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "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 1500 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 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for 36 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 VRRRA 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 VRRRA 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. You can reach me by e-mail at SWright@roa.org.

status in 2011. Despite having taken senior status, so that his position could be filled by a new judge, he continues to handle a very active docket.

The plaintiff, James P. Scanlan, is a Major General in the Air Force Reserve and a member of the Reserve Organization of America (ROA).³ On the civilian side, he is a pilot for American Airlines (AA), our country's largest domestic air carrier. In the lawsuit, he claims that he and others similarly situated have not received what is due to them under the American Airlines Group One Global Profit-Sharing Plan (GPSP).

Under section 4318⁴ of the Uniformed Services Employment and Reemployment Rights Act (USERRA), a person who leaves a civilian job (federal, state, local, or private sector) for voluntary or involuntary service in the uniformed services and who meets the five USERRA conditions and then returns to the pre-service job is entitled to civilian pension credit for the time that he or she was away from the civilian job for service. A profit-sharing plan is one variety of pension plan.⁵ Scanlan is alleging that he and other AA employees (not just pilots) who left AA for short or long periods of uniformed service and returned to the airline after service have not received proper GPSP credit for their military service time.

In his opinion, Judge Bartle refers to the "putative" class of AA employees who are similarly situated to Scanlan with respect to the GPSP. "Putative" means "assumed to exist or to have existed."⁶ At this early point in the litigation, the existence of the class is assumed to exist because Judge Bartle has not yet granted or refused Scanlan's request for certification of this case for class-action treatment.

For this case to be accorded class-action treatment, the plaintiff must demonstrate that the case meets the criteria of numerosity, commonality, and representativeness. Numerosity means that there are so many persons similarly situated that it makes sense to resolve the

³ At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new "doing business as" (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

⁴ 38 U.S.C. 4318.

⁵ Please see Law Review 12008 (January 2012).

⁶ *The Merriam-Webster Dictionary*.

matter in a single case rather than expecting each affected person to bring his or her own lawsuit. Commonality means that the members in the proposed class all have essentially the same interest and the same arguments, not conflicting interests and arguments. Representativeness means that the named plaintiff's situation is typical of members of the proposed class.

The plaintiff in a proposed class action must also demonstrate that his or her lawyers are competent to handle a case of this nature. Scanlan's lawyers (listed in the court decision) include ROA life members Thomas Jarrard and Matthew Crotty and some other USERRA lawyers whose names I recognize, including Peter Romer-Friedman and R. Joseph Barton. I am confident that this case will be approved for class-action adjudication, but that has not yet happened.

Before Judge Bartle can determine if this case is appropriate for class-action treatment, much less address the merits, he was first required to address the issue of *venue*—where (in what court) should the case be tried and adjudicated.

Our nation has 93 federal judicial districts—each state has at least one and some of the larger states have two, three, or four. Pennsylvania has three districts and Texas has four. USERRA provides: “In the case of an action [to enforce USERRA] against a private employer, the case may *proceed* in the United States district court for any district in which the private employer maintains a place of business.”⁷ AA maintains a hub at the Philadelphia Airport, in the Eastern District of Pennsylvania, and Scanlan lives in that district. Accordingly, Scanlan filed his lawsuit in that district, and the case was assigned to Judge Bartle.

AA's headquarters is in Fort Worth, in the Northern District of Texas, and AA filed a motion to transfer venue of the case to that court. Federal law provides: “For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.”⁸

In his opinion, Judge Bartle cited a 3rd Circuit⁹ decision holding that in addressing a motion to move a case to a different district a District Judge must determine whether “on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum. ... The burden of establishing the need for transfer ... rests with the movant. ... the plaintiff's choice of venue should not lightly be disturbed.”¹⁰ Judge Bartle

⁷ 38 U.S.C. 4323(c)(2) (emphasis supplied).

⁸ 28 U.S.C. 1404(a).

⁹ The United States Court of Appeals for the 3rd Circuit is the federal appellate court that sits in Philadelphia and hears appeals from district courts in Delaware, New Jersey, Pennsylvania, and the United States Virgin Islands.

¹⁰ *Jumara v. State Farm Insurance Co.*, 55 F.3d 873, 879 (3d Cir. 1995).

considered AA's arguments for moving the case and Scanlan's arguments for leaving it in the Eastern District of Pennsylvania and determined that AA had not met its burden of establishing the need for a transfer. Thus, Judge Bartle denied AA's motion to transfer the case to the Northern District of Texas.

USERRA's pro-plaintiff venue provision provides that a USERRA case may *proceed* in the United States District Court for any district where the employer maintains a place of business. It is not enough that Scanlan be allowed to *file* his case in the Eastern District of Pennsylvania—USERRA allows him to litigate the whole case in that court. How does section 4323(c)(2), applicable only to USERRA cases, relate to section 1404(a), which applies to civil cases generally? I believe that the more specific USERRA provision should control.

Over almost a millennium, the courts in Great Britain, the United States, and other common law countries have developed *rules of statutory construction* to determine the meaning of statutes, constitutions, contracts, and other legal texts. The leading recent treatise on statutory construction is *Reading Law: The Interpretation of Legal Texts*, by Justice Antonin Scalia and law professor Bryan A. Garner, published by Thomson/West Publishing in 2012. In their book, Justice Scalia and Professor Garner address the "general/specific canon" as follows:

The general/specific canon, like the irreconcilability canon (see section 29), deals with what to do when conflicting provisions simply cannot be reconciled—when the attribution of no permissible meaning can eliminate the conflict. Which provision must yield? Or must they both be disregarded? Under this canon, the specific provision is treated as an exception to the general rule. Jeremy Bentham supplied the rationale: "[T]he particular provision is established upon a nearer and more exact view of the subject than the general, of which it may be regarded as a correction." Or think of it this way: the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence.¹¹

Section 4323(c)(2) of USERRA¹² deals with USERRA cases specifically. Section 1404(a) of title 28 of the United States Code deals with civil cases generally. I contend that the USERRA venue provision should control over the general provision applicable to civil cases generally. Under USERRA, Scanlan is entitled to file his case and to *proceed to adjudication* in the Eastern District of Pennsylvania.

I believe that Judge Bartle erred by applying section 1404(a) of title 28 as the controlling authority, but his error was harmless because he came to the correct bottom-line

¹¹ *Reading Law: The Interpretation of Legal Texts*, page 183 (footnotes omitted).

¹² 38 U.S.C. 4323(c)(2).

determination—that the case should remain in the Eastern District of Pennsylvania and not be transferred to the Northern District of Texas.

We will keep the readers informed of developments in this most important case about the application of USERRA to profit-sharing plans like AA's plan.