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There Need Not Be a Merger or Transfer of Assets for the New Employer To Be the Successor-in-Interest to the Old Employer

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About Sam Wright

1.1.1.9—USERRA applies to successors in interest

***Coffman v. Chugach Support Services, Inc.,* 411 F.3d 1231 (11th Cir. 2005).[3]**

***Brown v. Lincoln Property Co.,* 354 F. Supp. 3d 1276 (N.D. Fla. 2019).[4]**

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 1800 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 44 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 (VRRA—the 1940 version of the federal reemployment statute) for 38 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.

[3] This is a decision of the United States Court of Appeals for the 11th Circuit, the federal appellate court that sits in Atlanta and hears appeals from district courts in Alabama, Florida, and Georgia. The citation means that you can find this decision in Volume 411 of *Federal Reporter, Third Series,* starting on page 1231.

[4] This is a decision of the United States District Court for the Northern District of Florida, one of the district courts that is reviewed by the 11th Circuit. While a district court does not have the authority to overrule a circuit court precedent, in this case the district court correctly noted that *Congress* effectively overruled the *Coffman* precedent.

Coffman v. Chugach Support Services, Inc.

In October 1997, the Air Force awarded Del-Jen, Inc. (DJI) the Base Operating Support (BOS) contract for Tyndall Air Force Base in Florida, and DJI hired Charles Coffman (an Air Force Reservist) that same month. Coffman remained in his DJI job until November 2001, when the Air Force called him to active duty for one year, in the immediate aftermath of the terrorist attacks of September 11, 2001.

In 2002, while Coffman was on active duty, the Air Force BOS contract with DJI expired and was not renewed. The Air Force awarded the new BOS contract to Chugach Support Services, Inc. (CSSI), effective October 1, 2002. DJI became a subcontractor to CSSI as to some of the functions that it had previously performed as the prime contractor.

Coffman was aware of the transition from DJI to CSSI as he was nearing the end of his one-year active duty period, and he sent a letter to CSSI (with a copy of his resume) applying for reemployment or employment with the new BOS contractor (CSSI). The new contractor sent a transition team to Tyndall Air Force Base to interview DJI employees and otherwise to plan for the transition from DJI to CSSI. The transition team interviewed 100 DJI employees, including Coffman, and hired 97 of them, not including Coffman. Coffman was reemployed by DJI as a subcontractor, but his new DJI position was inferior in pay and status to the DJI position that he held before he was called to the colors and likely would have continued to hold but for his absence from work for uniformed service.[5]

Coffman argued (I believe correctly)[6] that CSSI was the successor-in-interest to DJI and that CSSI had inherited DJI's obligation to reemploy him.[7] CSSI argued that it was not the successor in interest to DJI because it had not merged with DJI nor had it acquired DJI's assets. The district court agreed with CSSI's argument that there can be no successorship without a merger or transfer of assets, and the district court accordingly granted CSSI's motion for summary judgment.

Coffman appealed to the 11th Circuit, which affirmed the district court. The appellate court agreed with the district court that there can be no successor in interest liability without a merger or transfer of assets. The 11th Circuit panel held:

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[5] Because Coffman met the five USERRA conditions for reemployment, he was entitled to be reemployed "in the position of employment in which the person [Coffman] would have been employed if the continuous employment of such person with the employer had not been interrupted by such [uniformed] service, or a position of like seniority, status, and pay, the duties of which the person is qualified to perform." 38 U.S.C. 4313(a)(2)(A).

[6] I discussed this case previously in Law Review 79 (2003) and Law Review 0634 (2006).

[7] USERRA's definition of "employer" includes: "any successor in interest to a person, institution, or other entity referred to in this subparagraph." 38 U.S.C. 4303(4)(A)(iv).

The question of successor in interest or successor employer under USERRA is one of first impression for this circuit. Under USERRA, "employer" is defined to include a "successor in interest" to a plaintiff's previous employer. 38 U.S.C. § 4303(4)(A)(iv) (2002). USERRA does not, however, define "successor in interest." The legislative history of USERRA states that "the Committee intends that the multi-factor analysis utilized by the court in *Leib v. Georgia-Pacific Corp.*, 925 F.2d 240 (8th Cir. 1991), is to be the model for successor in interest issues, except that the successor's notice or awareness of a reemployment rights claim at the time of merger or acquisition should not be a factor in this analysis." H.R. Rep. No. 103-65, reprinted in 1994 U.S.C.C.A.N. 2449 at 2454.

In *Leib*, the plaintiff had worked for a company named St. Regis and left his employment to serve in the Air Force. 925 F.2d at 241. After receiving an honorable discharge, he sought reemployment with Georgia-Pacific since it had purchased St. Regis's assets while he was away on active duty. *Id.* Georgia-Pacific refused to recognize the plaintiff's reemployment rights, claiming that it had only purchased St. Regis's assets and, as such, was not obligated as a successor in interest to St. Regis for purposes of the veteran's rights statute. *Id.* The government filed suit on behalf of the plaintiff. *Id.* at 242. The district court decided in favor of Georgia-Pacific, and, on appeal, the Eighth Circuit reversed the district court's judgment. *Id.* at 241.

In so doing, the court examined two distinct prior interpretations of the successor in interest language in veteran's reemployment statutes. *Id.* at 244. First, the court examined the "ownership and control" test. *Id.* at 243-44. This test looks for common ownership and control between the successor employer and the veteran's previous employer. *See id.* at 244. Second, the court examined the "business continuity" test suggested by the government. *Id.* at 245-47. This test looks at the actual business activities being conducted before and after the change in employers so that a "simple paper transaction" would not rob a veteran of his reemployment rights. *See id*. at 245. After considering both tests, the court concluded that "a multi-factor, business continuity approach [was] the most consistent with Congress'[s] intent." *Id.* This test includes an examination of "whether there is (1) substantial continuity of the same business operations, (2) use of the same plant, (3) continuity of work force, (4) similarity of jobs and working conditions, (5) similarity of supervisory personnel, (6) similarity in machinery, equipment, and production methods, and (7) similarity of products or services." *Id.* at 247.

Coffman contended that Chugach was a successor in interest to Del-Jen and, thus, was required to reemploy him under sections 4312 and 4313. Coffman argues that the district court did not utilize the *Leib* approach, but instead, focused only on the ownership and control test to conclude that Chugach was not a successor in interest to Del-Jen. Although the district court mentioned the multi-factor test, Coffman asserts that its decision relied on the fact that there was no continuity of ownership or control when Chugach became the primary contractor. Coffman contends that this was error because a review of the multi-factor test demonstrates that Chugach is a successor in interest to Del-Jen.

In response, Chugach claims that it is not the successor in interest or successor employer to Del-Jen; therefore, it is not liable to reemploy Coffman. Specifically, Chugach claims that the district court properly determined that Chugach was not Del-Jen's successor in interest because there was no predecessor-successor relationship between Chugach and Del-Jen in the form of a merger or transfer of assets. We conclude that the district court and Chugach are correct.

While we agree with Coffman that a determination of successor liability under USERRA requires an analysis under the *Leib* factors as stated by Congress, such an analysis is unnecessary and improper when no merger or transfer of assets even transpired between the two subject companies. Generally, one of the fundamental requirements for consideration of the imposition of successor liability is a merger or transfer of assets between the predecessor and successor companies. *See Kicinski v. Constable Hook Shipyard*, 168 F.2d 404, 408-09 (3d Cir. 1948) (holding that because there was no predecessor-successor relationship, defendant corporation was under no duty to reemploy nurse returning from military service who had worked for alleged predecessor company). In the present case, indisputably, there was no merger or transfer of assets between Del-Jen and Chugach.

Coffman urges this court to ignore the holding in *Kicinski* because the reemployment statute there did not contain any successor in interest language. This argument is without merit. Plainly, Congress's addition of the successor in interest language did not alter the requirement for a merger or transfer of assets between the predecessor and successor companies for consideration of successor liability. Moreover, Coffman cannot cite any case, legislative history, or authority indicating otherwise.

Coffman also implies that the equitable principles underlying USERRA and the successor in interest doctrine allow this court to overlook the lack of a predecessor-successor relationship as described above. In this regard, citing *Preyer v. Gulf Tank & Fabricating Co.*, 826 F. Supp. 1389 (N.D. Fla. 1993), a civil rights case, and *Rego v. ARC Water Treatment Co. of Pa.*, 181 F.3d 396 (3d Cir. 1999), an employment discrimination case, Coffman contends we should be mindful that successor liability is derived from equitable principles, and fairness is the prime consideration in its application. Thus, Coffman urges this court to use its equitable powers to fulfill USERRA's remedial purpose by reinstating Coffman to his pre-activation position. *See* 38 U.S.C. § 4323(e) ("The court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.").

Coffman's argument is unpersuasive. Although USERRA "is to be liberally construed for the benefit of those who left private life to serve their country," *Leib* 925 F.2d at 245 (quotation and citation omitted), and undoubtedly equitable principles underlie the doctrine of successor liability, *see United States v. Davis*, 261 F.3d 1, 53 (1st Cir. 2001), these factors are not without their limits. Further, *Rego* and *Preyer*, the very cases Coffman cites for the proposition that equitable principles underlie the imposition of

> successor liability, involved asset acquisitions or transfers between the subject predecessor and successor companies, *Rego*,181 F.3d at 399, *Preyer*, 826 F. Supp. at 1391-93, as did *Leib*. 925 F.2d at 241. Not surprisingly, Coffman fails to cite one case in which a court imposed successor liability when no predecessor-successor relationship existed.
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> Because there is no predecessor-successor relationship between Del-Jen and Chugach, Chugach is not the successor in interest or successor employer to Del-Jen and, as such, owed no duty under sections 4312 and 4313 of USERRA to reemploy Coffman. Accordingly, we conclude that the district court properly granted summary judgment in favor of Chugach as to Coffman's reemployment claim.[8]

A party who loses at the federal Court of Appeals level can apply to the United States Supreme Court for certiorari (discretionary review). The deadline for doing so is 90 days after the entry of the Court of Appeals judgment.[9] Coffman did not apply for certiorari.[10] The Court of Appeals decision is dated June 8, 2005. Thus, *Coffman* became final 91 days later, on September 7, 2005.

Congress amends USERRA in response to *Coffman*

In 2010, in direct response to the *Coffman* decision, Congress amended USERRA's definition of "employer" by adding language defining the term "successor in interest."[11] The legislative history of the 2010 amendment shows that Congress intended the amendment to respond to and overrule *Coffman:*

> Section 4303 of title 38, U.S.C., uses a broad definition of the term "employer" and includes in subsection (4)(A)(iv) a definition of a "successor in interest." In regulations, the Department of Labor has provided that an employer is a "successor in interest" where there is a substantial continuity in operations, facilities, and workforce from the former employer. It further stipulates that the determination of whether an employer is a successor in interest must be made on a case-by-case basis using a multifactor test (20 C.F.R. 1002.35). One Federal court, however, in a decision made prior to the promulgation of the regulation, held that an employer could not be a successor in interest unless there was a merger or transfer of assets from the first employer to the second.

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[8] *Coffman,* 411 F.3d at 1236-38.

[9] Supreme Court Rule 13.1.

[10] Applying for certiorari is always a long shot. The Supreme Court denies certiorari in more than 99% of the cases where it is sought. At least four of the nine Justices must vote for certiorari, or it is denied. The best way to get certiorari is to point to a conflict among the circuits—that different Courts of Appeals have ruled inconsistently on the same legal question. At the time (2005), there was no conflict among the circuits, because no other circuit had addressed the question of whether there can be successor in interest liability without a merger or transfer of assets. Coffman's attorney logically concluded that the chance of getting the Supreme Court to grant certiorari was so small that applying for certiorari was not worth the substantial cost.

[11] Veterans' Benefits Act of 2010, Public Law 111-275, section 702, 124 Stat. 2864, 2887-88 (2010).

(*See Coffman v. Chugach Support Services, Inc.,* 411 F.3d 1231 (11th Cir. 2005); *but see Murphree v. Communications Technologies, Inc.,* 460 F. Supp. 2d 702 (E.D. La. 2006) applying 20 C.F.R. 1002.35 and rejecting the *Coffman* merger or transfer of assets requirement.

Senate Bill

Section 402 of H.R. 1037 [in the form that it passed the Senate], as amended, would amend section 4303 of title 38, U.S.C., to clarify the definition of "successor in interest" by incorporating language that mirrors the regulatory definition adopted by the Department of Labor.

House Bill

The House Bills contain no comparable provision.

Compromise Agreement

Section 702 of the Compromise Agreement follows the Senate bill.[12]

Brown v. Lincoln Property Co.

Michael Brown, a Navy Reservist, worked for Lincoln Property Company (LPC) as a maintenance worker at a student apartment complex. He left his LPC job for six months of active duty in the Navy. He returned from active duty to find that he had no job.

During Brown's six months of active duty, LPC lost the management contract to Cardinal Group Management Midwest (CGMM). The new management company hired most of the LPC employees, but not Brown. When Brown returned from his active duty assignment, he applied for reemployment with both LPC and CGMM, but he was not reemployed. He sued both companies for violating USERRA.

CGMM filed a motion for summary judgment, citing *Coffman* and claiming that it could not be the successor in interest to LPC because it had neither merged with LPC nor acquired any of that company's assets.

Judge Robert L. Hinkle denied CGMM's summary judgment motion, holding that Congress had "legislatively overruled" *Coffman* when it enacted the 2010 amendment. Judge Hinkle's scholarly decision includes the following paragraphs:

[12] 2010 Amendments: Joint Explanatory Statement, September 28, 2010), 156 Cong. Rec. S7656-02, 2010 WL 3767475. This legislative history in included in Appendix E-5 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted language can be found on pages 993-94 of the 2020 edition of the *Manual.*

Cardinal asserts it had no obligation to employ Mr. Brown because it was not the prior management company's successor in interest.

For most purposes, a company that gets a contract to perform the same work previously done by a different, otherwise-unrelated company is not the prior company's successor in interest. And this is true even if the new company chooses to hire most or all of the prior company's workforce and in essence simply takes over the operation.

In *Coffman v. Chugach Support Services*, 411 F.3d 1231 (11th Cir. 2005), the Eleventh Circuit applied this principle under USERRA. There, as here, the plaintiff was called up for active duty and returned to find his employer had lost the relevant contract to a new, otherwise-unrelated contractor. There, as here, the new contractor chose not to hire the plaintiff.

Coffman cited *Leib v. Georgia-Pacific Corp*., 925 F.2d 240 (8th Cir. 1991), in which the Eighth Circuit identified factors to be considered in determining whether a company was a successor in interest under USERRA. The factors included, for example, continuity of business operations and workforce. But *Coffman* held the *Leib* factors comprised only the second step in a two-step analysis: first, whether there was a merger or transfer of assets from the prior employer to the alleged successor; and second, only if the answer was yes, whether the *Leib* factors were met. Because there had been no merger or transfer of assets, *Coffman* held there was no successor in interest.

Had *Coffman* remained the law, Cardinal would be entitled to summary judgment on the failure-to-reemploy claim here. At least as shown by this record, there was no merger or transfer of assets meeting the first step of the *Coffman* analysis.

But Congress responded to *Coffman* by changing the law. In the Veterans' Benefits Act of 2010, Pub. L. No. 111-275, section 702, 124 Stat. 2864, 2887-88 (2010), Congress adopted a definition of the previously undefined term "successor in interest." The new definition provides:

> Whether the term "successor in interest" applies . . . shall be determined on a case-by-case basis using a multi-factor test that considers the following factors:
>
> (I) Substantial continuity of business operations.
>
> (II) Use of the same or similar facilities.
>
> (III) Continuity of work force.
>
> (IV) Similarity of jobs and working conditions.
>
> (V) Similarity of supervisory personnel.
>
> (VI) Similarity of machinery, equipment, and production methods.
>
> (VII) Similarity of products or services.

Id. § 4303(4)(D)(i). These are the *Leib* factors, almost verbatim—the second step under *Coffman*. The statutory definition pointedly does *not* include *Coffman*'s first step.

> That Congress intended to disapprove *Coffman* is clear from this statutory language. And the legislative history dispels any doubt about whether Congress was aware of this issue—of *Coffman*'s insistence that a member of the military must satisfy not only the *Leib* factors but also a separate merger-or-transfer-of-assets test. The contemporaneous explanation for the proposed (and now enacted) statutory definition was that it tracked a Department of Labor rule—a rule adopted after "[o]ne Federal court," the Eleventh Circuit in *Coffman*, held that an employer could be a successor in interest only if there was "a merger or transfer of assets from the first employer to the second." 156 Cong. Rec. H7337-38 (daily ed. Sept. 29, 2010) (explanatory statement of Committee on Veterans' Affairs Chairman Rep. Filner on H.R. 3219, as amended), 156 Cong. Rec. H7321, at *H7337-38 (Westlaw), 2010 WL 3911810, at *H7337-38. *See also* S. Rep. No. 111-71, at 26 (2009) (providing the same explanation).
>
> The bottom line is this. *Coffman* has been legislatively overruled. Whether an employer is a successor in interest of a prior employer depends on the factors now listed in the statute. The record would support a finding that, under those factors, Cardinal was a successor in interest of the management company that employed Mr. Brown before he was called to active duty. Cardinal does not assert, as a basis for summary judgment, that Mr. Brown has not met those factors.[13]

Brown survived the employer's motion for summary judgment. I congratulate Brown's attorney, Thomas L. Dickens, III, of Morgan & Morgan PA, and his mentor Marie A. Mattox, Esq., of the Law Office of Marie A. Mattox PA, or their imaginative, diligent, and successful representation of this reservist.

Importance of successor in interest liability going forward

Because of the lengthy shutdowns necessitated by the COVID-19 emergency, many companies (especially in the retail, restaurant, travel, and hospitality industries) are in serious financial trouble, and some will not survive. As a result, many National Guard and Reserve service members who are away from their civilian jobs for military duty during the emergency will return from military duty to find that their pre-service employers no longer exist, at least not with the same name and same ownership. In this scenario, the service member should apply for reemployment with the new employer as well as the old employer (if it still exists).

Here is USERRA's definition of "employer" and "successor in interest":

> **(4)**
> **(A)** Except as provided in subparagraphs (B) and (C), the term "employer" means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including—

[13] *Brown,* 354 F. Supp. 3d at 1278-79.

(i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;
(ii) the Federal Government;
(iii) a State;
(iv) any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph; and
(v) a person, institution, organization, or other entity that has denied initial employment in violation of section 4311.
(B) In the case of a National Guard technician employed under section 709 of title 32, the term "employer" means the adjutant general of the State in which the technician is employed.
(C) Except as an actual employer of employees, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)) shall be deemed to be an employer only with respect to the obligation to provide benefits described in section 4318.
(D)
(i) Whether the term "successor in interest" applies with respect to an entity described in subparagraph (A) for purposes of clause (iv) of such subparagraph shall be determined on a case-by-case basis using a multi-factor test that considers the following factors:
(I) Substantial continuity of business operations.
(II) Use of the same or similar facilities.
(III) Continuity of work force.
(IV) Similarity of jobs and working conditions.
(V) Similarity of supervisory personnel.
(VI) Similarity of machinery, equipment, and production methods.
(VII) Similarity of products or services.
(ii) The entity's lack of notice or awareness of a potential or pending claim under this chapter at the time of a merger, acquisition, or other form of succession shall not be considered when applying the multi-factor test under clause (i).[14]

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ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard,

[14] 38 U.S.C. 4303(4).

are a cost-effective way to meet our nation's defense needs. Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

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