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ROA Members File Class Action Lawsuit against Southwest Airlines

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On July 14, 2017, two Reserve Officers Association (ROA) members, Thomas G. Jarrard[3] and Matthew Z. Crotty,[4] along with two other lawyers,[5] filed a lawsuit in the United States District

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1500 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, along with 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 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 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 or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers, including the lawyers who filed the lawsuit detailed in this article.

[3] Thomas G. Jarrard recently retired from the Marine Corps Reserve and is a life member of ROA. He has a nationwide practice representing service members and veterans with claims under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws, based out of his office in Spokane, Washington. Thomas was the co-author, with me, of the amicus curiae (friend of the court) brief filed by ROA in the United States Supreme Court in 2010 in the case of *Staub v. Proctor Hospital,* 562 U.S. 411 (2011). Thomas is also the author of several of our "Law Review" articles, including Law Review 10082 (October 2010). Thomas

Court for the Northern District of California, San Francisco Division.[6] The named plaintiff is Jayson Huntsman.[7] The named defendant is Southwest Airlines (Southwest).[8] In the complaint that they filed, the four lawyers allege that Southwest has violated and is still violating the Uniformed Services Employment and Reemployment Rights Act (USERRA)[9] in two ways.

As I explain in considerable detail below, the complaint alleges that Southwest has violated and is violating section 4318 of USERRA[10] in that it has made and continues to make inadequate contributions to the pension accounts of individual pilots like Huntsman, for periods when they are away from their civilian jobs at Southwest for voluntary or involuntary service in the uniformed services. The complaint also alleges that Southwest has violated and is violating section 4316(b) of USERRA[11] concerning a pilot's continuing accrual of sick leave benefits while he or she is away from Southwest for uniformed service.

In their complaint, the attorneys have asked the court to approve this case for class action treatment. They allege that Jayson Huntsman is a proper representative for a "class of current and former Southwest pilots" who did not receive adequate pension contributions from the company and who did not receive, but should have received, continuing sick leave accrual while away from their Southwest jobs for service.

Class action lawsuit

Under the Federal Rules of Civil Procedure (FRCP), a plaintiff must show five conditions for the judge to approve the case for class action treatment:

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would like to hear from you if you are a member of the proposed class in the lawsuit discussed in this article. His e-mail is TJarrard@att.net.

[4] Matthew Z. Crotty is a Lieutenant Colonel in the Washington Army National Guard and a life member of ROA. He is also based in Spokane, Washington and has a nationwide practice representing veterans and service members.

[5] Jahan C. Sagafi and Peter Romer-Friedman.

[6] Under section 4323(c)(2) of USERRA, 38 U.S.C. 4323(c)(2), an individual who claims that his or her USERRA rights have been violated by a private employer can sue that employer in the United States District Court for any district where the employer maintains a place of business. Southwest maintains a place of business at the San Francisco airport and another at the Oakland airport, and both of those business places are in the Northern District of California.

[7] Huntsman served on active duty in the Air Force for 12 years and left active duty in early 2012, then affiliated with the Air Force Reserve as a traditional reservist. He began his career as an airline pilot at Southwest Airlines in February 2012.

[8] According to its own website, Southwest is the nation's largest airline, computed by the number of passenger miles flown.

[9] As I have explained in detail in Law Review 15067 (August 2015) and in footnote 2 of this article, Congress enacted USERRA and President Bill Clinton signed it into law on October 13, 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940.

[10] 38 U.S.C. 4318.

[11] 38 U.S.C. 4316(b).

a. Numerosity

The plaintiff's lawyers must demonstrate that the number of affected persons is so great that it serves the interests of justice and judicial economy to adjudicate a single case, rather than expecting each to file his or her own lawsuit. In their complaint, the attorneys allege that more than 1,000 Southwest pilots are members of the proposed class.

b. Commonality

The plaintiff's attorneys must show that the members of the proposed class have common issues of fact and law, so that it is practicable to adjudicate the case as a class action.

c. Typicality

The attorneys must demonstrate that Jayson Huntsman's facts are typical of the facts of class members generally, so that Huntsman is an appropriate lead plaintiff.

d. Adequacy

The attorneys must demonstrate that Jayson Huntsman is an adequate representative of the class.

e. Competence

The attorneys must demonstrate that they (the attorneys) are competent to serve as counsel in a complex case like this.

I am confident that the judge will find that these five criteria are met and will approve this case for class action treatment. After that happens, the judge will order that the class members be notified by appropriate means, probably by mail. Each class member will then be given a reasonable but limited time to opt out of the class.

A class member might opt out if he or she fundamentally disagrees with the premise of the lawsuit or if he or she wants to bring his or her own lawsuit. Typically, only a handful of class members choose to opt out. The class action mechanism is a great deal for class members, in that they stand to benefit if the case is successful but bear no risks or costs if the case fails.

The pension claims

The complaint alleges that Southwest has violated and continues to violate section 4318 of USERRA, which reads as follows:

- (a)(1)(A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person *reemployed under this chapter* shall be determined under this section.
    - (B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter [38 USCS §§ 4301 et seq.].
        - (2)(A) A person *reemployed under this chapter* shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.
    - (B) Each period served by a person in the uniformed services shall, *upon reemployment under this chapter*, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.

- (b)(1) An employer *reemploying a person under this chapter* shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated--
    - (A) by the plan in such manner as the sponsor maintaining the plan shall provide; or
    - (B) if the sponsor does not provide--
        - (i) to the last employer employing the person before the period served by the person in the uniformed services, or
        - (ii) if such last employer is no longer functional, to the plan.
            - *(2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective*

deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.

- (3) *For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed--*
  - *(A) at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or*
  - (B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

- (c) Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.[12]

Section 4318 applies to a person who has been "reemployed under this chapter" [USERRA]. That means that the person must have met all five of the USERRA eligibility conditions:

a. Must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary uniformed service.[13]
b. Must have given the employer prior oral or written notice.[14]
c. Must not have exceeded the five-year cumulative limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment.[15]

[12] 38 U.S.C. 4318 (emphasis supplied).
[13] 38 U.S.C. 4312(a).
[14] 38 U.S.C. 4312(a)(1).

d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.[16]
e. After release from the period of service, must have made a timely application for reemployment with the pre-service employer.[17]

Under section 4302 of USERRA, this federal law is a floor and not a ceiling on the rights of those who are serving or have served our country in uniform. Section 4302 provides:

- (a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is *more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.*

- (b) This chapter supersedes any State law (including any local law or ordinance), *contract, agreement*, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.[18]

The Southwest pilots (including Huntsman and the members of the proposed class) are represented by a labor union called the Southwest Airlines Pilots Association (SWAPA). Many years ago, Southwest and SWAPA negotiated a collective bargaining agreement (CBA) that governs the terms and conditions of employment for Southwest pilots, and that CBA is periodically renegotiated and renewed.

Under section 4318 of USERRA, a Southwest pilot who is away from his or her Southwest employment for uniformed service, and who meets the five USERRA conditions and is reemployed by the airline after release from the period of service, is entitled to be treated for seniority purposes as if he or she had been continuously employed by the airline during the period that he or she was away from work for service, with certain exceptions and limitations set forth in the text of section 4318 (quoted above). The CBA between Southwest and SWAPA must be consulted in determining how the individual pilot would have been treated for pension purposes if he or she had remained continuously employed. Under section 4302 of USERRA (quoted above), the CBA can give the individual service member or veteran *greater or additional rights* than the rights conferred by USERRA, but the CBA cannot take away USERRA rights and cannot impose additional prerequisites upon the exercise of USERRA rights.

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[15] 38 U.S.C. 4312(c). Under that subsection, there are nine exemptions—that is, there are nine kinds of service that do not count toward exhausting the individual's five-year limit. Please see Law Review 16043 (May 2016) for a detailed discussion of USERRA's five-year limit.

[16] 38 U.S.C. 4304. Disqualifying bad discharges include punitive discharges awarded by court martial for serious criminal misconduct and other-than-honorable administrative discharges.

[17] After a period of service of 181 days or more, the deadline to apply for reemployment is 90 days after the date of release. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

[18] 38 U.S.C. 4302 (emphasis supplied).

Many years ago, the CBA between Southwest and SWAPA established a defined contribution pension plan[19] for the pilots. For years up to and including 2016, the individual pilot was permitted but not required to contribute up to 9.3% of his or her annual Southwest compensation to the pilot's individual pension account in the plan.[20] If the pilot made the 9.3% contribution, the airline would make a matching contribution of the same amount, into the pilot's account.

Starting this year (2017), Southwest makes an automatic contribution to the individual pilot's account—not deducted from the pilot's compensation—and the individual pilot is no longer required or permitted to make individual contributions that are matched by the airline. In 2017, the airline's contribution is 13.4% of the pilot's annual compensation. In 2018, the airline's contribution will be 14.2%. In 2019, the airline's contribution will be 15%.

The current CBA expires in 2019. The arrangement for 2020 and beyond will be established in the next CBA.

Southwest complies with section 4318 of USERRA for periods of uniformed service of 31 days or more, but not for periods of service of 30 days or fewer.[21] USERRA, and specifically section 4318 of USERRA, applies to short periods of uniformed service (like drill weekends and two-week annual training periods) as well as longer periods, and to defined contribution pension plans as well as defined benefit plans.[22]

Section 4318 requires Southwest to treat the individual pilot (like Huntsman) as if he or she had been continuously employed during a period of uniformed service, including a short period like a drill weekend or a traditional two-week annual training tour. For 2016 and prior years, this means that the airline must notify the pilot, upon his or her return to work after a short tour of military training or service, of the amount that the individual *would have earned* from the airline but for the interruption of civilian employment caused by the short tour of service. For 2016 and prior years, the airline must give the individual the opportunity to contribute 9.3% of those imputed earnings, and the airline must then match the individual's make-up contribution.

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[19] A defined contribution pension plan is to be distinguished from a defined benefit plan, sometimes called a traditional pension. In a defined contribution plan, unlike a defined benefit plan, there is an account in the name of each participating employee or retiree. Employer and employee contributions are put in that individual account. In a defined contribution plan, the amount available for the individual's retirement depends upon the amount placed in the employee's account during his or her employment and on the performance of the investments.

[20] These contributions are made pre-tax, under the Internal Revenue Code. For example, let us say (for ease of computation) that the pilot's annual compensation was $100,000. In that case, the pilot's contribution to the pension account would be $9,300, or 9.3% of the annual compensation. In that case, the pilot would pay federal income tax on $90,700, not $100,000.

[21] As a traditional reservist, Huntsman performs many periods of service, like drill weekends and traditional two-week annual training tours, that last for fewer than 31 days. The same is true for the other members of the proposed class.

[22] I have addressed this issue in many previous "Law Review" articles, including Law Reviews 0703 (January 2007), 12030 (March 2012), 12061 (June 2012), 13136 (October 2013), 13137 (October 2013), 14022 (February 2014), 16025 (April 2016), 16038 (May 2016), 16053 (June 2016), 16054 (June 2016), 16094 (September 2016), 17047 (May 2017), and 17051 (May 2017).

For 2017, 2018, and 2019 (and possibly later years, depending on the wording of the next CBA between Southwest and SWAPA), the airline must make its required contribution based on a percentage of the imputed earnings.

A commercial airline pilot typically works and is paid for 70-90 hours per month, depending upon the availability of work at the pilot's airline and the pilot's own desires about how many hours to work. At a unionized airline like Southwest, each pilot (First Officer or Captain) submits a proposed schedule each month, for the following month. Accommodating the individual's requested schedule depends upon seniority with the airline. A pilot with lots of seniority will largely get the schedule that he or she requests. For a junior pilot with little seniority, the pilot's schedule will bear little or no resemblance to his or her request.

Let us assume that Huntsman submitted his proposed schedule (bid) in January 2013 for February 2013. In the bidding process, Huntsman was scheduled to fly 80 hours in February 2013, but one day of that schedule conflicted with his scheduled drill weekend in the Air Force Reserve. Huntsman was scheduled to fly for Southwest for eight hours on Saturday, February 23, 2013, but the Air Force had scheduled him to perform inactive duty training on that day. Accordingly, Huntsman exercised his USERRA right to take unpaid but job-protected military leave on that day. As a result, Huntsman worked and was paid for 72 hours, rather than 80 hours, during February 2013.

Under section 4318 of USERRA, Huntsman was entitled and is entitled to make a pre-tax contribution to his pension account, in the amount of 9.3% of what he *would have earned* during those eight hours, and Southwest is then required to match Huntsman's make-up contribution. Southwest and other airlines, and other employers, have protested that it is "too hard" to make these computations and payments for short and recurring periods of Reserve and National Guard training, but "too hard" is not a defense to the duty to comply with USERRA. This argument has been made, and has prevailed, in lawsuits against American Airlines, United Airlines, Federal Express, and other employers. I predict that Huntsman and the class will be successful in this argument against Southwest.

The furlough or leave of absence clause claims

In his complaint, Huntsman has also alleged that Southwest has violated and is violating section 4316(b)(1) of USERRA, which provides:

> (b) (1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be--

- (A) deemed to be on furlough or leave of absence while performing such service; and

- (B) *entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence* under a contract, agreement,

> policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.[23]

Essentially the same "furlough or leave of absence" language was included in the VRRA, before the enactment of USERRA in 1994. USERRA's legislative history includes the following paragraphs about the meaning of section 4316(b)(1):

> Section 4315(b) [later renumbered as 4316(b)] would reaffirm that a departing serviceperson is to be placed on a statutorily-mandated military leave of absence while away from work, regardless of the employer's policy. Thus, terminating a departing serviceperson, or forcing him or her to resign, even with a promise of reemployment, is of no effect. *See Green v. Oktibbeha County Hospital,* 526 F. Supp. 49 (N.D. Miss. 1981); *Winders v. People Express Airlines, Inc.,* 595 F. Supp. 1512, 1518 (D.N.J. 1984), *affirmed,* 770 F.2d 1078 (3rd Cir. 1985).
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> Accordingly, while away on military leave, the servicemember would be entitled to participate in whatever non-seniority related benefits are accorded employees on non-military leaves of absence. *See Winders, supra.* In contrast, benefits which are seniority based would not be limited to the treatment accorded employees on non-military leaves of absence, but are to be accorded, after reemployment, as if the servicemember had remained continuously employed, under the escalator principle.
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> The Committee [House Committee on Veterans' Affairs] intends to affirm the decision in *Waltermyer v Aluminum Company of America,* 804 F.2d 821 (3rd Cir. 1986) that, to the extent the employer policy or practice varies among various types of non-military leave of absence, the most favorable treatment accorded any particular leave would also be accorded the military leave, regardless of whether the non-military leave is paid or unpaid. Thus, for example, an employer cannot require servicemembers to reschedule their work week because of a conflict with reserve or National Guard duty, unless all other employees who miss work are required to reschedule their work. *Cf. Rumsey v. New York State Department of Corrections Services,* 124 LRRM 2914 (N.D.N.Y. 1987). However, servicemembers are not entitled to receive benefits beyond what they would have received had they remained continuously employed.
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> The last sentence of this subsection would require the employee to pay his or her share of the cost of the continued benefit only if that is a requirement for all other employees

[23] 38 U.S.C. 4316(b)(1) (emphasis supplied).

on non-military leave of absence. Insurance provided by an employer would, however, be treated as provided in subsection (c) [now section 4317].[24]

Section 4331 of USERRA[25] gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed USERRA regulations in the *Federal Register* in September 2004. After considering the comments received and making a few adjustments, DOL published the final USERRA regulations in the *Federal Register* in December 2005. In January 2006, these regulations were incorporated into the *Code of Federal Regulations* (CFR), at part 1002. Three sections of the DOL USERRA regulations address section 4316(b)(1), as follows:

> **§ 1002.149 What is the employee's status with his or her civilian employer while performing service in the uniformed services?**
>
> During a period of service in the uniformed services, the employee is deemed to be on furlough or leave of absence from the civilian employer. In this status, the employee is entitled to the non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status, and pay that are on furlough or leave of absence. Entitlement to these non-seniority rights and benefits is not dependent on how the employer characterizes the employee's status during a period of service. For example, if the employer characterizes the employee as "terminated" during the period of uniformed service, this characterization cannot be used to avoid USERRA's requirement that the employee be deemed on furlough or leave of absence, and therefore entitled to the non-seniority rights and benefits generally provided to employees on furlough or leave of absence.[26]
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> **§ 1002.150 Which non-seniority rights and benefits is the employee entitled to during a period of service?**

- (a) The non-seniority rights and benefits to which an employee is entitled during a period of service are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of the employee's employment and those established after employment began. They also include those rights and benefits that become effective during the employee's

[24] House Committee Report, April 28, 1993, H.R. Rep. No. 103-65, Part 1, reprinted in Appendix B-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on pages 703-04 of the 2017 edition of the *Manual.*

[25] 38 U.S.C. 4331.

[26] 20 C.F.R. 1002.149 (bold question in original).

period of service and that are provided to similarly situated employees on furlough or leave of absence.

- (b) If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be "comparable" to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

- (c) As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on a military leave of absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.[27]

§ 1002.151 If the employer provides full or partial pay to the employee while he or she is on military leave, is the employer required to also provide the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?

- Yes. If the employer provides additional benefits such as full or partial pay when the employee performs service, the employer is not excused from providing other rights and benefits to which the employee is entitled under the Act.[28]

In his complaint, Huntsman alleges that Southwest pilots who are away from their jobs for non-military leaves, including jury leave and union leave, continue accruing sick leave from the airline while on such leave, but pilots who are away from work for military leave periods of comparable duration do not continue accruing sick leave while on military leave. Huntsman alleges that this disparate treatment of military leave violates USERRA's "furlough or leave of absence" clause. I believe that this is a strong argument, and I predict that it will prevail.

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

Updated: October 2019

In October 2019 this lawsuit settled on terms that are very favorable to the SWA pilots who serve in the National Guard or Reserve. Please see Law Review 19093 (October 2019).

[27] 20 C.F.R. 1002.150 (bold question in original).
[28] 20 C.F.R. 1002.151 (bold question in original).