Docket No. 15-56744

In the

United States Court of Appeals

for the

Ninth Circuit

DALE HUHMANN,
an individual,
Plaintiff-Appellee,

v.

FEDERAL EXPRESS CORPORATION,
a Delaware corporation, dba Federal Express,
Defendant-Appellant.

Appeal from a Decision of the United States District Court for the Southern District of California, Case No. 3:13-cv-00787-BAS-NLS · Honorable Cynthia A Bashant

BRIEF OF APPELLEE

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1. STATEMENT OF JURISDICTION

The basis for jurisdiction at the District Court was founded on federal question jurisdiction, 28 U.S.C. §1331, as conferred by 38 U.S.C. §4323(b)(3). The basis for this appeal is 28 U.S.C. §1291.

2. STATEMENT OF ISSUES

A. Did the District Court properly apply USERRA's "escalator principle" in determining that Huhmann was eligible for the higher of two signing bonuses and entering judgment in favor of Huhmann?

B. Did the District Court properly reject FedEx's argument that the Railway Labor Act required arbitration of Huhmann's USERRA claim?

3. STATEMENT OF THE CASE

In February 2003, Plaintiff-Appellee Dale Huhmann, was a FedEx 727 Second Officer (727 S/O) and had just been selected to upgrade into the MD-11 aircraft as a First Officer (MD-11 F/O) when he answered the call of duty and took a leave of absence from FedEx for military service. Huhmann spent more than three years on active duty flying combat missions in support of Operations Iraqi Freedom and Enduring Freedom. He returned to FedEx in December 2006 after his service to his country was complete and began training as an MD-11 First Officer (MD-11 F/O) shortly thereafter. The welcome and thanks he received from FedEx upon his return? Being shortchanged $10,300 in a signing bonus that he

unquestionably would have earned had he not left for military service and that FedEx itself said pilots on military leave would receive in its entirety. To further undercut FedEx's untenable position on this issue, FedEx considered Huhmann an MD-11 F/O for purpose of his retirement contributions and contributed to Huhmann's retirement plan based on the MD-11 F/O rate of pay beginning on May 24, 2003 - the date he would have completed training in the MD-11.

In refusing to pay Huhmann $10,300 in signing bonus compensation, FedEx violated the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). And, instead of owning up to what it did, FedEx has shirked its responsibilities for more than nine years by asserting the same baseless arguments to the Department of Labor, the Magistrate Judge, the District Judge, and now this Court. In so doing, FedEx more than once has called into question the integrity of the Appellee and his counsel (both of whom are or were senior military officers) and has made numerous blatant misrepresentations along the way. Specifically:

- The First Amended Complaint (FAC) alleges a claim for discrimination under [USERRA] 38 U.S.C. § 4311(a). Dkt 8-1, p.3. FALSE.

- On June 28, 2013, Huhmann filed a FAC alleging FedEx discriminated against Huhmann under § 4311(a) of USERRA. *Id*., p.13. FALSE.
- The FAC showed Huhmann challenged the interpretation and application of the signing bonus letter. *Id*., p. 21. FALSE.
- FedEx and Huhmann had agreed to try the case by stipulated facts, and FedEx was surprised when Huhmann changed his mind at the last minute. *Id*., p. 24. FALSE.[1]
- As a matter of law, the escalator principle only applies to a seniority-based bonus. *Id*. (emphasis in original). FALSE.
- Huhmann sued for discrimination under § 4311(a) of USERRA. *Id*., p. 25. FALSE.
- In order for the escalator principle to be applicable here, and for Huhmann to be entitled to the larger bonus under USERRA, the signing bonus had to be a seniority-based benefit. *Id*., p. 40. FALSE.

[1] Although Appellee is hesitant to enter the morass with FedEx's mud-slinging, this comment is not only factually inaccurate, it is a bald-faced lie, and FedEx knows it. The parties agreed to file cross-motions for summary judgment. Huhmann never agreed to "try the case by stipulated facts." Although it is beyond the purview of this Court to reconcile this issue, Appellee felt it imperative to set the record straight as he and his counsel, both Lieutenant Colonels in the Air Force and Marine Corps respectively, do not take kindly to having their integrity called into question in a public forum.

This case is actually very simple, and the District Court properly saw it the same way; but for Huhmann's military service, he would have been an MD-11 F/O, and USERRA's reemployment provisions and the "escalator principle" are the guiding factors in this analysis. Despite FedEx's continued efforts to obfuscate the one issue at bar by making irrelevant and unsupportable arguments every chance it gets, the reality is that the facts of this case and the law to which they apply are clear and weigh unequivocally in Huhmann's favor. Appellee is confident that this Court will agree and will affirm the District Court's entry of judgment for Mr. Huhmann.

4. STATEMENT OF FACTS

Plaintiff-Appellee was hired by FedEx on July 1, 2001 as a 727 Second Officer ("727 S/O"). ER, Tab 2, p.2. At the time he was hired, Huhmann was in the United States Air Force Reserve ("USAFR"), having been commissioned in 1985. *Id*. Huhmann retired from the USAFR as a Lieutenant Colonel in September 2006. *Id*.

Huhmann was selected to upgrade from the 727 S/O position to the MD-11 F/O position with a class date of February 19, 2003. *Id*. The 727 is classified as a narrow-body aircraft, and the MD-11 is classified as a wide-body aircraft. *Id*. The wide-body aircraft pay is higher than that for the narrow-body aircraft. *Id*. On February 7, 2003, Huhmann was mobilized on active duty in support of Operation

Iraqi Freedom and Operation Enduring Freedom, and served honorably until his discharge on August 31, 2006. *Id*. Huhmann exercised his rights under USERRA to take 90 days before reporting back to work with FedEx, which he did on December 1, 2006. *Id*. p.3.

Huhmann began training as an MD-11 F/O on December 7, 2006 and successfully completed his training. He was activated as an MD-11 F/O on February 22, 2007. *Id*. Huhmann was designated an MD-11 F/O for imputed earnings and retirement contribution purposes on May 24, 2003, the date on which he would have completed his first MD-11 F/O training but for his military service obligations. *Id*.; ER Tab 6, p. 21, lns 1-8. During his training, Huhmann never failed an academic event, simulator, or check ride. ER Tab 2, p. 6; Tab 6, p. 21, lns 11-22.

On August 26, 2006, FedEx authorized the payment of a signing bonus ("Bonus Letter") to its pilots who were in an active pay status from June 1, 2004 through October 30, 2006 (the "amendable period"). ER Tab 2, pp. 3-4; Tab 4. Pilots on military leave during the amendable period were considered to be in active pay status for the purposes of the signing bonus calculation. ER Tab 2. p.4; Tab 4. The bonus for 727 S/Os was $7,400 and the bonus for MD-11 F/Os was $17,700. ER Tab 2, p. 4; Tab 4. Mr. Huhmann was paid $7,400 in two installments based on the 727 S/O bonus amount. ER Tab 2, p. 4; Tab 6, p. 18, lns 6-9.

On June 28, 2013, Appellee filed his First Amended Complaint ("FAC") alleging violations of USERRA. ER Tab 12. On April 1, 2015 the Court held a bench trial, and on April 9, 2015, entered judgment against FedEx and for Plaintiff-Appellee in the amount of $10,300 plus pre-judgment interest, attorneys' fees, and costs. FedEx filed its Notice of Appeal on November 12, 2015. ER Tab 3.

5. SUMMARY OF ARGUMENT

Congress enacted USERRA in 1994 as a successor to a long history of statutes designed to protect the interests of servicemembers when called to duty in support of their country. One of the primary purposes of USERRA is "to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a). USERRA affords broad protections to servicemembers against employment discrimination, providing that members "shall not be denied … any *benefit of employment* by an employer on the basis of that membership." 38 U.S.C. 4311(a). "The Committee intends that these anti-discrimination provisions be broadly construed and strictly enforced and the intent has always been to have an expansive interpretation." H.R. Rep. No. 103-65, at 19 (1993), reprinted in 1994 U.S.C.C.A.N. 2449, 2452, 2456.

The District Court properly applied the "reasonable certainty" test to USERRA's "escalator principle" in determining that Appellee was entitled to and should have been paid the $17,700 signing bonus due to MD-11 F/Os. FedEx rests

much of its argument on a self-contrived assertion that Huhmann's entire case was a Section 4311 discrimination claim and therefore the District Court erred in applying the "escalator principle" to it. This assertion is baseless; all discrimination claims are covered by Section 4311, and the specific "benefits of employment" mentioned by Section 4311 are defined in other sections of USERRA. In this case, the benefit of employment that Appellee was denied was a signing bonus that was based on the proper reemployment position Appellee would have attained but for his military service (the MD-11 F/O position), and Sections 4312 and 4313 provide the framework for the analysis. Appellee never alleged that his claim arose solely under the catch-all anti-discrimination provisions of Section 4311, and he unequivocally pled facts to support his allegations that but for his military service he would have been an MD-11 F/O in May 2003 and was entitled to the pay, *bonuses,* and other benefits of employment as if he were continuously employed by FedEx. These allegations clearly encompass more than Section 4311, and the District Court properly analyzed Huhmann's claims under Sections 4312 and 4313, as well as 4311, as the vast majority of courts before it have done with similar results. FedEx's ill-fated effort to pigeonhole Appellee's arguments into one section of USERRA so it could attack them again is meritless.

Moreover, FedEx's own conduct in paying Huhmann's retirement contributions based on the imputed earnings of an MD-11 F/O beginning on May

24, 2003 conclusively prove that FedEx knew USERRA required this treatment. FedEx cannot now be heard to complain that Appellee was entitled to one benefit as a 727 S/O (the signing bonus) and another as an MD-11 F/O (retirement contributions). This argument defies logic and necessarily fails.

The District Court was also correct in not determining, as a threshold matter, whether the signing bonus was "seniority" based or "non-seniority" based. The Court properly dismissed FedEx's argument as a red herring, a point with which FedEx takes great exception, but the simple truth is that there is no binding precedent to support FedEx's position. There are several other "benefits of employment," as defined by USERRA and determined by a progeny of cases, that are neither seniority based or non-seniority based, and FedEx's unilateral effort to unreasonably narrow USERRA's protections is without merit or basis in the law.

6. STANDARD OF REVIEW

A reviewing court may affirm the district court's holding on any ground raised below and fairly supported by the record. *Proctor v. Vishay Intertechnology Inc.,* 584 F.3d 1208, 1226 (9th Cir. 2009). *See Washington v. Confed. Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979) (stating that a prevailing party is "free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court").

7. ARGUMENT

A. USERRA PROTECTS SERVICEMEMBERS FROM ADVERSE EMPLOYMENT ACTIONS BY THEIR CIVILIAN EMPLOYERS AND IS BROADLY INTERPRETED IN FAVOR OF THE SERVICEMEMBER

One of the primary purposes of USERRA is "to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a). USERRA affords broad protections to servicemembers against employment discrimination, providing that members "shall not be denied … reemployment…promotion…or any benefit of employment by an employer on the basis of that membership." 38 U.S.C. § 4311(a). Bonuses are benefits of employment. 38 U.S.C. § 4303(2). "Congress made clear that, to the extent consistent with USERRA, the large body of case law that had developed under previously enacted federal laws protecting veterans' employment and reemployment rights remained in full force and effect." *Rivera-Meléndez v. Pfizer Pharm., LLC*, 730 F.3d 49, 54 (1st Cir. 2013) (citing 20 C.F.R. § 1002.2) (internal quotation marks omitted) "The Committee intends that these anti-discrimination provisions be broadly construed and strictly enforced and the intent has always been to have an expansive interpretation." H.R. Rep. No. 103-65, at 19 (1993), reprinted in 1994 U.S.C.C.A.N. 2449, 2452, 2456.

B. THE DISTRICT COURT PROPERLY APPLIED USERRA'S "ESCALATOR PRINCIPLE" IN DETERMINING THAT HUHMANN SHOULD HAVE BEEN PAID THE $17,700 SIGNING BONUS DUE TO MD-11 F/OS

i. Section 4313 required Huhmann to be promptly reemployed in the position he would have attained but for his military service, including being paid all bonuses

The District Court properly determined that Appellee should have been paid the signing bonus as an MD-11 F/O, as mandated by Section 4313. As the District Court found, Section 4313 provides, in relevant part, that a servicemember is entitled to be promptly reemployed "in the position of employment in which the person *would have been employed* if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform." ER Tab 2, P. 9. (quoting 38 U.S.C. § 4313(a)(2)(A) (emphasis added); *Rivera-Meléndez*, 730 F.3d at 54.) This is known as the "escalator position" or "escalator principle." *Id*. (quoting *Rivera-Meléndez*, 730 F.3d at 54; 20 C.F.R. § 1002.191) Therefore, a returning service member "does not step back on the seniority escalator at the point he stepped off," but "steps back on at the precise point he would have occupied had he kept his position continuously" while away from the job for his military service. *Id*. (quoting *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *see also Batayola v. Municipality of Metro. Seattle,* 798 F.2d 355, 358 (9th Cir. 1986); *Rogers v. City of San Antonio*, 392 F.3d

758, 763 (5th Cir. 2004); *DeLee v. City of Plymouth*, 773 F.3d 172, 175 (7th Cir. 2014); *Rivera-Meléndez*, 730 F.3d at 54; 20 C.F.R. § 1002.191.)

The District Court also properly noted that the escalator position includes any "pay increases, differentials, step increases, merit increases, or periodic increases that the employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service." Tab 2, p. 13, FN 3 (quoting 20 C.F.R. § 1002.236(a); *see also* 20 C.F.R. 1002.193(a); *Serricchio v. Wachovia Secs. LLC*, 658 F.3d 169, 183-85 (2d Cir. 2011) (quoting favorably the Department of Labor's interpretation under prior reemployment law that "'[t]he "pay" protected under the statutes includes all elements of pay, such as traveling expenses, drawing accounts, hourly rates, piece rates, *bonuses*, etc.'") (emphasis added); 20 C.F.R. § 1002.236(a) ("Any pay adjustment must be made effective as of the date it would have occurred had the employee's employment not been interrupted by uniformed service.")

FedEx's argument that the escalator principle only applies to a seniority-based bonus is completely inaccurate. Dkt 8-1, p. 24. FedEx conveniently, but deceptively, cites from the section of the CFRs titled "What seniority rights does an employee have when reemployed following a period of uniformed service?" 20 C.F.R. §1002.210. This is an obvious effort to mislead this Court. USERRA provides, and the District Court properly determined, that the escalator principle

includes seniority, status, *and* rates of pay the employee would have attained but for his military service, including any changes that may have occurred during the period of service. 38 U.S.C. § 4313(a)(2)(A); 20 C.F.R. § 1002.193(a) (emphasis added).

Congress authorized the Department of Labor ("DOL") to publish regulations implementing USERRA as to private employers. 20 C.F.R. § 1002.2. In its Final Rule on USERRA, 70 Fed.Reg. 75,246 (Dec.19, 2005) (available at: https://www.dol.gov/vets/regs/fedreg/final/2005023961.htm) (2005 WL 3451172). DOL through its Veterans Employment and Training Service ("VETS") clarified USERRA's regulations which are codified at 20 CFR § 1002.1-314. Regarding the escalator principle, DOL-VETS stated:

> The escalator principle also determines the returning service member's rate of pay after an absence from the workplace due to military service. As with respect to benefits and the reemployment position, the application of this fundamental principle with respect to pay is intended to restore the returning service member to the employment position that he or she would have occupied but for the interruption in employment occasioned by military service. See generally *Fishgold v. Sullivan Drydock and Repair Corp*, 328 U.S. 275 (1946). Section 1002.236 implements the escalator principle for purposes of determining the reemployed service member's rate of pay. The regulation also addresses the various elements of compensation that often comprise the returning service member's 'rate of pay.' Depending on the particular position, the rate of pay may include more than the basic salary. The regulation lists various types of compensation that may factor into determining the employee's overall compensation package under the escalator principle. The list is not exclusive; **any compensation, in whatever form, that the employee would have received with reasonable**

> **certainty if he or she had remained continuously employed should be considered an element of compensation**. The returning employee's rate of pay may therefore include pay increases, differentials, step increases, merit increases, periodic increases, or performance bonuses.

DOL Final Rule on USERRA, 70 Fed.Reg. 75,246 at 75,278 (Dec. 19, 2005).

The DOL further clarified that "seniority," "pay," and "status" are separate and distinct benefits of employment, as defined by Section 4313, and stated, "Although 'seniority' and 'pay' are generally well-understood terms [albeit not by FedEx], USERRA does not define 'status' as it is used in section 4313 of the Act. Case law interpreting VRRA, a precursor to USERRA, recognized status as encompassing a broader array of rights than either seniority or pay." Id. at 75,273.

Accordingly, there is no merit to FedEx's contention that the District Court needed to first determine whether the signing bonus was a seniority or non-seniority based benefit. It was a form of pay protected by Section 4313, which Huhmann would have earned but for his absence due to his military service obligations.

ii. The "reasonable certainty" test is the appropriate standard for determining the proper reemployment position and benefits

The District Court properly determined that it was reasonably certain that Huhmann would have successfully completed MD-11F/O training in May 2003 and as such was entitled to the higher signing bonus. ER Tab 2, pp. 11-12.

The "reasonable certainty" test applies to discretionary or non-automatic promotions. *Rivera-Meléndez*, 730 F.3d at 56-58 (holding that the escalator principle and reasonable certainty test apply regardless of whether the promotion at issue is automatic or non-automatic); 70 Fed. Reg. 75,246, 75,271 (Dec. 19, 2005), available at 2005 WL 3451172, *75271 (noting that "Sections 1002.191 and 1002.192 [of the USERRA regulations] … incorporate[] the reasonable certainty test as it applies to discretionary and non-discretionary promotions"); *Evans v. MassMutual Fin. Grp.*, 856 F. Supp. 2d 606, 612 (W.D. N.Y. 2012) (noting that USERRA "does not require promotion or advancement to be a 'foregone conclusion,' but a 'reasonable certainty'")

As the District Court properly found, the "appropriate inquiry in determining the proper reemployment position for a returning servicemember is not whether an advancement or promotion was automatic, but rather whether it was reasonably certain that the returning servicemember would have attained the higher position but for his absence due to military service." *Rivera-Meléndez*, 730 F.3d at 56 (reading together *Tilton v. Mo. Pac. R.R. Co*., 376 U.S. 169 (1964) and *McKinney v.Missouri-Kansas-Texas R.R. Co*., 357 U.S. 265 (1958)). "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." *Tilton*, 376 U.S. at 181.

FedEx complains that Huhmann was not "guaranteed" to pass MD-11 training and that the MD-11 position was not "automatic" or would have occurred "solely with a passage of time" so the District Court erred in determining that it was reasonably certain that Huhmann would have completed the training upon his return from military service. Dkt. 8-1, pp. 25-37. FedEx obviously confuses "reasonable certainty" with "automatic" or "guarantee" and completely ignores the well-settled test articulated by the *Rivera-Melendez* court. Huhmann never failed a checkride, academic event, or simulator when he completed his MD-11 F/O training in February 2007. Tab 2, pp. 6, 11. FedEx presented no evidence that the result would have been different in 2003. And FedEx's underhanded comment that the flight time Appellee amassed during his military leave made it more likely that he would have finished the MD-11 training in 2007 than in 2003 is patently offensive. Dkt. 8-1, p. 34. Essentially, FedEx denied a servicemember a benefit of employment he was owed and, to make matters worse, is now to using the servicemember's military service as a weapon in defense of its denial.

If FedEx's argument were persuasive, which it is not, one wonders how FedEx reconciles its argument that Huhmann would not have completed MD-11 training in 2003 with the fact that FedEx itself considered Huhmann an MD-11 F/O as of May 24, 2003 and changed his pay status and his imputed earnings to an MD-11 F/O for his retirement contributions. SER Tab 1; ER Tab 6, p. 21, lns 1-8.

Given FedEx's failure to include Huhmann's imputed earnings statement in its Excerpt of Record or make any reference to it in its Opening Brief, one can only assume that FedEx knows this is problematic.

iii. Section 4311 includes protections from discrimination based on the reemployment rights of Sections 4312 and 4313

Section 4311 is the "catch-all" anti-discrimination portion of USERRA and, by definition, includes the right to reemployment. Section 4311 reads:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, *reemployment*, retention in employment, promotion, *or any benefit of employment* by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

38 U.S.C. § 4311(a) (emphasis added).

The District Court properly analyzed Huhmann's claims first under Section 4311 to show that his military service obligations were a substantial or motivating factor in the adverse employment action FedEx took, namely the denial of the higher signing bonus. ER Tab 2, pp. 7-9. In fact, Huhmann's military service was the *only* factor in denying him the signing bonus. Once the District Court determined that Huhmann's military service was a substantial or motivating factor in the discriminatory conduct, it then applied the "reasonable certainty" test to determine that but for his military service, Huhmann would have been an MD-11

F/O in May 2003 and that because military leave was considered "active service" according to the signing bonus letter, Huhmann was entitled to the bonus of an MD-11 F/O. Id., pp. 9-14. The District Court's analysis was correct and without error.

FedEx asserts the position that Appellee's claims rest solely within Section 4311(a) and, as such, the District Court erred in applying the reasonable certainty test of the escalator principle analysis. Dkt. 8-1, p. 14. FedEx is wrong.

First, FedEx disingenuously, and without basis, states that "Huhmann sued for discrimination under Section 4311(a) of USERRA." Id., p. 25. Nowhere in the FAC does Appellee state that his claims arise solely under Section 4311, and FedEx's assertion to the contrary is an obvious effort to mislead this Court and erroneously re-shape Appellee's claims in an attempt to suit its argument. See, generally, ER Tab 12.

FedEx then attacks the District Court for failing to apply the burden-shifting test under 4311. Dkt. 8-1, pp. 25-26. Apparently, FedEx did not read the District Court's opinion carefully, or it would have seen that the Court did address this issue and determined, correctly, that "FedEx Express has not demonstrated that it would have denied Plaintiff the [MD-11 F/O] signing bonus in the absence of his military leave. FedEx Express has not offered any explanation for the denial of the benefit other than Plaintiff's military service." ER, Tab 2, pp. 13.

Quite simply, the District Court analyzed Huhmann's claims properly and without error. Section 4311 provides the right to be free from discrimination, including reemployment rights. Section 4312 is USERRA's provision that establishes those reemployment rights, and Section 4313 discusses the appropriate reemployment positions including the pay associated with those positions. The District Court properly went through this progression and concluded that Huhmann was entitled to the MD-11 F/O signing bonus.

If, however, FedEx's position had any merit, which it does not, there is authority that claims brought pursuant to Section 4312 are separate and distinct from claims brought pursuant to Section 4311. In its Final Rule, DOL concluded that a person bringing a claim under Section 4312 need not prove the elements of an alleged violation of Section 4311. 70 Fed.Reg. 75,246, 75,251. Courts have interpreted Section 4312 to establish a statutory protection distinct from Section 4311, creating an entitlement to reemployment for qualifying servicemembers rather than a protection against discrimination. *Id*. (citing *Wriggleworth v. Brumbaugh*, 121 F.Supp.2d 1126, 1134 (W.D. Mich. 2000) (stating that requirements of Section 4311 do not apply to Section 4312). *Brumbaugh* relies in part on legislative history and the DOL's interpretation of USERRA. *Id*. *See also*, *Jordan v. Air Products and Chem*., 225 F.Supp.2d 1206, 1209 (supporting the *Brumbaugh* decision).

So, despite the fact that the District Court properly determined that Huhmann's military service obligations were a substantial or motivating factor in being denied the higher signing bonus (and in fact, the only factor) and then turned to the 4312 and 4313 reemployment provisions, this Court could certainly determine that 4312 confers a separate statutory protection from 4311 and affirm the District Court's verdict anyway. In either case, FedEx's position is incorrect.

B. HUHMANN'S CLAIMS ARE WHOLLY INDEPENDENT OF THE COLLECTIVE BARGAINING AGREEMENT AND THEREFORE DO NOT CONSTITUTE A MINOR DISPUTE UNDER THE RAILWAY LABOR ACT

i. Huhmann's claims arise out of a federal statutory right to not be discriminated against based on his military status, which is separate and apart from the collective bargaining agreement

The FAC, which is the operative pleading at issue, clearly states that Huhmann is not contesting "the interpretation of any collective bargaining agreement" but rather is seeking redress for discrimination based on his "obligation to perform service in a uniformed service." (Tab 12 at ¶¶ 30, 32-39.) USERRA prohibits "discrimination against persons because of their service in the uniformed services." 38 U.S.C. §4301(a)(3).

USERRA also specifically states that it "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." 38 U.S.C. § 4302.

FedEx argues that the RLA precludes Huhmann's USERRA claim thereby divesting the District Court of jurisdiction. This argument is flawed for several reasons. "Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994). The Supreme Court in *Elgin, J.&E. Ry. v. Burley*, 325 U.S. 711, 723 (1945) discussed the distinction between the two types of controversies covered by the RLA. The court noted:

> The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e. g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.

Elgin, 325 U.S. at 723. Courts refer to these two categories of controversy as major and minor disputes. See *Hawaiian Airlines, Inc.*, 512 U.S. at 252-253.

Many courts have noted that "where there is a statutory basis for the claim, the 'major/minor dispute' analysis becomes irrelevant. *Stokes v. Norfolk & Southern Ry.*, 99 F. Supp.2d 966, 971 (N.D. Ind.2000)." *See, e.g.*, *Carpenter v. Northwest Airlines, Inc.*, 2001 U.S. Dist. LEXIS 24622 at *8 (D. Minn. June 7, 2001.) "In a case under an anti-discrimination statute, the major factual issue is the defendant's motive in taking the adverse employment action and not the provisions of the CBA." *Lennon v. Finegan*, 78 F. Supp.2d 258, 259 (S.D.N.Y. 2000). The Ninth Circuit has reached similar conclusions. In *Saridakis v. United Airlines*, 166 F.3d 1272 (9th Cir. 1999), for example, the Ninth Circuit stated:

> While we have yet to squarely address the intersection of the ADA and the RLA, we have held that rights created by other anti-discrimination statutes such as Title VII and California's Fair Employment and Housing Acts are independent of a CBA and thus claims brought pursuant to these acts are not minor disputes. See *Espinal v. Northwest Airlines*, 90 F.3d 1452, 1456-58 (9th Cir. 1996) (RLA does not preempt claim under the FEHA); *Felt v. Atchison, Topeka & Santa Fe Railway Co.*, 60 F.3d 1416, 1419 (9th Cir. 1995) (Title VII claim independent of CBA); *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514 (9th Cir. 1995) (FEHA claim for disability discrimination in employment independent, not preempted); *Ackerman v. Western Electric Co.*, 860 F.2d 1514, 1517 (9th Cir. 1988) (same). Similarly, the ADA provides an "extensive and broad[] ground for relief, specifically oriented towards the elimination of discriminatory employment practices." *Benson v. Northwest Airlines*, 62 F.3d 1108, 1115 (8th Cir. 1995).

Saridakis v. United Airlines, 166 F.3d 1272, 1276-1277 (9th Cir. 1999).

The Supreme Court has held that the RLA does not automatically preclude all claims brought under independent federal statutes. *See*, *e.g.*, *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 563-64 n. 10 (1987) (plaintiff's Federal Employment Labor Act ("FELA") claim did not require interpretation of CBA and was not precluded by the RLA even though it could have been grieved through RLA procedures). Other courts have analyzed the preclusive effect of the RLA based on whether the plaintiff's claim is "inextricably intertwined" with the language of the CBA. *See, e.g.*, *Gore v. TWA*, 210 F.3d 944, 949 (8th Cir. 1999); *see also Schiltz v. Burlington N. R.R.*, 115 F.3d 1407, 1415 (8th Cir. 1997). Under this analytic framework, a federal claim is precluded by the RLA only if its resolution depends on the interpretation of the CBA. *Brown v. Ill. Cent. R.R.,* 254 F.3d 654, 661 (7th Cir. Ill.2001). Even if a plaintiff's claims relate to pay, preclusion is not warranted when the claims arise out of a federal anti-discrimination statute. *See*, *e.g.*, *Blakely v. USAirways, Inc.*, 23 F. Supp. 2d 560, 564-66 (W.D. Pa. 1998) (the RLA did not preclude the plaintiff's claims even though she had to rely on the CBA to prove she was eligible under the CBA to assert a claim); *Kidder v. E. Air Lines, Inc.*, 469 F. Supp. 1060, 1063 (S.D. Fla. 1978) (no RLA preclusion even where the plaintiff alleged she was discriminated against under the preceding USERRA statute with regard to denial of paid holiday, as provided in the CBA). Thus, as long as a plaintiff's dispute does not require

interpretation of the CBA, and even if the disputed provisions of the CBA are relevant but not dispositive, then the underlying federal claim is not precluded by the RLA. *See*, *e.g.*, *Id.*; *Hawaiian Airlines, Inc.,* 512 U.S. 246, 256-66 (1994).

Huhmann's dispute clearly does not concern any provision of the CBA nor must the CBA be interpreted to resolve his claims. Rather, Huhmann alleges that he was discriminated against based on his military service because he was not paid the signing bonus for MD-11 F/Os. Huhmann's claims are based on a federal statutory right not to be discriminated against based on his military status and therefore are wholly independent of the CBA.

ii. Even if the bonus letter is considered part of the CBA, the RLA has no preclusive effect because resolution of Huhmann's claims does not require interpretation of the Bonus Letter

FedEx attempts to claim that the Bonus Letter is part of the CBA and should therefore be addressed as the CBA itself. However, even if the Bonus Letter is considered part of the CBA, there is no interpretation required. The Bonus letter clearly states that pilots on military leave will be treated as having been on "active service" for the duration of the bonus period. ER Tab 4. Accordingly, Mr. Huhmann is entitled to the $10,300 difference between the 727 and MD-11 signing bonuses.

Huhmann has unambiguously alleged that his "military service delayed his training as an MD-11 pilot for which he had already been selected and which

resulted in FedEx using his prior status of 727 Second Officer to calculate his 'signing bonus." ER Tab 12 at ¶ 34. Huhmann alleges that FedEx's decision was discriminatory and denied him a benefit of employment based on his military service. *Id*. at ¶ 36. Huhmann's dispute therefore hinges on whether FedEx's decision to pay him the lower signing bonus constituted a violation of USERRA. This requires no interpretation of the Bonus Letter.

iii. Carder v. Continental Airlines is distinguishable and has been widely criticized

FedEx cites many cases involving other anti-discrimination statutes but only one in which the RLA was found to preclude a USERRA claim. Dkt 8-1, ¶ VI(B). However, *Carder v. Continental Airlines, Inc.*, 2013 U.S. Dist. LEXIS 121131 (S.D. Tex. Mar. 28, 2013), *aff'd* 636 F.3d 172 (5th Cir. Tex. 2011), *cert. denied* 132 S. Ct. 369 (U.S. 2011) is a case wholly distinguishable on its facts, has been widely criticized since it was issued, and has been statutorily overruled on other grounds[2]. In short, *Carder* is wrong on several levels and FedEx's reliance on it is misplaced.

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2 The Fifth Circuit held that USERRA did not provide a right of action for harassment or hostile work environment. *Carder v. Continental Airlines, Inc.*, 636 F.3d 172 (5th Cir. Tex. 2011). In direct response to this erroneous opinion, Congress overruled *Carder* and passed the VOW to Hire Heroes Act in November 2011 (Public Law 112-56) clarifying that hostile work environment claims are cognizable under USERRA.

In *Carder*, the plaintiffs were putative class members challenging, *inter alia*, the manner in which Continental Airlines calculated their retirement contributions. The Court found that it would have to interpret the ALPA-Continental CBA to determine how contributions to the B-Plan were made for pilots who did and did not take military leave and found that the RLA preempted the USERRA claims. *Carder*, 2013 U.S. Dist. LEXIS 121131 at *5-6. Notably, the *Carder* plaintiffs specifically alleged in their complaint that provisions of the CBA needed to be interpreted to properly calculate the manner in which their contributions were under-funded.

Less than two months ago, in a well-reasoned opinion, the Honorable John Robert Blakey of the Northern District of Illinois found that the RLA did not preempt plaintiff's USERRA claims. *Duffer v. United Continental Holdings, Inc.*, No. 13-C-3756, 2016 WL 1213668 at *17-19 (N.D. Ill. Mar. 30, 2016). The Court denied defendants' Motion for Summary Judgment finding that a predecessor statute to USERRA, the Universal Military Training and Service Act, trumps the RLA and cited the binding decision in *McKinney, supra,* 357 U.S. 265, 268-270 (1958) as support for its position.

The Court found that *McKinney* did not require service members to pursue the Railway Labor Act's grievance procedures before bringing a Universal Military Training and Service Act claim in court. *Duffer*, 2016 WL 1213668 at *18 (citation

omitted). "The Supreme Court explained that the service member's rights were created by federal statute even though their determination may have necessarily involved interpretation of a collective bargaining agreement." *Id.* "The Court further explained that the Universal Military Training and Service Act's statutory scheme contemplated a speedy vindication of rights that was inconsistent with requiring a service member to exhaust other avenues of relief." *Id.* Following *McKinney*, the Court in *Kidder v. Eastern Air Lines, Inc.*, *supra*, 469 F.Supp. 1060, 1063 (S.D.Fla.1978), likewise denied an employer's invocation of the Railway Labor Act in an action brought under the Veteran's Reemployment Rights Act (another predecessor statute to USERRA).

The *Duffer* opinion criticized the *Carder* court for failing to even consider *McKinney*. The court in *Duffer* stated, "*Calder* (sic), notably, did not answer the predicate question of whether the Railway Labor Act even extends to USERRA after *McKinney*. *See* Kathryn Piscitelli and Edward Still, The USERRA Manual §8:15 (Thompson Reuters 2016) (criticizing *Calder* (sic) for failing to address *McKinney*)." *Duffer*, 2016 WL 1213668 at *19.

The *Duffer* court positively invoked another USERRA case in support of its position that the RLA does not preempt USERRA claims. The *Duffer* court held,

> So long as the parties do not dispute the interpretation of the collective bargaining agreement, or the disputed provisions of the agreement are relevant but not dispositive, then the underlying federal claim is not precluded by the Railway Labor Act.

(citing *Roslyn v. Northwest Airlines, Inc.*, No. 05–441, 2005 WL 1529937, at *2 (D.Minn. June 29, 2005).

In *Roslyn*, 2005 WL 1529937, at *3, the Court denied defendant Northwest Airline's motion to dismiss, finding that the Railway Labor Act did not preempt the servicemember's USERRA claim. The servicemember was a flight attendant guaranteed 75 hours of flight time and pay per month. *Id.* at *1–2. The servicemember bid for, but did not receive, paid leave days over his military leave periods, so Northwest Airlines docked his pay for those missed days in accordance with the collective bargaining agreement. *Id.* at *1–2. Although a collective bargaining agreement governed scheduling, the Court found that the Railway Labor Act did not preempt the servicemember's USERRA claim, and explained that, as here, the servicemember was not contesting the interpretation of the agreement but rather alleging that its undisputed scheduling procedures discriminated against him because of his military status. *Id.* at *3.

The facts in *Duffer*, *Roslyn*, and the present case are very similar where the "parties dispute the construction of a federal law in the context of a clear contract provision." *Duffer*, 2016 WL 1213668 at *18. In the present case, Huhmann specifically pled that his lawsuit "does not contest the interpretation of any [CBA]." ER Tab 12, ¶30. Moreover, the District Court did not rely on the CBA or interpret it in rendering its decision, referring to it only in a footnote that also

stated that no interpretation of the Bonus Letter was required to resolve Huhmann's dispute. Tab 2, p. 14, n4. The Bonus Letter contains clear language setting forth the amount of the signing bonuses each pilot would receive based on the aircraft he was flying, what the amendable period was, and that military leave is considered "active service" for purposes of the signing bonus. Tab 4. FedEx's claim that Huhmann "challenged the interpretation and application" of the Bonus Letter rings hollow; the language is clear and requires no interpretation and the FAC confirms this. Dkt 8-1, p.21; ER Tab 12, ¶30. Accordingly the RLA does not preempt Huhmann's claims.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellee Dale Huhmann respectfully requests that this Court affirm the District Court's April 9, 2015 Order of Judgment in favor of Plaintiff-Appellee.

Respectfully Submitted,

By: Brian J. Lawler Dated: May 20, 2016.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 6,686 words.

Respectfully Submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellee hereby states that there are no cases in this Court related to this appeal.

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kirstin E. Largent