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Reservist's Back Pay Action Against United Moves Forward

By **Adam Sege**

Law360, Washington (March 30, 2016, 4:54 PM ET) -- An Illinois federal judge kept alive central claims of a United pilot's proposed class action alleging a lump sum payment he was owed in connection with a merger was illegally reduced due to time he spent serving with the Marine Corps Reserve, but trimmed other portions of the suit Tuesday.

While ruling Mark Duffer's state law and negligence claims were barred, U.S. District Judge Robert Blakey kept intact the pilot's claims that United Continental Holdings Inc., Continental Airlines Inc. and the Airline Pilots Association International violated a federal law requiring employers to count military service as continuous employment for benefits purposes.

The dispute follows the distribution of a \$400 million lump sum paid to pilots by United following negotiations with two pilots' unions affiliated with the Airline Pilots Association after 2010 announcement that United was merging with Continental.

In determining the payout for individual pilots, the union to which Duffer belonged used a formula that factored in a pilots' prior wages and also that pilot's past availability. Duffer, a lieutenant colonel in the Marine Corps Reserve, claims his payment was lower than it should have been because his calculated "availability" did not include time periods during which he was serving with the Marines.

Duffer sued in 2013 under the the Uniformed Services Employment and Re-Employment Rights Act, which he says prohibits counting absences due to military service as breaks in employment.

The pilot also asserted a claim under a California state law and negligence claims.

In his ruling Tuesday, Judge Blakey granted summary judgment to the defendants on these latter claims, saying much of the state law claim was barred by the federal Employee Retirement Income Security Act and that the negligence claims were preempted by the federal Railway Labor Act.

The judge declined, however, to dismiss the pilot's claims under USERRA, saying a factual dispute remained over whether the lump sum distribution constituted the type of discrimination barred by the law.

"There are triable issues of material fact as to whether part of the \$400 million payment is a protected 'benefit' under USERRA," the judge said.

The judge also denied summary judgment on a claim that United and Continental had

underpaid contributions to Duffer's retirement account in connection with his Marine Corps service, a ruling that an attorney for the pilot highlighted in an email to Law360 on Wednesday.

"The opinion and order issued by Judge Blakey yesterday was a significant victory for military service members protecting their rights to receive pension plan contributions from employers during periods of military leave," attorney Gene J. Stonebarger wrote.

Asked about the ruling, a spokeswoman for United emailed the following statement: "While we are pleased with aspects of the court's decision, we believe that several claims are without merit and we will continue to defend against them."

An attorney for the Air Line Pilots Association declined to comment.

Duffer is represented by Gene J. Stonebarger and Richard D. Lambert of Stonebarger Law, Brian J. Lawler of Pilot Law PC, and Joseph J. Siprut and Gregg M. Barbakoff of Siprut PC.

United Continental Holdings, United Air Lines Inc. and Continental Airlines Inc. are represented by Gary S. Kaplan, Brian W. Barrett and Samuel M. Schwartz-Fenwick of Seyfarth Shaw LLP.

The Air Line Pilots Association International is represented by Michael E. Abram, Michael L. Winston, Thomas N. Ciantra and Joshua J. Ellison of Cohen Weiss and Simon LLP, Rami Fakhouri and Andrew L. Goldman of Goldman Ismail Tomaselli Brennan & Baum LLP, and in-house attorneys Jonathan Cohen, Marcus C. Migliore and Matthew E. Babcock.

The case is Duffer v. United Continental Holdings Inc. et al., case number 1:13-cv-03756, in the U.S. District Court for the Northern District of Illinois.

--Editing by Mark Lebetkin.

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