O'Melveny | Aviation

Aviation Digest

Summary of O'Melveny's Recent Airline Litigation Victories

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We are delighted to share O'Melveny's inaugural issue of *Aviation Digest*, highlighting key litigation decisions relevant to the airline industry that O'Melveny has recently handled—and which impact some of the most critical legal and business matters facing the aviation sector.

We plan to provide similar updates periodically in the months to come. We hope you find this analysis informative and relevant, and we welcome your feedback on these matters or any other issues that may be concerning your legal and business teams.

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Summary Judgment Win in USERRA Vacation and Sick Benefits Class Action

Synoracki v. Alaska Airlines, Inc., 2022 WL 1746777 (W.D. Wash. May 31, 2022)

Alaska Airlines obtained summary judgment in a nationwide class action seeking sick and vacation benefits for pilots absent from work while performing military service. The Plaintiff, a pilot and reservist, argued that Alaska violated the Uniformed Services Employment and Reemployment Rights Act ("USERRA") by failing to accrue sick leave and vacation time for pilots while on long-term military leaves, despite accruing such benefit for pilots on jury duty and sick leave.

Under USERRA, an employee is only entitled to benefits while on military leave if they are either seniority-based or the benefits are generally provided to employees on leaves that are "comparable" to military leave. In assessing whether a non-military leave is comparable to military leave, the relevant regulations issued by the Department of Labor state that it is appropriate to consider factors such as duration, purpose, and the employee's ability to choose the timing of the leave.

Alaska moved for summary judgment on Plaintiff's claims, arguing that sick leave and vacation are not seniority-based benefits because they are contingent upon employees fulfilling a bona fide work requirement and do not accrue through mere seniority with the company. And Alaska argued that these benefits are also not generally provided to pilots on comparable forms of leave.

On May 31, 2022, the Western District of Washington granted Alaska summary judgment. First, the court agreed with precedent holding that sick leave and vacation accrual are non-seniority benefits because they constitute a reward for work performed rather than a perquisite of seniority. Next, the court rejected the Plaintiff's argument that military leave is comparable to jury duty for pilots at Alaska, finding that the duration of the leaves "differs significantly," and that Plaintiff's military leaves "far exceed any jury duty leaves taken by Plaintiff or other Alaska Airlines pilots." Finally, the court held that sick leave is not a furlough or leave of absence under USERRA and concluded, in the alternative, that sick leave is not comparable to military leave.

This victory followed wins by American Airlines and United Airlines (also represented by O'Melveny) in parallel cases involving accrual of sick and vacation for pilots on military leave, and thus all the cases addressing this issue have consistently held that USERRA does not require airlines to accrue sick and vacation for pilots on military leaves merely because they provide those benefits to employees on the occasional jury duty or sick leaves that last for an extended period.

Summary Judgment Win in USERRA Paid Leave Class Action

Scanlan v. Am. Airlines Grp., Inc., 2022 WL 16636935 (E.D. Pa. Nov. 2, 2022)

American Airlines and its parent corporation, American Airlines Group Inc. ("AAG"), obtained summary judgment in a nationwide USERRA class action seeking compensation and benefits for pilots who have taken military leave. The Plaintiffs, both pilots and service members, argued that USERRA requires American to provide paid "short-term military leave" (which Plaintiffs defined as military leaves of 16-days or less) and credit military leave time as part of pilots' eligible earnings for a profit-sharing plan offered by AAG because American provides such compensation and benefits for pilots on jury duty and bereavement leave. The Plaintiffs also argued that the profit-sharing plan obligates AAG to credit periods of military leave when calculating profit-sharing awards.

On November 2, 2022, the Eastern District of Pennsylvania granted American and AAG summary judgment on all claims. First, the court agreed with American that jury duty and bereavement leave are not comparable to military leave for pilots at American, and thus held that American did not violate USERRA. The court rejected the Plaintiffs' argument that frequency of military leave and the alleged comparable leaves is an improper consideration because it is not enumerated in the Department of Labor's regulations interpreting USERRA. Specifically, the court found that "the frequency of military leave, along with duration, is necessary to have a complete picture," and that "the difference between the amount of time American pilots spend on military leave as compared to bereavement and jury duty leave is stark." The court further found that unlike jury duty and bereavement leave, military leave is "accompanied with more than minimal Government pay and sometimes a pension," is "significantly different" in the degree of control over when to take that leave, and "generally recurs at regular intervals over a number of years." Finally, the court agreed with AAG's construction of the profit-sharing plan, and held that compensation under the profit-sharing plan does not include imputed income while on military leave.

Airlines have recently been faced with a wave of lawsuits challenging their failure to pay reservists on "short-term" military leaves. This decision (which follows a win last year by Alaska Airlines and Horizon Air in a parallel case, *Clarkson v. Alaska Airlines,* who were also represented by O'Melveny) makes clear that short-term military leaves that occur frequently may not be comparable even to absences of a similar length that occur less frequently.

Nationwide Age Discrimination Collective Action Based On COVID-Related VEOP Dismissed

Kincheloe v. Am. Airlines, Inc., 2022 WL 1409235 (N.D. Cal. May 4, 2022)

In March of 2020, American offered employee work groups, including flight attendants, the option to separate from American through a Voluntary Early Out Program (the "VEOP"). Approximately 600 flight attendants who took the VEOP, received the benefits of the program and were over the age of 40, sued American claiming that the VEOP violated the Age Discrimination in Employment Act. Specifically, the Plaintiffs alleged that their choice between taking the VEOP or continuing to work was not truly voluntary based on their increased risk of serious disease from COVID-19 due to their age.

American moved to dismiss the Plaintiffs' complaint on the grounds that the VEOP was offered based on a non-age factor—seniority—and was a benefit to employees, not an adverse employment action. Judge Beth Labson Freeman of the Northern District of California granted the motion with leave to amend, finding the Plaintiffs had not alleged any adverse employment action, but providing them an opportunity to plead that they had been constructively discharged.

In their amended complaint, the Plaintiffs alleged that American had "constructively discharged" them because they were placed in the untenable position of either accepting the first VEOP or continuing to fly despite the danger of contracting COVID, which disproportionately impacts older adults. American moved to dismiss again, and after full briefing and oral argument, Judge Freeman agreed with American, dismissing the case with prejudice. In her ruling, Judge Freeman noted that the complained-of conduct by American (denying leaves of absence until a sufficient number of employees accepted the VEOP, discouraging personal mask use, etc.) was "generally applicable to flight attendants, not targeted at just older ones, and so cannot establish constructive discharge."

This decision will help protect airlines that offered early retirement packages during the height of the COVID-19 pandemic from having those employee benefits be characterized as discriminatory conduct.

Significant Railway Labor Act Win Involving Airlines' Ability to Investigate and Discipline Union Representatives

Ass'n of Flight Attendants-CWA, AFL-CIO v. United Airlines, Inc., 583 F. Supp. 3d 162 (D.D.C. 2022)

United Airlines obtained dismissal of a lawsuit filed by the Association of Flight Attendants ("AFA"), alleging that United violated the Railway Labor Act ("RLA") by investigating allegations that two flight attendants who also served as Union representatives participated in a retaliation campaign against another United flight attendant.

In March 2021, a flight attendant submitted a complaint to United alleging that multiple other flight attendants engaged in a retaliation campaign against him because he reported a violation by two flight attendants of United's COVID-19 health and safety protocols. As part of its investigation of possible retaliation, United issued Letters of Investigation (pursuant to the express terms of the collective bargaining agreement) to 12 flight attendants—ten of whom had no Union roles and two who served as representatives of AFA's Washington Dulles Local.

In the summer of 2021, AFA filed a lawsuit in the District of Columbia alleging that United violated the RLA by issuing Letters of Investigation to the two flight attendants who also held roles with the AFA Local. In a January 2022 order dismissing AFA's lawsuit, the court found that "the union's position would provide union representatives with complete immunity from discipline for acts in violation of the Collective Bargaining Agreement ("CBA") so long as those violations took place while conducting union duties," and would therefore "permit union representatives to retaliate against flight attendants who take disfavored actions."

This decision confirms there is no "cloak of immunity" under the RLA that protects union representatives from being investigated or disciplined by their employer for legitimate reasons. As the court recognized, United is permitted and will continue to proceed with its investigation, pursuant to the CBA procedures, including the grievance and System Board arbitration procedures.

Biometric Information Privacy Act (BIPA) Lawsuit Dismissed Based on Airline Deregulation Act Preemption

Kislov v. Am. Airlines, Inc., 2022 WL 846840 (N.D. Ill. Mar. 22, 2022)

In March of 2022, American Airlines secured the dismissal of biometric privacy claims brought against it by two consumers based on Airline Deregulation Act ("ADA") preemption. The Plaintiffs alleged American used an interactive voice response software for its hotline which collected and analyzed callers' "voiceprints" to understand the consumers' requests and provide them with personalized responses. The Plaintiffs brought their claims under the Illinois Biometric Information Privacy Act ("BIPA"). American moved to dismiss the complaint in full contending that Plaintiffs' claims were preempted by the ADA because they sought to use BIPA to regulate American's customer services and management of customer data.

The Northern District of Illinois agreed with American that the Plaintiffs' claims were preempted. It held that the hotline was "a 'service' under the ADA, because it is an integral and bargained-for part of the customer's airline experience." The court further held that the Plaintiffs could not "characterize their privacy claims as relating only

to American's unlawful handling of their personal data, where that data was collected in the course of (and in furtherance of) American's provision of services." The court concluded that the Plaintiffs' BIPA claims would directly impact American's services by regulating American's interactions with its customers and American's management of customer data. Such state law regulation of customer services is forbidden by the ADA and as such, the court dismissed Plaintiffs' claims with prejudice.

This first-of-its-kind decision finding a BIPA claim preempted under the ADA is important given that at least 27 states have introduced BIPA-like legislation. If these laws are passed, the ADA will be even more important in helping airlines avoid having to comply with a patchwork of state privacy laws.

COVID Policy Injunction Win

Stephens v. Am. Airlines, Inc., 2022 WL 1115048 (N.D. Ill. Mar. 31, 2022)

American Airlines' successfully defended its vaccination policies from a challenge brought by four passenger service agents. These employees alleged American had breached the governing CBA by implementing a vaccine mandate. Specifically, Plaintiffs alleged that the vaccine mandate failed to "promote safe and sanitary conditions in all facilities," because it was less effective than regular COVID-19 testing. The workers also claimed that the grievance process under their CBA was insufficient given the "lengthy administrative procedures" involved and "the dangers posed every day testing is not made."

After Plaintiffs moved for a temporary restraining order in Illinois state court, American removed the case to the Northern District of Illinois and moved to dismiss. In its motion to dismiss, American argued the Plaintiffs' claim constituted a "minor dispute" because it required interpretation and application of the CBA's terms, and thus was subject to the exclusive jurisdiction of a system board of adjustment. In response, the Plaintiffs made two novel arguments. First, they claimed American was precluded from arguing the court lacked subject matter jurisdiction over their claims because it removed the case to federal court. Second, they claimed if the court lacked subject matter jurisdiction over their claims, it should remand the case to state court rather than grant dismissal.

The Northern District of Illinois rejected these arguments and agreed with American. The court concluded that the Seventh Circuit had definitively held a district court has subject matter jurisdiction to determine whether a claim was preempted by the RLA. The court further concluded that "the RLA rules out the continuation of th[e] case in any court," and as such, it would be pointless to remand the lawsuit to a state court that also lacked jurisdiction over the Plaintiffs' claims. Instead, he found the proper remedy was dismissal.

This decision is important for two reasons. First, it confirms that airlines may set their COVID-19 and vaccination policy without having to face a state or federal lawsuit based on breach of the CBA. And second, it confirms that the Seventh Circuit permits airlines to both remove lawsuits on RLA grounds and simultaneously move to dismiss them for lack of subject matter jurisdiction as preempted minor disputes.

Win in Dispute Over Port Authority Holiday Pay Provisions

Int'l Ass'n of Machinist Aerospace Workers, Dist. 141 v. United Airlines, Inc., 2022 WL 1988991 (N.D. Ill. June 6, 2022)

In June 2022, United Airlines won dismissal of a lawsuit filed under the RLA by the International Association of Machinists ("IAM") alleging that United violated holiday pay requirements set by the Port Authority of New York/New Jersey.

These holiday pay requirements are set forth in the Port's operating contract with United for Newark, LaGuardia, and JFK airports. The IAM originally filed a grievance with a System Board arbitrator asserting a contractual right to the additional holiday pay.

United filed a pre-hearing motion to dismiss the grievance with the arbitrator, arguing that the arbitrator had no jurisdiction to interpret the Port's regulations and the union had failed to state a claim for any right or benefit under the CBA. The arbitrator agreed.

The union then filed suit in federal court seeking to vacate the arbitrator's award under the RLA. United moved to dismiss and the court granted United's motion in June 2022. Notably, the court held that the arbitrator did not violate any RLA due process requirement when he granted United's motion to dismiss prior to the arbitration—a rare outcome in labor arbitrations.

This decision confirms the power of labor arbitrators to dispose of meritless grievances without a hearing.

Wage & Hour Class Action Win

Ward v. United Airlines, Inc., 2021 WL 6427868 (N.D. Cal. Dec. 20, 2021)

United Airlines obtained summary judgment against three named Plaintiffs and two certified classes of reserve pilots and flight attendants in the Northern District of California. Plaintiffs alleged that a collectively-bargained multi-formula compensation scheme, common across the airline industry, did not appropriately compensate employees for reserve hours worked under California minimum wage laws. United argued that the multi-formula compensation scheme compensated pilots and flight attendant for all hours worked under operative law and Plaintiffs' allegations were preempted by the RLA.

The district court rejected Plaintiffs' claims, agreeing with United's arguments. The court found that the bargained-for compensation scheme satisfied all elements of a legal pay scheme in California, and the airline's pay system guarantees a base on-duty day compensation that increases if crew members' flying minimums are surpassed.

This decision confirms that United's compensation scheme, and others in the airline industry like it, is valid under California law.

Court Dismisses Union's Attempt to Obtain Major Dispute Injunction

Allied Pilots Ass'n v. Am. Airlines, Inc., 2022 WL 1608636 (N.D. Tex. May 20, 2022)

In May 2022, American Airlines obtained the dismissal of a complaint brought by its pilot union (the Allied Pilots Association ("APA")) seeking a major dispute injunction prohibiting American from allowing non-check airmen to "seat fill" during Line Operation Evaluations. Faced with increasing customer demand after the COVID-19 pandemic, American modified its flight training protocols to permit additional qualified pilots to "seat-fill" during the final days of training during Line Operation Evaluations, which are designed to mimic real world flight environments. American had previously used "check airmen" to seat-fill during these final days of training.

APA sued American in the Northern District of Texas alleging this change violated the parties' collective bargaining agreement and constituted a "major" dispute under the RLA, entitling APA to a preliminary injunction. It also accused American of instituting an unsafe change to its training protocols. American immediately moved to dismiss the lawsuit on the grounds that APA's complaint presented a "minor dispute" under the RLA because it could not be resolved without interpreting and applying the parties' collective bargaining agreement and past practices, and thus the applicable system board had exclusive jurisdiction.

The district court agreed, finding that American's position was justified by the parties' collective bargaining agreement, and that APA was thus prohibited from seeking relief in Court. This decision reconfirms that a carrier must only show that its proposed interpretation of a collective bargaining agreement is "arguably justified" in order for a dispute to be minor and outside the jurisdiction of state or federal courts.

For more than four decades, O'Melveny's aviation practice has provided an unparalleled depth of experience in the cases and controversies that are most significant to the nation's airlines. There is no sector more illustrative of the importance of seamless collaboration. Our commitment to delivering client service in a highly collaborative way spans matters involving the RLA, Airline Deregulation Act ("ADA"), USERRA, Employee Retirement Income and Security Act ("ERISA"), and a myriad other federal and state labor and employment laws and regulations.

Our inaugural update in a series on recent airline litigation trends and developments seeks to provide a snapshot of recent decisions pertinent to the legal and business issues presently facing the airline industry. We hope you find this analysis informative and relevant, and we welcome your feedback. Please reach out to any member of our team to discuss these or any other matters that may be concerning your legal and business teams.

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