

Pittsburgh Post-Gazette®

Back from Pakistan, he wants his job back

Monday, November 10, 2008

By Paula Reed Ward, Pittsburgh Post-Gazette



Arnold Hamovitz has spent nearly all of his adult life working around airplanes.

During six years in the Marine Corps, he was an air traffic controller.

In the last 20 years with the Air Force Reserves, he has opened and worked at airfields all over the world.

In his civilian life, in January 2001, he was hired to be the airfield manager for the 911th Airlift Wing in Moon.

But in September 2005, Mr. Hamovitz was activated and ordered to go to Pakistan to serve as an airfield liaison.

When he returned to the United States four months later, his job at the 911th had been given to someone else. He was unemployed.

"Here we have a person who's done everything you're supposed to do and has done it correctly," said Mr. Hamovitz's attorney, Timothy O'Brien. "If this individual can fall through the cracks, then there are no reservists or National Guard members who are safe."

After formally requesting his job back to no avail, Mr. Hamovitz filed a federal lawsuit against Maytag Aircraft Corp, claiming violations of the Uniform Services Employment and Reemployment Rights Act, called USERRA, which dictates that employers cannot discriminate against National Guard members or reservists who are called to active duty.

Their jobs must be available to them when they return, provided they've given proper notice of deployment and make a request for reinstatement.

The man Maytag hired to replace Mr. Hamovitz was his subordinate, who was less qualified for the position, Mr. Hamovitz said.

The major legal question that must be answered is whether Maytag is what is called a "successor in interest."

When Mr. Hamovitz left for his deployment, he was employed by V.T. Griffin Services Inc, which was contracted by the federal government to provide base operations services, including airfield management; however, that company lost the contract in January 2006.

Santa Barbara Applied Research Inc. won the new contract and then subcontracted Mr. Hamovitz's and other positions with Maytag, based in Colorado Springs.

Mr. O'Brien contends that Maytag is a "successor in interest" to V.T. Griffin because it took over the same facilities and equipment, and hired almost all of the existing employees. The company is therefore required by USERRA to hire his client.

The problem, however, is that while USERRA includes "successor in interest" as a type of employer, it does not define the term.

Generally, a successor in interest is a company that follows another in ownership or control of property. Examples include when one company buys out another and takes over its entire operation.

Maytag is arguing that it is not a successor in interest and therefore had no legal obligation to hire Mr. Hamovitz.

The company is relying on a case decided by the 11th U.S. Circuit Court of Appeals. In that opinion, the court found that if there is no merger or transfer of assets, then the new company is not a successor in interest.

But Mr. Hamovitz is relying on a 6th U.S. Circuit Court of Appeals decision, which found that a merger or transfer of assets is not necessary to meet the successor test.

Though that case was filed under the Family Medical Leave Act and not USERRA, experts believe it can apply to military service members.

Capt. Samuel F. Wright, who retired from the Navy Reserve Judge Advocate General Corps, helped draft what would become USERRA in 1994. He believes that the law was clearly intended to cover people in Mr. Hamovitz's situation.

"He shouldn't lose out because of this thing that happened that was beyond his control," Capt. Wright said. "Getting called up for service -- things are going to change, and that shouldn't cause you to lose your job."

The problem could be remedied in one of two ways, Capt. Wright said: Either the U.S. Supreme Court could take up a case involving the issue or Congress could pass new legislation.

It could take years before the Supreme Court gets involved. But there is already a bill pending, the Servicemembers Access to Justice Act, that was introduced in August by Sens. Ted Kennedy, D-Mass., Barack Obama, D-Ill., and Robert Casey, D-Pa.

The legislation spends an entire section defining successor in interest.

"Congress is really upset with noncompliance with USERRA, especially with federal employers," Capt. Wright said. "I think government agencies, in general, are more likely to disobey this law and try to get away with it."

Beyond defining successor in interest, Mr. Hamovitz might face another problem in his case -- the timing of his application with the company.

Maytag has said in court filings that he did not comply with company requirements to be hired.

"Maytag was justified in its decision not to hire [Mr. Hamovitz]," the company wrote in its answer to the federal lawsuit.

Applications were given to all V.T. Griffin employees in mid-December 2005 and were due back by the end of that month.

Neither Santa Barbara nor Maytag sent Mr. Hamovitz an application, Mr. O'Brien said, even though the companies had his e-mail address in Pakistan.

Instead, Mr. Hamovitz's now-wife, Christine, got an application for him in early January and e-mailed it to him. He returned it, and she hand-delivered the application to Santa Barbara on Jan. 10, 2006.

"They all knew where he was. They knew what he was doing, and that he was on military duty," said Mr. O'Brien, who had 25 years in the Army National Guard and retired as a major with the JAG corps.

A week later, Ms. Hamovitz learned that the job had been given to her husband's subordinate.

When he challenged the decision, Maytag stood firm.

"They did nothing to figure out what happened," Mr. O'Brien said. "Instead, they hired lawyers to defend themselves."

An attorney for Maytag did not return phone calls seeking comment.

The person who made the company's hiring decision, Douglas Harris, said he would not comment on pending litigation.

But in a deposition, he told Mr. O'Brien that at the time he hired the subordinate, he did not know Mr. Hamovitz's application existed.

Mr. O'Brien does not believe that's true. What's more, he continued, the subordinate said in his deposition that he'd be willing to step aside if asked.

In a letter from Maytag last summer, the company referred to Mr. Hamovitz's lawsuit as a "nuisance," and offered him a \$10,000 settlement.

It was rejected.

"For someone in the business of contracting with the government to suggest a reservist trying to get his job back is a 'nuisance' is outrageous," Mr. O'Brien said.

Since he lost his job at the 911th, Mr. Hamovitz has been working for a plumbing company, doing estimates. He has lost about 40 percent of his income and benefits from what he was earning before. But more than that, he is out of his chosen profession.

"One of the reasons I took the job in the first place was to get out of the plumbing field," Mr. Hamovitz said. "I liked the challenge of it."

Paula Reed Ward can be reached at pward@post-gazette.com or 412-263-2620.