

2013

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Recommended Citation

Christopher W. Lambert, *Employment Law - Retired Pilots Awarded Monetary Interest on Delayed Lump Sum Pension Payments*, 78 J. AIR L. & COM. 189 (2013)
<https://scholar.smu.edu/jalc/vol78/iss1/5>

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EMPLOYMENT LAW—RETIRED PILOTS AWARDED MONETARY INTEREST ON DELAYED LUMP SUM PENSION PAYMENTS

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IN *STEPHENS V. US AIRWAYS GROUP*, the court ruled in favor of two retired pilots (the plaintiffs) after deciding that a forty-five-day pension payment delay was unreasonable.¹ The Employee Retirement Income Security Act of 1974 (ERISA) requires a lump sum pension payment to be the “actuarial equivalent” of the “projected value of all annuity payments.”² Here, the pensions satisfied this requirement, and the central issue then became whether a forty-five-day pension distribution delay was reasonable under Internal Revenue Service (IRS) regulations.³ The plaintiffs claimed that the delay was unreasonable because they saw no administrative necessity in the delays and because, as a result of the unreasonable delay, they lost the ability to accrue interest while waiting.⁴ The court agreed.⁵ In the end, public policy may benefit from this decision because airlines will hopefully pay pensions with more efficiency. The court, however, was wrong for three reasons: (1) the pension administrator could not have known the pilots’ “Final Average Earnings” until a certain period of time after each one retired; (2) the plaintiffs had the burden to prove that the delay was unreasonable but did not meet this burden; and (3) even if the court was correct about the interest payments overall, damages should have been awarded for less than the full forty-five days.⁶

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¹ *Stephens v. US Airways Grp.*, 644 F.3d 437, 438–39, 442 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 1857 (2012).

² *Id.* at 439 (citing 29 U.S.C. § 1054(c)(3) (2006)).

³ *Id.* at 440 (citing Treas. Reg. § 1.401(a)-20, Q&A 10(b)(3) (2011)).

⁴ *Id.* at 441.

⁵ *Id.* at 440–41.

⁶ *Id.* at 444–46 (Henderson, J., dissenting in part).

The plaintiffs initially chose to have their pensions paid in the form of one lump sum instead of in the form of monthly annuity payments.⁷ However, when the lump sums were not paid for forty-five days, the retirees brought suit against their former employer, US Airways, to recover the interest lost during the delay.⁸ The plaintiffs argued that they could have chosen an annuity retirement plan that would have produced checks without a waiting period, and they further argued that this delay caused their lump sums to no longer be equal in value to what they would have received under an annuity system.⁹ US Airways, however, claimed that ensuring accuracy in its calculations necessitated the delay.¹⁰

The case originated in 2000 in the U.S. District Court for the Northern District of Ohio, where the court dismissed it for lack of subject-matter jurisdiction.¹¹ On appeal, the U.S. Court of Appeals for the Sixth Circuit remanded the case after it found that the ERISA argument created subject-matter jurisdiction.¹² The Pension Benefit Guaranty Corporation (PBGC), however, became the new pension trustee when US Airways filed for bankruptcy in 2003, and the case was transferred to the U.S. District Court for the District of Columbia.¹³ That court granted summary judgment for PBGC, and the plaintiffs again appealed.¹⁴

In an opinion written by Judge Brown, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) first found that the lump sum payment here was the actuarial equivalent of an annuity.¹⁵ The court and the dissent agreed on actuarial equivalence because it was clear that US Airways accurately calculated the lump sum payments and that these payments were fairly equal to an annuity before the delay.¹⁶ The next issue was whether the delay in payment was administratively necessary and thus reasonable.¹⁷ The court noted that “[a] payment shall not be considered to occur after the annuity starting

⁷ *Id.* at 439 (controlling opinion).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Stephens v. Ret. Income Plan for Pilots of U.S. Air, Inc.*, 464 F.3d 606, 607 (6th Cir. 2006).

¹² *Id.* at 614.

¹³ *Stephens*, 464 F.3d at 439.

¹⁴ *See id.*

¹⁵ *Id.* at 440.

¹⁶ *Id.*; *see id.* at 444 (Henderson, J., dissenting in part).

¹⁷ *Id.* at 440–41 (controlling opinion).

date merely because actual payment is reasonably delayed for calculation of the benefit amount if all payments are actually made.”¹⁸ The court found that US Airways did not meet this standard.¹⁹ US Airways argued that an additional eighteen days could be necessary to determine a pilot’s final month of earnings.²⁰ It also presented evidence portraying a delay of twenty-one business days as necessary to competently determine lump sum funds and a delay of thirty calendar days as customary within the industry.²¹ The court, however, found that none of these explanations related to the administrative calculation of a lump sum pension payment.²²

The D.C. Circuit held for the plaintiffs for three reasons. First, given that retirement was mandatory for US Airways pilots at the age of sixty, pension administrators could plan ahead for the calculation of each lump sum payment.²³ Second, a forty-five-day delay was more prolonged than the thirty-day delays that occurred “in practice” at the time.²⁴ Finally, the floodgates would not be opened to lawsuits concerning *de minimis* amounts of interest because “the probability of litigation [would] correlate [] with the length of delay.”²⁵

The court’s first rationale was that administrators can plan ahead and will know, with a fair amount of accuracy, what the final month of earnings will likely be for each retiree.²⁶ Debate ensued as to whether determining the final month’s earnings required an additional eighteen days, but apparently the evidence could not support this contention.²⁷ The court provided no reason for denying an additional eighteen days, though, be-

¹⁸ *Id.* at 440; Treas. Reg. §1.401(a)-20, Q&A (10)(b)(3) (2011).

¹⁹ *Stephens*, 644 F.3d at 442.

²⁰ *See id.* at 441 n.1.

²¹ *See id.* at 440–41.

²² *Id.* at 442. After this court ruled for the plaintiffs, the Supreme Court denied certiorari. *See Stephens v. US Airways Grp.*, 132 S. Ct. 1857 (2012).

²³ *Stephens*, 644 F.3d at 441 n.1.

²⁴ *Id.* at 441.

²⁵ *Id.*

²⁶ *Id.* at 441 n.1; *id.* at 445 (Henderson, J., dissenting in part).

²⁷ *Id.* at 441 n.1 (controlling opinion); *id.* at 445 (Henderson, J., dissenting in part). US Airways provided a numerical breakdown of the first twenty-one business days needed to calculate the clerical delay. *Id.* at 440–41 (controlling opinion). It included time for data checks, benefit calculations, qualified domestic relations checks, check transmittal, and check review. *Id.* These calculations were separate from the time needed to calculate the pilot’s “Final Average Earnings,” a figure that also played a role in determining the lump sum. *Id.* at 445 (Henderson, J., dissenting in part).

cause no argument was made to show that final earnings *would not* take eighteen days.²⁸ The court's second rationale was that even the industry norm of thirty days for a clerical delay was less than the forty-five days taken by US Airways.²⁹ The plaintiffs' expert testified to this norm, and the court stated that the testimony merely showed that US Airways did not finish its calculations within the time frame.³⁰ The plaintiffs used the industry standard to demonstrate that there was little correlation between the payment delay and administrative necessity, but PBGC likely could have used the testimony as a way of showing that forty-five days was so close to thirty that it was also a reasonable delay.³¹ The court's final rationale was that this case would not open the floodgates to *de minimis* claims.³² The court explained that future retirees would still have the burden to prove an *unreasonable* delay and that the less likely a delay is unreasonable, the less likely a retiree will even bring suit.³³ This case does not shut the doors on those with legally cognizable claims; instead, claimants can decide for themselves whether bringing suit would be beneficial enough to justify the legal expenses.³⁴

The dissent in this case raised multiple counterarguments to the majority. First, although the pension coordinator knows when a pilot will retire, a pilot's final average earning amount is derived, at least partially, from the last month of work, which can vary relative to previous months.³⁵ Second, the dissent stated that the court conceded that the industry norm of thirty days was a reasonable delay.³⁶ Third, the plaintiffs still had the burden to prove that a forty-five-day wait was unreasonable.³⁷ Fourth, this case could open the door to *de minimis* claims;³⁸ this contention is in direct opposition to Judge Brown's assertion in the controlling opinion.³⁹ Finally, the retirees in this case were awarded more interest than pilots retiring after them could pos-

²⁸ See *id.* at 441 & n.1 (controlling opinion).

²⁹ *Id.* at 441.

³⁰ *Id.*

³¹ See *id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 445 (Henderson, J., dissenting in part).

³⁶ *Id.*

³⁷ *Id.* (citing *Horton v. Reliance Standard Life Ins. Co.*, 141 F.3d 1038, 1040 (11th Cir. 1998)).

³⁸ *Id.*

³⁹ See *id.* at 441 (controlling opinion).

sibly receive, and it would be inequitable to give the plaintiffs a greater monetary award than others.⁴⁰

The concurring opinion in this case focused on the first issue: whether ERISA was satisfied at all.⁴¹ Judge Kavanaugh explained that ERISA was not satisfied, which meant that there should have been little reason to even consider the reasonableness of the delay.⁴² The concurring opinion relied primarily on 29 U.S.C. § 1054(c)(3), a section in ERISA which states that a lump sum, even if calculated to equal an annuity at first, would not be equal to that annuity after any amount of delay due to the time value of money.⁴³ To protect retirees, “‘ERISA requires actuarial equivalence between the *actual distribution* and the accrued benefit it replaces,’” which means that an actual distribution later on is not the actuarial equivalent of one now.⁴⁴ Judge Kavanaugh also concluded that an IRS regulation cited by US Airways does not relate to ERISA and should therefore not be controlling.⁴⁵

The court incorrectly decided this case because the specific facts show that the delay could have been reasonable.⁴⁶ In the alternative, the interest awarded should only be for twenty-four days at most, rather than the full forty-five days.⁴⁷ The court first addressed the question of whether the delay was reasonable, and then it looked to whether US Airways could validate a defense of administrative necessity.⁴⁸ Every time US Airways gave an explanation, however, the court rejected the reasoning as an unlikely answer, even a “red herring,” but it provided little to no

⁴⁰ See *id.* at 446 (Henderson, J., dissenting in part) (explaining that pilots who retired on April 1, 2000, or later—that is, most pilots retiring after the plaintiffs—have had their pensions capped at the statutory maximum); see also Kathleen Pender, *What They’ll Get: How Pension Agency Pays Out*, SFGATE (May 12, 2005, 4:00 AM), <http://www.sfgate.com/business/network/article/what-they-ll-get-how-pension-agency-pays-out-2635479.php> (reporting, in 2005, that when an airline is in bankruptcy, pilots’ pension benefits may be limited to set maximums). This note, however, discusses only the potential increase in administrative efficiency caused by this decision.

⁴¹ *Stephens*, 644 F.3d at 442 (Kavanaugh, J., concurring).

⁴² *Id.* at 442–43.

⁴³ *Id.*; see also *Esden v. Bank of Bos.*, 229 F.3d 154, 163 (2d Cir. 2000) (requiring that a lump sum payment be no less than the present value of an annuity to comply with ERISA).

⁴⁴ *Stephens*, 644 F.3d at 443 (quoting *Miller v. Xerox Corp. Ret. Income Guarantee Plan*, 464 F.3d 871, 874 (9th Cir. 2006)).

⁴⁵ *Id.*

⁴⁶ See *id.* at 440–41 (controlling opinion).

⁴⁷ See *id.* at 445 (Henderson, J., dissenting in part).

⁴⁸ *Id.* at 440–41 (controlling opinion).

explanation.⁴⁹ For instance, the court assumed that US Airways had a scant amount of justification for the time it takes to add up a pilot's final month of earnings.⁵⁰ The dissent, though, gave a reasonable explanation for this additional time based on "the number of hours logged and differentials for night pay, 'overwater pay[,] and other adjustments."⁵¹ The dissent's explanation listed various factors that could add time to the verification of final earnings, and these factors did not even include the need to then average all of the earnings together to confirm the final total.⁵² The court incorrectly presupposed that a pension plan would know a pilot's final earnings just because it knows when that pilot will retire—but no evidence supports this claim.⁵³

Furthermore, the plaintiffs had the burden of proof on the claims in this case.⁵⁴ The plaintiffs had to prove that the delay was unreasonable and could do so by showing that there was no administrative rationale for the wait.⁵⁵ Once US Airways introduced evidence showing that it actually did take administrative time to calculate a lump sum payment, the burden should have shifted back to the plaintiffs to disprove the relevance of this evidence or offer new evidence.⁵⁶ The court, however, disregarded the proof given by US Airways, even though it clearly showed a possible reason for the clerical delay.⁵⁷ US Airways (or PBGC, at this point in the trial) did not have to prove administrative necessity; rather, the plaintiffs had to prove unreasonable delay. Upon examination of the given facts, it is unlikely that the retirees met their burden.⁵⁸

Even if the delay was truly unreasonable, which is unlikely, the plaintiffs should not have been awarded the full forty-five days of interest.⁵⁹ The court noted that a twenty-one-day procedure was possible but then discounted it as lacking proof.⁶⁰ This proce-

⁴⁹ See *id.* at 441 & n.1.

⁵⁰ See *id.* at 441 n.1.

⁵¹ *Id.* at 445 (Henderson, J., dissenting in part).

⁵² *Id.*

⁵³ See *id.* at 441 n.1 (controlling opinion).

⁵⁴ *Id.* at 445 (Henderson, J., dissenting in part).

⁵⁵ See *id.*

⁵⁶ See *id.* at 440–41 (controlling opinion).

⁵⁷ See *id.*

⁵⁸ See *id.* at 445 (Henderson, J., dissenting in part) (citing *Horton v. Reliance Standard Life Ins. Co.*, 141 F.3d 1038, 1040 (11th Cir. 1998)).

⁵⁹ See *id.*

⁶⁰ *Id.* at 440–41 (controlling opinion).

ture is clear proof, though, because it substantiates one possible and reasonable clerical process for US Airways.⁶¹ Even if *final average earnings* take no time to compute, a delay of twenty-one days for *administrative calculation* still seems reasonable; this would mean that the plaintiffs should have only received interest for a delay of, at most, twenty-four days—the difference between the reasonable twenty-one days and the ultimate forty-five days.⁶² The dissent also discussed the industry norm for delay and how “Judge Brown concede[d] that a delay of up to thirty days would be reasonable.”⁶³ Although it is unclear whether Judge Brown actually conceded this point, if the industry norm is the benchmark, then thirty days should have been the basis for interest calculations instead of twenty-one days.⁶⁴ The court should have roughly based damages on a fifteen-day scale, making the interest award only one-third of what the court awarded.⁶⁵ Either way, the full forty-five-day delay was likely an incorrect basis for calculating damages in this case and seems to disregard IRS regulations by removing any possible allowance of time for pension calculations.⁶⁶

The concurring opinion gave a straightforward solution to the ERISA issue in this case, but it failed to consider the difficulty of meeting such a strict standard.⁶⁷ If any delay—including a reasonable one—would result in an ERISA violation, then even the waiting time for a check sent in the mail could spur a violation.⁶⁸ The concurrence even explained that “ERISA tolerates reasonable delays” but that interest should still be paid during any wait.⁶⁹ What is the point of having a reasonableness exception to ERISA while still requiring a pension plan to pay interest as if it were being punished?⁷⁰ Such a strict standard would be burdensome for airlines and would increase pressure on pension coor-

⁶¹ *See id.*

⁶² For clarification, the mathematical argument is that $45 - 21 = 24$. *Cf. id.* at 445 (Henderson, J., dissenting in part).

⁶³ *Id.*

⁶⁴ *See id.*; *id.* at 440–41 (controlling opinion). Judge Brown noted that the industry norm is thirty days after reviewing expert testimony, but Judge Brown’s controlling opinion does not seem to have fully conceded that this number determines the reasonableness standard here. *See id.* at 441 (controlling opinion).

⁶⁵ *See id.* at 445 (Henderson, J., dissenting in part).

⁶⁶ *See id.*; *id.* at 442 (controlling opinion).

⁶⁷ *See id.* at 442 (Kavanaugh, J., concurring).

⁶⁸ *See id.* at 443.

⁶⁹ *Id.* (citing *Contilli v. Local 705 Int’l Bhd. of Teamsters Pension Fund*, 559 F.3d 720, 722 (7th Cir. 2009) (Easterbrook, C.J.)).

⁷⁰ *See id.*

dinators to simply finish the calculations.⁷¹ This pressure could add to check accuracy problems and increase the potential for clerical error.⁷² Although Judge Kavanaugh had a simple answer for the problem, the resolution would not likely be so easy or beneficial.⁷³

Although the dissent was likely correct that the delay was *not* unreasonable, the court's decision may still serve as beneficial public policy for two reasons.⁷⁴ First, the decision might improve payment plans for retiring pilots because airlines will be more careful in the future about the time they take to calculate lump sums. These pensions are extremely important to pilots. The money represents years of hard work and dedication, and a delay in payment can cause difficulties for those who rely on their retirement savings. Second, the courts should not turn pilots away from litigation just because interest awards might be small compared to legal expenses.⁷⁵ The dissent stated that this litigation is likely more burdensome for the pilots than it is beneficial, but this argument is weak and is a point on which Judge Brown was correct.⁷⁶ Pilots should be able to seek legal redress in the courts and will be more likely to do so if they realize an actual delay in their pension fund payments.⁷⁷ The dissent was also likely wrong about the inequitable nature of this lawsuit.⁷⁸ Current claimants should not have their rights limited just because subsequent claimants cannot earn as much.⁷⁹ Such a rule would lead to substantial drawbacks for many with valid claims and would cause unnecessary additional determinations and steps in a single lawsuit. These two points, however, merely appear to be side arguments, and they do not affect the main arguments on which the dissent relied.⁸⁰

The court decided this case incorrectly because IRS regulations allow for reasonable delays.⁸¹ Furthermore, the specific facts all point to the conclusion that the delay here was administratively necessary. The decision, however, may still turn out to

⁷¹ *See id.*

⁷² *See id.*

⁷³ *See id.*

⁷⁴ *See id.* at 444 (Henderson, J., dissenting in part).

⁷⁵ *But see id.* at 445.

⁷⁶ *See id.*; *id.* at 441 (controlling opinion).

⁷⁷ *See id.* at 441 (controlling opinion).

⁷⁸ *See id.* at 446 (Henderson, J., dissenting in part).

⁷⁹ *Contra id.*

⁸⁰ *See id.* at 445-46.

⁸¹ Treas. Reg. § 1.401(a)-20, Q&A 10(b)(3) (2011).

be a blessing in disguise for pilots near retirement. Although the awards in this case are not large in hindsight, the value of increased payment certainty may pay off in the end. Overall, the precedent that arises could decrease administrative delay and remind pilots of their ability to take legal action, even if the case itself was not a crushing defeat for airlines and pension plans.

