

LAW REVIEW 1130

Does USERRA Provide a Remedy for Employer Harassment?

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Carder v. Continental Airlines, Inc., Case No. 10-20105 (5th Cir. Mar. 22, 2011).

1.2—USERRA-Discrimination Prohibited

1.4—USERRA Enforcement

1.8—USERRA-Relationship Between USERRA and other Laws/Policies

Derek Carder, Mark Bolleter, Drew Daugherty, and Andrew Kissinger are pilots for Continental Air Lines (CAL)[\[1\]](#) and are members of the National Guard or Reserve. They filed a class action lawsuit against CAL in the United States District Court for the Southern District of Texas.[\[2\]](#) The class was certified, and these four named plaintiffs represent a class of all similarly situated CAL pilots, except those who notified the court of their intent to opt out of the class. The class complaint asserts several claims against CAL under the Uniformed Services Employment and Reemployment Rights Act (USERRA). This case is about one count of a multi-count complaint.

Section 4311(a) of USERRA provides: “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 supplied).

In the relevant count of their complaint, the four named plaintiffs and the class that they represent allege that CAL denied them a “benefit of employment” by creating a “hostile work environment.” They accuse CAL supervisors of “harassing, discriminatory, and degrading comments and conduct relating to and arising out of” the plaintiffs’ military service and service obligations.”[\[3\]](#)

CAL filed a motion to dismiss this count of the complaint[\[4\]](#) under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP). CAL argued, and the District Court agreed, that even accepting the factual allegations of this count as true the plaintiffs are not entitled to any relief (money damages or injunctive relief) that the court can award. CAL argued and the court agreed that USERRA does not prohibit harassment of military members nor otherwise contemplate a hostile work environment action.

Under the FRCP, normally there is not an appeal until the district court has resolved all counts of the plaintiffs’ complaint, but under certain circumstances the district court can grant leave to the losing party to file an interlocutory appeal of a district court ruling that resolves part but not all of a case. The district court granted leave to the plaintiffs to file an interlocutory appeal to the United States Court of Appeals for the Fifth Circuit, the federal appellate court that sits in New Orleans and hears appeals from district courts in Texas, Louisiana, and Mississippi.

Section 4302 of USERRA defines 16 terms used in this law, including the term “benefit of employment.” The statutory definition controls for purposes of this statute. USERRA’s definition of “benefit of employment” is as follows: “The term ‘benefit,’ ‘benefit of employment,’ or ‘rights and benefits’ means any advantage, profit, privilege, gain, status, account, or interest (including salary or wages for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.” 38 U.S.C. 4302(2).

Title VII of the Civil Rights Act of 1964 forbids discrimination in employment on the basis of race, color, sex, religion, or national origin. The Supreme Court has held that creating a hostile work environment for women, based on their sex, is a violation of Title VII. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 63-66 (1986). In this case, the 5th Circuit pointed out that the Supreme Court in *Meritor Savings Bank* relied heavily on Title VII language prohibiting discrimination with respect to “terms, conditions, or privileges of employment.”

The 5th Circuit pointed out that the Supreme Court decided *Meritor Savings Bank* eight years before Congress enacted USERRA in 1994. The 5th Circuit reasoned that if Congress intended USERRA to create a hostile work environment cause of action, Congress should have included the “terms, conditions, or privileges of employment” language that the Supreme Court relied upon in *Meritor Savings Bank*. In the absence of that language in USERRA’s definition of “benefit of employment,” the 5th Circuit inferred that Congress did not intend to create a hostile work environment cause of action under USERRA.

Recommendation

We need a statutory amendment to add “terms, conditions, or privileges of employment” to USERRA’s definition of “benefit of employment.” Congress needs to make it unlawful for an employer or supervisor to harass and deride National Guard and Reserve personnel in order to make their work life intolerable, in hopes of driving them away and thereby limiting the employer’s obligations under USERRA.

[1] CAL is in the process of merger with United Air Lines (UAL). It is unclear how the merger will affect this pending lawsuit.

[2] The CAL headquarters is in Houston, in the Southern District of Texas.

[3] Among the comments that plaintiffs attribute to supervisors are “If you guys take more than three or four days of military leave you’re just milking the system” and “you need to choose between CAL and the Navy.”

[4] The other counts of the complaint will proceed to discovery and then to summary judgment or trial.