**LAW REVIEW 1189**

**October 2011**

**Veterans Opportunity to Work Act of 2011**

**By Captain Samuel F. Wright, JAGC, USN (Ret.)**

1.2—USERRA-Discrimination Prohibited

1.8—Relationship Between USERRA and other Laws/Policies

On July 7, 2011, Representative Jeff Miller (Chairman of the House Committee on Veterans' Affairs) introduced H.R. 2433, the proposed Veterans Opportunity to Work Act (VOTWA) of 2011. On October 12, 2011, the bill passed the House of Representatives by a vote of 418-6. In the Senate, the bill has been referred to the Senate Committee on Veterans' Affairs. I am optimistic that the bill will pass the Senate and be signed into law by President Obama.[1]

Each year, an "omnibus" bill comes out of the House Veterans' Affairs Committee and is usually enacted. As in past years, the VOTWA makes many changes to title 38 of the United States Code (U.S.C.), which deals with veterans' affairs. Only one section (section 401) of the VOTWA would amend the Uniformed Services Employment and Reemployment Rights Act (USERRA), which is codified at 38 U.S.C. 4301-4335.

Section 4303 of USERRA (38 U.S.C. 4303) defines 16 terms used in this law, including the term "benefit of employment" which is defined as follows:

> The term "benefit", "benefit of employment", or "rights and benefits" means any advantage, profit, privilege, gain, status, account, or interest (including wages or salary 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.
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> 38 U.S.C. 4303(2).

Section 401 of the VOTWA would amend section 4303(2) to read as follows:

> The term "benefit", "benefit of employment", or "rights and benefits" means *the terms, conditions, or privileges of employment, including* any advantage, profit, privilege, gain, status, account, or interest (including wages or salary 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

(The italicized words above are the words that section 401 of the VOTWA would add to existing law)

I am most pleased with this proposed amendment. It is exactly what I proposed in Law Review 1130 (July 2011).

This amendment is intended as a legislative overrule of *Carder v. Continental Airlines, Inc.*, 636 F.3d 172 (5th Cir. 2011), *petition for certiorari filed,* No. 10-1546 (June 17, 2011). I think that it is most unlikely that the Supreme Court will grant *certiorari* (discretionary review), and the best way to fix this problem is legislatively.

In the *Carder* case, Derek Carder, Mark Bolleter, Drew Daugherty, and Andrew Kissinger are pilots for Continental Air Lines (CAL) 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. 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 USERRA. This case is about one count of a multi-count complaint.

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."

CAL filed a motion to dismiss this count of the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP). CAL argued, and the District Court and Court of Appeals 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 courts 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. The 5th Circuit affirmed the District Court.

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 in *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, but USERRA does not contain the "terms, conditions, or privileges of employment" language that the Supreme Court relied upon in *Meritor Savings Bank*. The 5th Circuit reasoned that if Congress intended USERRA to create a hostile work environment cause of action, Congress should have included the exact 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. The purpose of section 401 of the VOTWA is to add that specific language to USERRA. If enacted, this amendment would make it clearly unlawful for an employer to create a hostile work environment for employees who are members of the National Guard or Reserve.

We have a long litany of proposed USERRA improvements. I invite your attention to www.fedattorney.com/tullyuserraproposal. Fixing the *Carder* problem is the "low hanging fruit" that we can reasonably expect to accomplish this year, in the first session of the 112th Congress. Our other proposals will likely have to wait for the 2nd Session of the 112th Congress, or the 113th Congress (2013-14).

Fixing *Carder* is relatively easy for three reasons:

a. There is a very recent appellate court decision that clearly illustrates the problem and offers a simple statutory fix.

b. This amendment has no cost, either for the Federal Government or for employers.

c. It is difficult for employers to argue that they should have the right to harass National Guard and Reserve personnel because of their service.

We will keep the readers informed of progress on this issue and other issues pertaining to USERRA.

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[1] On November 21, 2011, President Obama signed this bill into law. It is now Public Law 112-56.