LAW REVIEW 1211

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Harassment as USERRA Violation

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

1.2—USERRA-Discrimination Prohibited

1.4—USERRA Enforcement

1.8—Relationship Between USERRA and other Laws/Policies

***Carder v. Continental Airlines,* Case No. 10-20105 (5th Cir. Mar. 22, 2011), *cert. denied* Oct. 3, 2011.**

Section 251 of Public Law 112-56, 125 Stat. 711 (signed Nov. 21, 2011).

Derek Carder, Mark Bolleter, Drew Daugherty, and Andrew Kissinger are pilots for Continental Air Lines (CAL) and are members of Reserve Components of the armed forces. They filed suit in the United States District Court for the Southern District of Texas against CAL, claiming that the airline had violated their rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) in several ways. They requested and the District Court granted class certification. This means that Carder, Bolleter, Daugherty, and Kissinger represent a class consisting of all CAL pilots who are members of the National Guard or Reserve, except for a handful of pilots who consciously chose to opt out of the class.

The Carder group filed suit—a complaint with multiple counts, each alleging that CAL violated USERRA in a different way. This case deals with just one count of the multi-count complaint.[1]

The Carder group alleged that CAL supervisors *routinely* harass class members about their service in the National Guard or Reserve.[2] In their complaint, they alleged that the harassment violates section 4311(a) of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4311(a). They claimed that the right to do one's job without this sort of harassment by one's supervisor is a "benefit of employment" protected by section 4311(a), which provides as follows:

> A person who is a member of, applies to be a member of, performs, applies to perform, or has an obligation to perform service in the uniformed services 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.
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> 38 U.S.C. 4311(a) (emphasis supplied).

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant in a federal civil lawsuit can file a motion to dismiss the lawsuit soon after it is filed, based on "failure to

state a claim for which relief can be granted." The court will grant the motion if the defendant shows the court that *assuming what the plaintiff alleges is true* there is no relief that the court can award to the plaintiff. The idea is that the court should not waste time determining the truth of an allegation if the plaintiff loses anyway, even if the allegation is true.

The District Court agreed with CAL's contention that the opportunity to work free of supervisor harassment, based on one's Reserve Component service, is not a "benefit of employment" as defined by USERRA. The Carder Group appealed to the United States Court of Appeals for the 5th Circuit, which is the federal appellate court that sits in New Orleans and hears appeals from federal district courts in Texas, Louisiana, and Mississippi. On March 22, 2011, the 5th Circuit affirmed the dismissal of the lawsuit. The Carder Group applied to the Supreme Court for *certiorari*[3] and the Court denied the application on October 3, 2011, thus rendering the case final.

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. At the time the *Carder* case was decided by the 5th Circuit, USERRA's definition of "benefit of employment" was 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.
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> 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.

The 5th Circuit decision suggested an easy statutory fix, and Congress enacted exactly that fix in late 2011. I invite the reader's attention to section 251 of Public Law 112-56[4], which was signed into law by President Obama on November 21, 2011. This new law amended USERRA's definition of "benefit" 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 5th Circuit held that supervisor harassment of employees, based on their membership in the Reserve or National Guard, did not violate USERRA. The 5th Circuit relied on the fact that USERRA's definition of "benefit of employment" differed from the Title VII definition that the Supreme Court had relied upon in finding harassment of female employees, based on their sex, to be a violation of Title VII. Congress amended USERRA to include in USERRA's definition the *exact words* of Title VII that the Supreme Court had relied upon in *Meritor Savings Bank.*

It is clear that the intent and effect of this 2011 amendment of USERRA is to overrule *Carder.* This is exactly how our system is supposed to work. When Congress does not like a court's interpretation of a federal statute, Congress can fix the problem by amending the statute. Such a statutory amendment does not change the outcome of court decisions that are already final, but it does change the rule of law going forward.

Is it unlawful under USERRA for an employer to order or permit supervisors to harass employees based on their membership in the National Guard or Reserve? The answer is now clearly *yes,* with respect to harassment on or after November 21, 2011. Harassment that occurred before that date is lawful, at least in the 5th Circuit (Texas, Louisiana, and Mississippi).

I will chalk up this statutory amendment as one of the major accomplishments of ROA's Service Members Law Center (SMLC) in 2011.[5] In 2011, I met with several congressional staffers and explained that *Carder* created a big problem and that the problem could be solved easily by a simple statutory amendment.

Your dues and contributions to ROA support our efforts to ensure the enactment and implementation of national policies that provide adequate national defense, as called for in our congressional charter. Most of those efforts come from ROA's Legislative Director [Captain Marshall Hanson, USNR (Ret.)] and his assistant (Ms. Lauren Wilkins). Give us a call or send us an e-mail whenever we can be of assistance.

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[1] The other counts were not dismissed and may yet go to trial.

[2] Among the comments the plaintiffs allege that supervisors routinely make are "If you guys take more than three or four days of military leave you are just milking the system" and "You need to choose between CAL and the Navy."

[3] *Certiorari* is discretionary review. At least four of the nine Justices must vote for *certiorari,* or it is denied.

[4] 125 Stat. 711.

[5] I invite your attention to www.servicemembers-lawcenter.org. You will find more than 800 "Law Review" articles about USERRA and other military-relevant laws. We added 112 new articles in 2011. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and in 2009 I joined ROA's full-time staff as the first Director of the SMLC. In 2011, I received and responded to 5,405 inquiries about USERRA and other military-legal topics. I am available at SWright@roa.org or at 800-809-9448, extension 730. I am here during regular business hours and until 10 p.m. Eastern Time on Thursdays. The idea of the Thursday late night is to make it possible for Guard and Reserve personnel to call me outside their civilian work hours.