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Revising USERRA to Include Non-Pecuniary Compensatory Damages as Remedies

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USERRA (38 U.S.C. 4301 *et seq.*) is an anti-discrimination statute enacted in 1994 to protect Reserve and Guard personnel in their civilian occupations when they are performing their military service obligations. Those protections are significant and have evolved:

- In November 2011 Congress passed the VOW to Hire Heroes Act, PL 112-56, November 21, 2011, 125 Stat 711, which clarified that a claim for freedom from a hostile work environment under USERRA does not require a wrongful termination or constructive discharge to be actionable.
- The clarification was eight simple words, re-defining “benefit of employment” to mean “*the terms, conditions, or privileges of employment, including...*” to mirror the definition in Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act (ADA), two other well-known and powerful anti-discrimination statutes.
- For more information on the protections offered by USERRA, we invite you to visit the ROA [Servicemembers Legal Center \(SMLC\) online library](#). The library offers over 900 articles dealing with USERRA and areas of law affecting citizen warriors.

The November 2011 clarification came about after the Fifth Circuit Court of Appeal, in one of my cases, stated that there is no freedom from harassment or hostile work environment cause of action cognizable under USERRA. *See, Carder v. Continental Airlines*, 636 F.3d 172 (5th Cir. 2011). During the process of petitioning the Supreme Court for *certiorari* which was unfortunately denied, the Department of Labor, Department of Justice and Solicitor General’s office assisted us with getting Congress to pass the VOW to Hire Heroes Act.

Unfortunately in USERRA there is no measure of damages for service members who are subjected to harassment and/or hostile work environments unless they are terminated or forced to quit (constructive discharge) at which point they are entitled to lost wages and possibly liquidated damages double the amount of their lost wages. Title VII was amended in 1991 to include emotional distress and punitive damages as remedies for being subjected to discriminatory and/or harassing conduct under both Title VII and the ADA, and USERRA should follow suit.

This clarification would cost the taxpayers nothing and requires little more than inserting similar language from the 1991 amendment to Title VII into USERRA. Specifically, the language suggested would be:

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- **RIGHT OF RECOVERY**- In an action brought by a complaining party under USERRA (38 U.S.C. 4301, et seq.) against a respondent who engaged in unlawful discrimination and/or denial of benefits prohibited under and defined by the Act, the complaining party may recover compensatory and punitive damages as allowed in subsection (“x”), in addition to any relief authorized by section 4323 or 4324 of USERRA, from the respondent.
- **DETERMINATION OF PUNITIVE DAMAGES**- A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.
- **EXCLUSIONS FROM COMPENSATORY DAMAGES**- Compensatory damages awarded under this section shall not include back pay, interest on back pay, or any other type of relief otherwise authorized under section 4323 or 4324 of USERRA.
- **LIMITATIONS**- The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--
 - in the case of a respondent who has more than 1 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000;
 - in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$100,000; and
 - in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000; and
 - in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000.
- **CONSTRUCTION**- Nothing in this section shall be construed to limit the scope of, or the relief available under, section 4323 or 4324 of USERRA.