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Does USERRA Forbid Employer Harassment of Employees because of their Reserve Component Service? Congress Amends the Definition of "Benefit of Employment" To Clarify that the Answer Is Yes.

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
Update on CAPT Sam Wright

1.2—USERRA forbids discrimination
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

***Carder v. Continental Airlines,* 636 F.3d 172 (5th Cir.), *cert. denied,* 565 U.S. 930 (2011).**[3]

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1600 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1400 of the articles.

[2] BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 35 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

[3] This is the 2011 decision of a three-judge panel of the United States Court of Appeals for the 5th Circuit, the federal appellate court that sits in New Orleans and hears appeals from federal district courts in Louisiana, Mississippi, and Texas. The citation means that you can find this decision in Volume 636 of *Federal Reporter Third Series,* and the decision starts on page 172. The "*cert. denied*" means that the United States Supreme Court denied certiorari (discretionary review). At least four of the nine Justices must vote for certiorari at a conference to consider certiorari petitions, or certiorari is denied. Certiorari is denied in more than 99% of the cases in which it is sought. The denial of certiorari means that the decision of the Court of Appeals is final, but it does not necessarily mean that the Supreme Court agrees with the holding or legal reasoning of the Court of Appeals.

Derek Carder, Mark Bolleter, Drew Daugherty, and Andrew Kissinger were pilots for Continental Air Lines (CAL)[4] and were actively participating members of Reserve Components of the armed forces. On behalf of themselves, and seeking to represent a class of CAL pilots who were similarly situated, they sued CAL in the United States District Court for the Southern District of Texas, because CAL at the time had its headquarters in Houston. They were represented by attorney Brian Lawler, a Lieutenant Colonel in the Marine Corps Reserve and life member of the Reserve Officers Association (ROA). They asserted that CAL violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) in several discrete ways.

The complaint which is the focus of this appeal alleges that CAL created a hostile work environment through "harassing, discriminatory, and degrading comments and conduct relating to and arising out of" the plaintiffs' military service and service obligations. This count of the complaint cited a "continuous pattern of harassment in which Continental has repeatedly chided and derided plaintiffs for their military service through the use of discriminatory conduct and derogatory comments regarding their military service and military leave obligations."

The factual content of this count was based primarily on the plaintiffs' allegations that CAL management placed onerous restrictions on taking military leave and arbitrarily attempted to cancel military leave and made derisive and derogatory comments to pilots about their military service. Examples of these alleged derisive comments include comments by CAL managers such as the following: "If you guys take more than three or four days a month in military leave, you're just taking advantage of the system."; "I used to be a guard guy, so I know the scams you guys are running."; "Your commander can wait. You work full time for me. Part-time for him. I need to speak with you, in person, to discuss your responsibilities here at Continental Airlines."; "Continental is your big boss, the Guard is your little boss."; "It's getting really difficult to hire you military guys because you're taking so much military leave."; "You need to choose between CAL and the Navy."

CAL moved for dismissal of this hostile work environment claim under Federal Rule of Civil Procedure (FRCP) 12(b)(6). CAL argued that USERRA does not prohibit harassment of military members nor otherwise contemplate a hostile work environment action. The district court agreed. The district court held that the plain meaning of the phrase prohibiting the denial of any "benefit of employment" to a member of the uniformed services based on such membership or the performance of service, 38 U.S.C. § 4311(a), does not include a cause of action based on a hostile work environment.[5]

The plaintiffs appealed, and the 5th Circuit affirmed, in this decision. At the time the 5th Circuit decided *Carder,* USERRA's definition of "benefit of employment" read as follows:

[4] Continental has since merged with United Air Lines (UAL), and the new combined airline is now known as UAL.
[5] *Carder v. Continental Airlines, Inc.,* 2009 U.S. Dist. LEXIS 110671 (S.D. Texas November 30, 2009).

> 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.[6]

The 5th Circuit held:

> From the plain language of section 4301(a)(3), it is clear that one of the purposes of USERRA is to prohibit discrimination and acts of reprisal against service members because of their service. Section 4311(a) defines this discrimination to include the denial of any "benefit of employment." The language of section 4303(2) defining the word "benefit" and the phrase "benefit of employment" includes the long list of terms "advantage, profit, privilege, gain, status, account, or interest." But section 4303(2) does not refer to harassment, hostility, insults, derision, derogatory comments, or any other similar words. Thus, the express language of the statute does not provide for a hostile work environment claim.[7]
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> Hostile work environment claims were first recognized in discrimination cases decided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. ("Title VII"). In originally permitting a plaintiff to assert a hostile work environment claim in a Title VII case, the Supreme Court relied heavily on Title VII's language prohibiting discrimination with respect to the "terms, conditions, or privileges of employment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-66, 106 S. Ct. 2399, 2404-05, 91 L. Ed. 2d 49 (1986). The Court stated that "'[t]he phrase terms, conditions, or privileges of employment in Title VII is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.'" *Id*. at 66 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)). The Court further held that this broad phrase "evinces a congressional intent to strike at the entire spectrum of men and women in employment." *Id*. at 64, 106 S. Ct. at 2404 (internal quotes and citation omitted).
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> The *Meritor* opinion makes clear it is the word "conditions," in particular, that the Court relied on in inferring a claim for hostile work environment under Title VII. For instance, the opinion states that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive to *alter the conditions* of the victim's employment and create an abusive working environment." *Id*. at 67, 106 S. Ct. at 2405 (internal quotes and citation omitted) (emphasis added). The Court added: "mere utterance of an ethnic or racial

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[6] *Carder,* 636 F.3d at 175.
[7] *Id.,* at 176.

epithet which engenders offensive feelings in an employee would not affect the *conditions* of employment to sufficiently significant degree to violate Title VII." *Id*. (internal quotes and citation omitted) (emphasis added).

The Supreme Court has consistently applied this standard: "'When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter *the conditions* of the victim's employment and create an abusive working environment, Title VII is violated.'" *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 368, 126 L. Ed. 2d 295 (1993) (quoting *Meritor*, 477 U.S. at 67, 106 S. Ct. at 2405) (emphasis added); *see also Penn. State Police v. Suders*, 542 U.S. 129, 133, 124 S. Ct. 2342, 2347, 159 L. Ed. 2d 204 (2004) ("To establish hostile work environment, plaintiffs like Suders must show harassing behavior 'sufficiently severe or pervasive to alter *the conditions* of their employment.'") (internal citations omitted) (emphasis added); *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81, 118 S. Ct. 998, 1003, 140 L. Ed. 2d 201 (1998) (Title VII's prohibition of harassment "forbids only behavior so objectively offensive as to alter *the 'conditions'* of the victim's employment.") (internal citation omitted) (emphasis added).

We have relied on the same phrase "terms, conditions, or privileges of employment" in other anti-discrimination statutes such as the American with Disabilities Act ("ADA") to infer a cause of action for hostile work environment. For example, in a statutory question of first impression like this one, this court interpreted the phrase "terms, conditions, or privileges of employment" used in the ADA as encompassing a claim for hostile work environment, or "disability-based harassment." *Flowers v. S. Reg'l Physician Servs.*, 247 F.3d 229, 233-35 (5th Cir. 2001). *Flowers* drew heavily from the *Meritor* opinion and the fact that the ADA used the same language as Title VII. *Flowers* concluded that "the language of Title VII and the ADA dictates a consistent reading of the two statutes" and that "[t]herefore, following the Supreme Court's interpretation of the language contained in Title VII, we interpret the phrase 'terms, conditions, or privileges of employment' as it is used in the ADA to 'strike at' harassment in the workplace." *Id*. at 233 (quoting *Meritor*, 477 U.S. at 64, 106 S. Ct. at 2404).

Notably, Congress passed the ADA after *Meritor*. Thus, Congress's choice to include the same phrase in the ADA that the Court relied on in *Meritor* supports the view that Congress intended to make harassment actionable under the ADA to the same extent as Title VII. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85-86, 126 S. Ct. 1503, 1513, 164 L. Ed. 2d 179 (2006) ("[W]hen 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general mater, the intent to incorporate its judicial interpretations as well.'") (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645, 118 S. Ct. 2196, 2208, 141 L. Ed. 2d 540 (1998)). Other anti-harassment statutes passed by Congress after *Meritor* have included the same or similar language from Title VII. *See, e.g.*, 18 U.S.C. § 1514A(a) (regarding civil actions to protect against retaliation in fraud cases) ("[N]o covered entity or individual may discharge, demote, suspend, threaten, *harass*, or

> in any other manner discriminate against an employee *in the terms and conditions of employment* because of any lawful act done by the employee . . . ."). (emphasis added).
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> Congress initially passed USERRA in 1994, years after *Meritor* was announced. Accordingly, Congress's choice to not include the phrase "terms, conditions, or privileges of employment" or similar wording in USERRA weighs in favor of the conclusion that USERRA was not intended to provide for a hostile work environment claim to the same extent as Title VII and other anti-discrimination statutes containing that phrase. The significance that the Supreme Court has placed on this phrase—and particularly on the specific word "conditions"—cannot be ignored. If Congress had intended to create an actionable right to challenge harassment on the basis of military service under USERRA, Congress could easily have expressed that intent by using the phrase "terms, conditions, or privileges of employment" interpreted previously by the Supreme Court. *See Merrill Lynch*, 547 U.S. at 85-86, 126 S. Ct. at 1513. The fact that Congress did not do so, even though USERRA was passed after the *Meritor* opinion, but instead chose to use the narrower phrase "benefits of employment," indicates that Congress intended to create a somewhat more circumscribed set of actionable rights under USERRA.[8]

In *Meritor Savings Bank,* the Supreme Court found that Title VII of the Civil Rights Act of 1964 created a "hostile work environment" claim for workplace harassment, based on the specific "terms and conditions of employment" language that Congress included in Title VII. If Congress had intended the same result under USERRA, it could have and should have included the exact same language in USERRA. Because Congress used different language in USERRA, it must have intended a different result, the 5th Circuit reasoned.

Thus, the legislative fix was simple and obvious. On November 21, 2011, Congress made that fix and amended section 4303(2) of USERRA into its present form:

> 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.[9]

The 2011 legislative history explains the purpose and effect of this amendment as follows:

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[8] *Id.,* at 177-79.

[9] 38 U.S.C. 4303(2) (emphasis supplied). The italicized words were added by Public Law 112-56, Title II, Subtitle D, section 251, 125 Stat. 729.

> The Uniformed Services Employment and Reemployment Rights Act (USERRA) sets the parameters under which an employer must employ and reemploy members of the uniformed services who are returning from active duty or who must be absent from work due to military obligation.
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> DoL [the United States Department of Labor] has suggested adding language to clarify the definition of, or has suggested, clarifying the definition of "benefit," "benefit of employment," or "rights and benefits." On page 18 of the Department's Fiscal Year 2010 Annual Report on USERRA, DoL noted that:
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> > In the Department's view these terms to include the right not to suffer workplace harassment or the creation of a hostile working environment because of an individual's membership in the uniformed service or uniformed service obligations. DoL considers it a violation of USERRA for an employer to cause or permit workplace harassment, the creation of a hostile working environment, or to fail to take prompt and effective action to correct harassing conduct because of an individual's membership in the uniformed service or uniformed service obligations. Although the Department believes that the statute currently supports this reading, in light of the risk of contrary interpretations by the courts, the Department recommends that Congress consider clarifying that USERRA prohibits workplace harassment or the creation of a hostile working environment. The Department of Justice and the Office of Special Counsel concur with this recommendation.
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> In determining the existence of a "hostile workplace," the Supreme Court in *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 63-66 (1986) considered whether the "terms, conditions, or privileges of employment" were violated. Therefore, section 401 will expand the definition of a hostile work environment to include "the terms, conditions, or privileges of employment," to conform USERRA with the Supreme Court's decision and DoL's request in its annual report on USERRA.[10]

This 2011 solves the *Carder* problem *going forward.* It is now clear that USERRA makes it unlawful for an employer (through its supervisors) to harass employees because of their membership in a uniformed service (including a Reserve Component of a uniformed service), application to join a uniformed service, performance of uniformed service, or application or obligation to perform future service.

Q: Does the 2011 amendment change the outcome of the *Carder* case?

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[10] H.R. Rep. No. 112-242(1), at 15-16 (2011), available at 2011 WL 4837273, *17-*18. This legislative history is reprinted in Appendix B-9 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on pages 883-84 of the 2017 edition of the *Manual.*

A: No. Like most enactments of Congress, the 2011 USERRA amendment is *prospective only.* It applies to situations arising on or after the date of enactment (11/21/2011).

In our tripartite Federal Government, it is the proper role of the Judicial Branch (the courts) to determine *what the law is* at a given moment, when it decides a case. In determining the meaning of a federal statute like USERRA, a court must start with the language of the statute. If the language is ambiguous or does not address the specific issue that has arisen in the case, the court can look to legislative history (House and Senate committee reports, floor debates, etc.). In determining the meaning of a statute, the courts utilize the *rules of statutory construction* that have been developed by the courts of Great Britain, the United States, and other common law countries over the course of a millennium.

Congress probably lacks the constitutional power to change the outcome of a court case that has been decided. At a minimum, it is fair to say that trying to reach back in time and change the outcome of decided cases is very controversial.

Q: Does the 2011 amendment entirely solve the problem prospectively?

A: No. There is another section of USERRA that needs to be amended. Section 4323(d)(1) sets forth the remedies that a federal district court can award to the successful USERRA plaintiff:

> Remedies.
>
> **(1)** In any action under this section, the court may award relief as follows:
> **(A)** The court may require the employer to comply with the provisions of this chapter.
> **(B)** The court may require the employer to compensate the person for *any loss of wages or benefits suffered* by reason of such employer's failure to comply with the provisions of this chapter.
> **(C)** The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.[11]

If the court finds that an employer has been harassing the plaintiff because of his or her military service and obligations, or that the employer has failed to take prompt and effective action to stop harassment by supervisors and fellow employees, the court can and should *order* the employer to stop the harassment. If the employer defies the court's order, the court can and should use its equity powers to command respect for and compliance with the court's orders. This quite literally means that individual supervisors who violate the court's order are put in jail, and they remain in jail until they purge themselves of the contempt by coming into compliance and remaining in compliance.

[11] 38 U.S.C. 4323(d)(1) (emphasis supplied).

But if the plaintiff is no longer employed by that employer, for whatever reason, no such injunctive relief is available. Congress needs to amend section 4323(d)(1) to provide *money damages for harassment.*

There are three kinds of money damages that can be awarded in civil cases: pecuniary damages, non-pecuniary compensatory damages, and punitive damages. The language of section 4323(d)(1)(B) ("loss of wages or benefits") appears to limit USERRA money damages to pecuniary damages.

Pecuniary damages are damages that are readily expressed in a sum certain of dollars. For example, let us assume that the plaintiff should have been promptly reemployed upon his or her return from military service but was not—the employer violated USERRA by failing to reinstate the plaintiff. Because of the violation, the plaintiff lost $20,000 in salary or wages that he or she should have received but did not receive. Ordering the employer to compensate the plaintiff for this $20,000 is clearly authorized by section 4323(d)(1)(B)—this is a pecuniary damage.

Compensatory non-pecuniary damages include damages for emotional distress, humiliation, loss of reputation, and like matters. These damages are very real, but they are not so readily expressed in a sum certain of dollars. In sexual harassment and other harassment cases under Title VII of the Civil Rights Act of 1964, as amended, juries routinely award six-figure verdicts and sometimes seven-figure verdicts for damages of this nature, and the courts routinely approve and enforce those verdicts.

Punitive damages are intended to punish wrongdoers for especially egregious misconduct and to deter similar misconduct by the same and other wrongdoers in the future. USERRA provides for punitive damages (called "liquidated damages"), but only to a very modest extent. Under section 4323(d)(1)(C), the court can double the pecuniary damages if the court finds that the employer-defendant violated USERRA willfully.

Frequently, there are USERRA cases where the employer violation is willful and egregious, but the pecuniary damages to the plaintiff are very modest.[12] When punitive damages are awarded, the damages should be measured by the degree of egregiousness, not the actual damages suffered by the plaintiff.

In Law Review 15088 (October 2015), I suggested that Congress amend section 4323(d)(1) of USERRA, using section 1981a of title 42 of the United States Code as a model, to authorize the award of non-pecuniary compensatory damages and punitive damages in USERRA cases. I reiterate now the suggestions that I made in October 2015.

[12] For example, after the unlawful firing, the plaintiff may have quickly found another job paying just as much or more.