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USERRA Forbids Employer Harassment of Reserve Component Personnel

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About Sam Wright

1.1.1.8—USERRA applies to the Federal Government
1.2—USERRA forbids discrimination
1.3.1.2—Character and duration of service
1.4—USERRA enforcement
1.7—USERRA regulations
1.8—Relationship between USERRA and other laws/policies

Q: I am a Major in the Army Reserve (USAR) and a member of the Reserve Organization of America (ROA).[3] I am a nurse-anesthetist in the Army Reserve and also in my civilian job, for

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "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, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 1800 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. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 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] At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new "doing business as" (DBA) name:

the United States Department of Veterans Affairs (VA). My USAR responsibilities require that I frequently be away from my VA job for drills, annual training, and involuntary call-ups with my USAR medical unit, and my direct VA supervisor continually harasses me at work, concerning my military obligations. He has continually said "you are gone too often for the Army" or words to that effect, and he has denied me valuable job assignments because of his annoyance with me about my Army duties. He even tried to get the state to revoke my nursing license.

While I was deployed outside the United States for 90 days in 2018, he moved my personal property out of my assigned office space without my permission and over my expressed objection. His e-mail communications to me, while I was deployed, distressed me and distracted me from my military duties.

I was recently notified by the Army that I am being called to active duty once again. When I notified my direct supervisor at work, he exploded, cursing at me, saying "I'm tired of this b……t." In June, there will be a vacancy in our department at the VA medical center. Currently, I am the next in line for the position that would be a promotion for me. My supervisor has been grooming another junior Nurse Anesthetist to challenge my application. All of this is in retaliation because of my frequent involuntary obligations to the Army. My work environment has deteriorated considerably. Because of the complaint to the Board of Health, it seems there is extra scrutiny on my job performance. I feel as if I am being ostracized by my colleagues with my supervisors supporting the ostracizing. I am being denied morning breaks as well as feeling alienated by the others.

I don't want to try to get my orders canceled, and I think that it is most unlikely that the Army would cancel the orders upon my request. Accordingly, I have the following questions:

a. **How much military leave is "too much?" Is there a limit on the number of times the Army can call me to duty or on the number of times the employer must grant me unpaid military leave under USERRA?**

Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

b. **Does my supervisor's harassment of me because of my military obligations violate USERRA?**
c. **If my employer's annoyance with me because of my military obligations causes me not to be selected for the promotion opportunity this summer, would that violate USERRA?**
d. **What remedies are available when a federal agency like the VA violates USERRA?**

Answer, bottom line up front

We (the Reserve Organization of America) believe that it is unconscionable that the VA (of all employers) permits supervisors to harass employees because of their obligations as members of the Reserve or National Guard. Now, I will address each of your questions separately.

Q: How much military leave is "too much?" Is there a limit on the number of times that I can be away from my civilian job for military service?

A: There is no limit, other than the five-year cumulative limit on the duration of periods of uniformed service that you can perform with respect to your employer relationship with the VA and the Federal Government. As I have explained in detail in Law Review 16043 (May 2016), there are nine exemptions from the five-year limit under section 4312(c) of USERRA.[4] That is, there are nine kinds of service that do not count toward exhausting your five-year limit. I have reviewed all your military service periods in the last 15 years, since you were hired by the VA. All these periods (drill weekends, annual training periods, and involuntary mobilizations) are exempt from the five-year limit. You still have the full five-year limit to use.

From July 1953 (when the Korean War ended) until August 1990 (when Iraq invaded and occupied Kuwait and President George H.W. Bush announced "this shall not stand"), our nation's seven Reserve Components (RC)[5] were considered to be a "strategic reserve" that was only available for World War III, which thankfully never happened. Many domestic and international political considerations supposedly made it "impossible" to call up RC units for anything short of the total war scenario that might start with a massive Warsaw Pact invasion of West Germany.

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[4] 38 U.S.C. 4312(c).

[5] In ascending order of size, the Reserve Components are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. Erickson is retired from the Army National Guard. The total number of RC personnel is almost equal to the number of personnel on full-time active duty, so the RC amounts to almost half of our nation's pool of trained and available military personnel. More than a million RC personnel have been called to the colors since the terrorist attacks of 9/11/2001.

When President Bush decided that important national interests required our country to use military force to protect Saudi Arabia and liberate Kuwait, he effectively said "I never signed off on that memo" saying that it was impossible to call up the RC for anything short of a total war. That decision started the transformation of the RC to an "operational reserve" that would be called to duty for intermediate military operations like Operation Desert Storm, Operation Enduring Freedom, and Operation Iraqi Freedom. That transformation accelerated after the terrorist attacks of 9/11/2001.

Many civilian employers, including federal agencies like the VA, have not gotten the word that Reserve Component service is no longer limited to the "one weekend per month and two weeks in the summer" model that was typical of the period between July 1953 and August 1990. Under USERRA, there is essentially no limit on the "burden" that an employer must bear because of the military obligations of an individual employee.

Under USERRA, there is no such thing as "excessive" military leave. The law provides:

> In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) [the five-year limit, with its exemptions] and the notice requirements established in subsection (a)(1) [prior notice to the employer] and the notification requirements [timely application for reemployment] established in subsection (e) are met.[6]

> USERRA's legislative history explains the purpose and effect of section 4312(h) as follows:

> Section 4312(i) [later renumbered as 4312(h)] is a codification and amplification of *King v. St. Vincent's Hospital,* 112 S. Ct. 570 (1991), which held that there was no limit as to how long a National Guardsman could serve on active duty for training and still have reemployment rights under former section 2024(d) of title 38. This new section makes clear the Committee's [House Committee on Veterans' Affairs] intent that no "reasonableness" test be applied to determine reemployment rights and that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limitations under section 4312(c) and the servicemember has complied with the requirements under sections 4312(a) and (e).[7]

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[6] 38 U.S.C. 4312(h).

[7] House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1), reprinted in Appendix D-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found at pages 774-75 of the 2019 edition of the *Manual.* Please see Law Review 09029 (July 2009) for a detailed discussion of *King v. St. Vincent's Hospital,* 502 U.S. 215 (1991).

As I explained in Law Review 30 (October 2001), it is for military authorities to decide which RC personnel need to serve or train to serve, and to decide the timing, frequency, and duration of service and training periods. These military decisions must not be second-guessed by civilian employers or the courts.

Yes, USERRA puts a burden on civilian employers, and sometimes on the civilian colleagues of those who answer the country's call. The burden placed on the civilian employers and colleagues of those who serve is tiny as compared to the much greater burden (sometimes the ultimate sacrifice) voluntarily undertaken by those who serve and by their families.

To employers who complain about the burdens they bear, I say:

> Our country is not drafting you, nor is it drafting your children and grandchildren. When you find RC personnel in your workforce or among job applicants, you should cheerfully do all that USERRA requires and more. It has been 47 years since Congress abolished the draft and established the all-volunteer military in 1973. Without a law like USERRA, the services would not be able to recruit and retain the quality and quantity of personnel needed to defend our country. Do not complain about the tiny burdens that you are required to bear. Cheerfully honor and support those who serve in your place, and in the place of your offspring.[8]

Q: Does my supervisor's continuous harassment of me, because of my military obligations, violate USERRA?

A: Yes. *See Carder v. Continental Airlines,* 636 F.3d 172 (5th Cir.), *cert. denied,* 565 U.S. 930 (2011).[9] Derek Carder, Mark Bolleter, Drew Daugherty, and Andrew Kissinger were pilots for Continental Air Lines (CAL)[10] 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

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[8] Please see Law Review 17055 (June 2017) and Law Review 14080 (July 2014).

[9] 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.

[10] Continental has since merged with United Air Lines (UAL), and the new combined airline is now known as UAL.

represented by attorney Brian Lawler, a Lieutenant Colonel in the Marine Corps Reserve and life member of ROA. They asserted that CAL violated USERRA in several ways.

The complaint which was the focus of this appeal alleged 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.[11]

The plaintiffs appealed, and the 5th Circuit affirmed. At the time the 5th Circuit decided *Carder,* USERRA's definition of "benefit of employment" read 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.[12]

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[11] *Carder v. Continental Airlines, Inc.,* 2009 U.S. Dist. LEXIS 110671 (S.D. Texas November 30, 2009).
[12] *Carder,* 636 F.3d at 175.

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.[13]
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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 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).
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> 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,

[13] *Id.,* at 176.

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).

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.[14]

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.[15]

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

> 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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[14] *Id.,* at 177-79.

[15] 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.

> 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.[16]

This 2011 amendment solved the *Carder* problem. 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 entirely solve the problem?

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.
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> **(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.

[16] 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 E-6 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on pages 959-60 of the 2019 edition of the *Manual.*

> **(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.[17]

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. 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. In cases involving state and local governments and private employers, USERRA provides for punitive damages (called "liquidated damages"), but only to a very modest extent. Under section 4323(d)(1)(C),

[17] 38 U.S.C. 4323(d)(1) (emphasis supplied).

the court can double the pecuniary damages if the court finds that the employer-defendant violated USERRA willfully.[18]

Q: If I apply for the promotion opportunity that will come up this summer and I am not selected, and if I complain that my non-selection was motivated by my military obligations, what do I have to prove to establish a violation of USERRA?

A: If the employer denies you the promotion because of your military obligations, that violates section 4311 of USERRA:

> **Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited**
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> - **(a)** 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.
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> **(b)** An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.
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> - **(c)** An employer shall be considered to have engaged in actions prohibited--
>
> **(1)** under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is *a motivating factor* in the employer's action, unless the employer can *prove* that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

[18] Your case is governed by section 4324 of USERRA, 38 U.S.C. 4324, not section 4323, 38 U.S.C. 4323. Section 4323 governs enforcement of USERRA against state and local governments and private employers. Section 4324 governs enforcement against federal agencies as employers. Section 4324, unlike section 4323, does not provide for liquidated (double) damages for willful violations. Congress should amend USERRA to provide for punitive damages against all employers, including federal agencies, and the measure of the punitive damages should be the egregiousness of the violation, not the plaintiff's actual pecuniary damages.

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is *a motivating factor* in the employer's action, unless the employer can *prove* that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

- **(d)** The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.[19]

Under section 4311(c) of USERRA,[20] it is not necessary to prove that one of the protected statuses or activities was *the reason* for the firing, denial of initial employment, or denial of a promotion or a benefit of employment. It is enough to prove that one of the protected activities or statuses was *a motivating factor* in the employer's decision. If the plaintiff proves motivating factor, the *burden of proof shifts to the employer to prove (not just say) that it would have made the same decision in the absence of the protected status or activity.*

USERRA's legislative history explains section 4311 as follows:

> Current law [the VRRA] protects Reserve and National Guard personnel from termination from their civilian employment or other forms of discrimination based on their military obligations. Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment (*see Beattie v. The Trump Shuttle, Inc.,* 758 F. Supp. 30 (D.D.C. 1991), current employees who are active or inactive members of Reserve or National Guard units, current employees who seek to join Reserve or National Guard units (*see Boyle v. Burke,* 925 F.2d 497 (1st Cir. 1991), or employees who have a military obligation in the future such as a person who enlists in the Delayed Entry Program which does not require leaving the job for several months. *See Trulson v. Trane Co.,* 738 F.2d 770, 775 (7th Cir. 1984). The Committee [House Committee on Veterans' Affairs] intends that these anti-discrimination provisions be broadly construed and strictly enforced. The definition of employee, which also includes former employees, would protect those persons who were formerly employed by an employer and who have had adverse action taken against them by the former employer since leaving the former employment.
>
> If the employee is unlawfully discharged under the terms of this section prior to leaving for military service, such as under the Delayed Entry Program, that employee would be entitled to reinstatement for the remainder of the time the employee would have

[19] 38 U.S.C. 4311 (emphasis supplied).
[20] 38 U.S.C. 4311(c).

continued to work plus lost wages. Such a claim can be pursued before or during the employee's military service, even if only for lost wages.

Section 4311(b) [now 4311(c), as amended in 1996] would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called "but for" test and that the burden of proof is on the employer, once a prima facie case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted current section 2021(b)(3) [later renumbered 4321(b)(3)] of title 38, in 1968. *See* Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Session at 5320 (February 23, 1966). In 1986, when Congress amended section 2021(b)(3) to prohibit initial hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and Chairman of the House Committee on Veterans' Affairs) explained that, in accordance with the 1968 legislative intent cited above, the courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. *See* 132 Cong. Rec. 29226 (October 7, 1986) (statement of Cong. Montgomery) citing *National Labor Relations Board v. Transportation Management Corp.,* 462 U.S. 393 (1983).

This standard and burden of proof is applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that courts have relied on dicta from the Supreme Court's decision in *Monroe v. Standard Oil Co.,* 452 U.S. 549, 559 (1981), that a violation can occur only if the military obligation is the sole factor (*see Sawyer v. Swift & Co.,* 836 F.2d 1257, 1261 (10th Cir. 1988), those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.[21]

Two sections of the Department of Labor (DOL) USERRA Regulations address how to prove a violation of section 4311:

Who has the burden of proving discrimination or retaliation in violation of USERRA?

The individual has the burden of proving that a status or activity protected by USERRA was one of the reasons that the employer took action against him or her, in order to establish that the action was discrimination or retaliation in violation of USERRA. If the individual succeeds in proving that the status or activity protected by USERRA was one

[21] House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1), reprinted in Appendix B-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on pages 665-66 of the 2016 edition of the *Manual.*

of the reasons the employer took action against him or her, the employer has the burden to prove the affirmative defense that it would have taken the action anyway.[22]

What must the individual show to carry the burden of proving that the employer discriminated or retaliated against him or her?

- **(a)** In order to prove that the employer discriminated or retaliated against the individual, he or she must first show that the employer's action was motivated by one or more of the following:
- **(1)** Membership or application for membership in a uniformed service;
- **(2)** Performance of service, application for service, or obligation for service in a uniformed service;
- **(3)** Action taken to enforce a protection afforded any person under USERRA;
- **(4)** Testimony or statement made in or in connection with a USERRA proceeding;
- **(5)** Assistance or participation in a USERRA investigation; or,
- **(6)** Exercise of a right provided for by USERRA.
- **(b)** If the individual proves that the employer's action was based on one of the prohibited motives listed in paragraph (a) of this section, the employer has the burden to prove the affirmative defense that the action would have been taken anyway absent the USERRA-protected status or activity.[23]

Case law under section 4311 of USERRA

***Staub v. Proctor Hospital*[24]**

While employed by Proctor Hospital as an angiography technician, Vincent Staub (a noncommissioned officer in the Army Reserve) was required to attend one drill weekend per month and two or three weeks of full-time training per year. Because the angiography department of the hospital required weekend staffing, Staub's military obligations imposed some burden on the hospital.

Both Janice Mulally, Staub's immediate supervisor, and Michael Korenchuk, Mulally's supervisor, were hostile to Staub's military obligations. Mulally scheduled Staub for additional

[22] 20 C.F.R. 1002.22 (bold question in original). The DOL USERRA Regulations technically do not apply to the VA, a federal executive agency. The DOL Regulations govern the application of USERRA to state and local governments and private employers. 38 U.S.C. 4331(a). Regulations promulgated by the United States Office of Personnel Management (OPM) govern the application of USERRA to federal executive agencies. 38 U.S.C. 4331(b)(1). The OPM regulations do not go into the same detail as the DOL regulations, but the first section of USERRA provides that it is the sense of Congress that the Federal Government should be a mode employer. 38 U.S.C. 4301(b). Thus, rules that apply to state and local governments and private employers should also apply to the Federal Government.

[23] 20 C.F.R. 1002.23 (bold question in original).

[24] 562 U.S. 411 (2011). This is a 2011 decision of the United States Supreme Court. The citation means that you can find the decision in Volume 562 of *United States Reports* (where Supreme Court decisions are published), and the decision starts on page 411. I discuss this case in detail in Law Review 1122 (March 2011).

shifts without notice so that he would have to "pay back the department for everyone else having to bend over backward to cover his schedule for the Reserves." She also informed Staub's co-worker (Leslie Swedeborg) that Staub's "military duty has been a strain on the department" and she asked Swedeborg to help her "get rid of" Staub. Korenchuk referred to Staub's military obligations as "a bunch of smoking and joking and a waste of the taxpayers' money" and he stated that he was aware that Mulally was "out to get" Staub.[25]

In January 2004, Proctor Hospital issued Staub a "corrective action" disciplinary warning for purportedly violating a company rule requiring him to stay in his work area whenever he was not working with a patient. In April 2004, Proctor Hospital fired Staub for allegedly violating the corrective action. Staub contended that both the corrective action and the allegation that he had violated it were invented by Mulally and Korenchuk based on their animus against him because of his Army Reserve service.

Proctor Hospital contended that the decision to fire Staub was made by Linda Buck, the hospital's human relations director, and that Buck was not infected by any of the anti-military animus that Korenchuk and Mulally had exhibited. But Korenchuk and Mulally clearly initiated the process that led to the firing of Staub, and Buck must have relied primarily on adverse reports about Staub's work performance that she received from Korenchuk and Mulally.

Staub sued the hospital in the United States District Court for the Central District of Illinois, claiming that the firing violated section 4311 of USERRA, 38 U.S.C. 4311. The case was tried before a jury, and Staub prevailed. After hearing the evidence in multi-day trial, and after hearing the District Judge's instructions, the jury found that Staub had proved, by a preponderance of the evidence, that his Army Reserve service was a motivating factor in Proctor Hospital's decision to terminate his employment, and that the hospital had not proved that it would have fired him anyway, for lawful reasons, in the absence of his membership in the Army Reserve, his performance of uniformed service, and his obligation to perform future service.

The District Judge denied Proctor's motion for new trial and motion for judgment notwithstanding the verdict. Proctor then appealed to the United States Court of Appeals for the 7th Circuit.[26] A three-judge panel of the 7th Circuit reversed the District Court verdict for Staub, holding that under the "cat's paw doctrine"[27] Proctor Hospital could not be held liable

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[25] These facts come directly from the majority opinion, written by Justice Antonin Scalia. At the outset, Justice Scalia wrote: "Staub and Proctor hotly dispute the facts surrounding the firing, but because the jury found for Staub in his claim of employment discrimination against Proctor, we describe the facts in the light most favorable to him."

[26] The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

[27] The "cat's paw" reference is to a fable written by Aesop about 25 centuries ago and put into verse by LaFontaine in 1679. In the fable, a clever monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing. See footnote 1 of the majority opinion.

for discrimination by Korenchuk and Mulally unless Staub proved that Buck was "singularly influenced" by the two direct supervisors.

Staub applied to the 7th Circuit for rehearing *en banc*, but that motion was denied. Staub then applied to the Supreme Court for discretionary review, which was granted. Briefs for the parties and friends of the court (including ROA) were filed in July and August 2010. The oral argument was held on November 2, 2010, and the decision came down March 1, 2011.

Justice Antonin Scalia wrote the majority decision, and his opinion was joined by Chief Justice John Roberts, Justice Anthony Kennedy, Justice Ruth Bader Ginsburg, Justice Stephen Breyer, and Justice Sonia Sotomayor. The majority decision relied on principles of agency law and tort law and found that the employer (Proctor Hospital) was liable for the discriminatory actions of supervisory employees Korenchuk and Mulally and that requiring Staub to prove that Buck was "singularly influenced" by the two immediate supervisors was inconsistent with those principles.

Near the end of the majority opinion, Justice Scalia summarized the Court's holding as follows:

> We therefore hold that if a supervisor performs an act motivated by anti-military animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.[28]

Justice Samuel Alito, joined by Justice Clarence Thomas, wrote a concurring decision, agreeing with the result (reversal of the 7th Circuit) but relying on the text of USERRA rather than general principles of agency law and tort law. Justice Elena Kagan did not participate.

***Sheehan v. Department of the Navy*[29]**

In an important precedential decision, the Federal Circuit set forth the mode of proving a violation of section 4311, as follows:

> Discriminatory motivation under USERRA may be reasonably inferred from a variety of factors, including (1) proximity in time between an employee's military activity and the adverse employment action, (2) inconsistencies between the proffered reasons [the reasons the employer asserts were the reasons for the adverse employment action] and other actions of the employer, (3) an employer's expressed hostility towards members

[28] *Staub,* 562 U.S. at 422 (emphasis in original).

[29] 240 F.3d 1009 (Fed. Cir. 2001). This is a 2001 decision of the United States Court of Appeals for the Federal Circuit, the federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board. The citation means that you can find this decision in Volume 240 of *Federal Reporter, Third Series,* and this decision starts on page 1008.

protected by the statute, and (4) disparate treatment of certain employees compared to other employees with similar work records or offenses.[30]

***Erickson v. United States Postal Service*[31]**

Some employers argue: We did not fire Joe Smith because of his military service. We fired him because he was *absent from work* while performing that service. In an important USERRA case, the United States Postal Service made that argument, and the Merit Systems Protection Board (MSPB) accepted it. On appeal, the Federal Circuit firmly rejected this nonsensical argument, holding:

> We reject that argument. An employer cannot escape liability under USERRA by claiming that it was merely discriminating on the basis of absence when the absence was for military service. … The most significant—and predictable—consequence of reserve service with respect to the employer is that the employee is absent to perform that service. To permit an employer to fire an employee because of his military absence would eviscerate the protections afforded by USERRA.[32]

***Bobo v. United Parcel Service*[33]**

Walleon Bobo is a Lieutenant Colonel in the Army Reserve (now retired) and was employed by United Parcel Service (UPS) as a supervisor of drivers, until the company fired him. UPS supervisors like Bobo were required to conduct "safety rides" for each driver on an annual basis and after an accident. Because of a shortage of supervisors, Bobo and other supervisors frequently conducted safety rides that did not fully comply with written UPS standards. UPS fired Bobo for allegedly falsifying reports on safety rides.

Bobo alleged that he was being treated more harshly than other supervisors guilty of the same offense because of his Army Reserve service (in violation of section 4311 of USERRA) and because of his African American race (in violation of Title VII of the Civil Rights Act of 1964).[34] Bobo sought to prove his case by showing evidence about "comparators"—other UPS supervisors who were Caucasian and who were not participants in the Reserve or National Guard.

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[30] *Sheehan,* 240 F.3d at 1014.

[31] 571 F.3d 1364 (Fed. Cir. 2009). Lieutenant Colonel Mathew Tully and I discuss this case in detail in Law Review 14090 (December 2014).

[32] *Erickson,* 571 F.3d at 1368.

[33] 665 F.3d 741 (6th Cir. 2012). I discuss this case in detail in Law Review 13036 (March 2013).

[34] If you choose to be represented by private counsel, rather than relying on the Department of Labor (DOL) and the Department of Justice (DOJ), you can combine your USERRA claim with other claims about why an unfavorable personnel action may have been unlawful.

After discovery, UPS filed a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The District Judge granted the motion, both as to Bobo's USERRA claim and his Title VII claim. Bobo appealed to the United States Court of Appeals for the Sixth Circuit.[35]

Under Rule 56, the district judge is to grant a motion for summary judgment (thus ending the case before trial) only if the judge can say, after a careful review of the evidence, that there is no evidence (beyond a "mere scintilla") in support of the non-moving party's claim or defense and that the moving party is entitled to judgment as a matter of law. By granting a motion for summary judgment, the judge is saying that no reasonable jury could find for the non-moving party, based on the evidence adduced during the discovery process. In considering a motion for summary judgment, the judge should not weigh conflicting evidence, because weighing evidence is the province of the jury.

On appeal, the 6th Circuit reversed the grant of summary judgment on two grounds. First, the appellate court held that the district court had improperly constrained the plaintiff's discovery and had thus prevented him from obtaining evidence to support his case. Second, the appellate court held that even with the constrained discovery there was enough evidence in support of Bobo's case to preclude granting summary judgment for UPS. The 6th Circuit held:

> In resolving this appeal, we first consider Bobo's argument that the actions of UPS and the district court during litigation of the case unfairly precluded him from presenting additional facts in support of his claims. We agree with Bobo that the district court improperly restricted the scope of discovery when it allowed UPS to determine unilaterally that the only Caucasian, non-military supervisor who was similarly situated to Bobo was Ronnie Wallace. We also conclude that the district court unduly delayed its ruling on Bobo's discovery motions until after the court had already granted summary judgment for UPS. The discovery errors alone convince us that the summary judgment in favor of UPS cannot stand, but we also conclude that the record demonstrates genuine issues of material fact for trial. As explained in more detail below, we reverse the grant of summary judgment in favor of UPS on most of Bobo's claims and remand the case to the district court with instructions.[36]
>
> USERRA was enacted to prohibit discrimination against individuals because of their military service. *Hance v. Norfolk Southern Railway Co.,* 571 F.3d 511, 517 (6th Cir. 2009) (per curiam); *Curby v. Archon,* 216 F.3d 549, 556 (6th Cir. 2000). USERRA provides, among other things, that "[a] person who is a member of . . . a uniformed service shall not be denied . . . retention in employment, . . . or any benefit of employment by an employer on the basis of that membership, . . . performance of service, . . . or obligation." 38 U.S.C. 4311(c)(1).

[35] The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.
[36] *Bobo,* 665 F.3d at 748.

An adverse employment action is prohibited under USERRA if the person's obligation for military service "is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such . . . obligation for service." *Id*. "Protected status is a motivating factor if a truthful employer would list it, if asked, as one of the reasons for its decision." *Escher v. BWXT-Y-12, LLC,* 627 F.3d 1020, 1026 (6th Cir. 2010). Discriminatory motivation may be inferred from a variety of considerations, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the employer's conduct and the proffered reason for its actions, the employer's expressed hostility toward military members together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses. *Id*. If Bobo carries the initial burden to show by a preponderance that his protected status was a motivating factor in his discharge from employment, the burden shifts to UPS to prove affirmatively that it would have taken the same employment action in the absence of Bobo's protected status. *See Hance,* 571 F.3d at 518 (quoting *Sheehan v. Department of the Navy,* 240 F.3d 1009, 1013 (Fed. Cir. 2001); *Petty v. Metropolitan Government of Nashville-Davidson County,* 538 F.3d 431, 446 (6th Cir. 2008).

Taking all of the evidence in a light most favorable to Bobo, we conclude that there are genuine issues of material fact for trial concerning whether Bobo's military service was a motivating factor in his discharge and whether UPS would have taken the same employment action in the absence of Bobo's protected status. The district court ruled that Morton's comment, "I did not want Walleon volunteering for additional military duty when he was needed at UPS[,]" might have satisfied Bobo's *prima facie* case under USERRA if the statement had been made by someone responsible for the decision to fire Bobo. But, the court reasoned, Bobo did not present admissible evidence to tie Morton to the termination decision, nor did he establish that Morton poisoned the minds of the ultimate decision-makers against Bobo.

To the contrary, Bobo's evidence tied Morton and Morton's direct supervisor, Wagner, directly to the termination decision. A jury could reasonably find that Morton's comment is direct evidence that Bobo's military service was a motivating factor in employment decisions. Wagner was aware of Morton's discriminatory remark because he read, signed, and dated the memorandum in which the comment was made. The evidence also shows Bobo complained to Wagner about supervisor Langford's comment that Bobo needed to choose between UPS and the Army, and that Bobo, Morton, and Wagner engaged in ongoing conversations about Bobo's requests to take leave to attend military training. Bobo felt discouraged from taking such leave, especially when Morton asked him if his military service was voluntary or involuntary. Wagner was

present at the meeting when managers of the Mid-South District decided to terminate Bobo's employment.

Bobo also produced evidence that might permit a jury to find UPS liable for a USERRA violation through the "cat's paw" theory. This phrase refers to a situation in which "a biased subordinate, who lacks decision-making power, influences the unbiased decision-maker to make an adverse [employment] decision, thereby hiding the subordinate's discriminatory intent." *Cobbins v. Tennessee Department of Transportation,* 566 F3d 582, 586 n. 5 (6th Cir. 2009). If a direct supervisor performs an act motivated by anti-military animus that is intended to cause an adverse employment action and that act is a proximate cause of the adverse employment action, then the employer may be held liable under USERRA based on the "cat's paw" theory. *See* ***Staub v. Proctor Hospital,*** 131 S. Ct. 1186, 1194 (2011) [37]

On remand, the district judge permitted additional discovery and then set the case for trial. After the trial was well under way, the judge learned of discovery misconduct by the UPS attorneys. He then ordered a mistrial and imposed substantial sanctions on UPS.[38] The company finally came to its senses and settled.

Other case law on section 4311 of USERRA

I invite the reader's attention to Category 1.2 ("USERRA forbids discrimination") in our Law Review Subject Index. You will find more than 200 articles about section 4311, and many of them are case notes about specific court cases.

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[37] *Bobo,* 665 F.3d at 754-55.

[38] *See Bobo v. United Parcel Service, Inc.,* 2012 U.S. Dist. LEXIS 166429 (W.D. Tenn. November 12, 2012), affirmed in part and reversed in part, 2013 U.S. Dist. LEXIS 8473 (W.D. Tenn. January 22, 2013).

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