

USERRA Does Not Provide for Punitive and Mental Anguish Damages

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.4—USERRA enforcement

***Carter v. United Parcel Service*, 2014 U.S. Dist. LEXIS 49181 (N.D. Tex. April 8, 2014).**

Kouri Carter was employed by United Parcel Service, Inc. (UPS) when he enlisted in the Army Reserve and took time off from his UPS job for Army basic training. He filed suit against UPS in the United States District Court for the Northern District of Texas, claiming that UPS had violated his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The case was assigned to United States District Judge Jane J. Boyle.

In his complaint, Carter sought (among other relief) punitive damages and mental anguish damages for the USERRA violation. UPS filed a partial motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP). The judge should grant a motion to dismiss only if

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 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 44 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 (VRRRA—the 1940 version of the federal reemployment statute) for 38 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 VRRRA 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 VRRRA 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.

he or she can say that there is no relief that the court can award even if all the facts are as alleged by the plaintiff. The motion to dismiss can be directed to the entirety of the plaintiff's complaint, or it can be directed to a specific count of the complaint or a specific form of relief sought. In this case, the UPS motion to dismiss was targeted on Carter's request for punitive damages and mental anguish damages.

UPS argued, and Judge Boyle agreed, that USERRA does not provide for punitive and mental anguish damages. In her scholarly opinion, Judge Boyle wrote:

With respect to the remedies available under the statute, USERRA is explicit that a court may require an employer to (1) comply with the provisions of the chapter; (2) compensate the plaintiff for lost wages or benefits; and (3) pay the plaintiff liquidated damages in the amount equal to the lost wages, if the court determines the employer's violation of the statute was willful. 38 U.S.C. § 4323(d). In addition, "[t]he court shall use, in any case in which the court determines it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter." *Id.* at § 4323(e). In addition, USERRA provides that "[n]othing in this chapter shall supersede, nullify, or diminish any Federal or State law . . . contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter." *Id.* at § 4302(a). Thus, "USERRA leaves open the potential for a plaintiff to assert state claims that provide greater rights or benefits than those set forth in USERRA." *Williams v. Sysco S.F., Inc.*, No. C 10—03760 MEJ, 2013 U.S. Dist. LEXIS 49124, 2013 WL 1390695, at *4 (N.D. Cal. Apr. 4, 2013).

Defendant has provided this Court with several cases—albeit from other districts—that directly address the type of relief available under USERRA. See Defs.' Mot. 2 (collecting cases). Each indicates that the statute does not provide for mental anguish or punitive damages. See *Dorris v. TXD Servs., LP*, No. 1:10—CV—93—KGB, 2012 U.S. Dist. LEXIS 107105, 2012 WL 3149106, at *3 (E.D. Ark. Aug. 1, 2012) ("The USERRA does not allow for recovery of damages for mental anguish, pain or suffering, nor does USERRA allow for the recovery of punitive damages.") (internal quotation marks omitted), *rev'd on other grounds*, 753 F.3d 740, 2014 U.S. App. LEXIS 3716, 2014 WL 747476 (8th Cir. 2014); *Dees v. Hyundai Motor Mfg. Ala., LLC*, 605 F. Supp. 2d 1220, 1229 (M.D. Ala. 2009) ("This remedial scheme conspicuously omits any recovery for mental anguish, pain and suffering, and punitive damages."); *Sutherland v. SOSi Int'l, Ltd.*, No. 1:07—CV—557, 2007 U.S. Dist. LEXIS 58919, 2007 WL 2332412, at *2 (E.D. Va. Aug. 10, 2007); *Vander Wal v. Sykes Enters.*, 377 F. Supp. 2d 738, 745 (D.N.D. 2005). Even one of the two authorities that Plaintiff offers acknowledges that, in cases in which a plaintiff alleges he suffered emotional distress, mental anguish, humiliation, and mental injuries as a result of defendant's conduct, "the compensatory and liquidated damages authorized in USERRA do not provide an avenue for Plaintiff to seek full recovery for such injuries." *Williams*, 2013 U.S. Dist. LEXIS 49124, 2013 WL 1390695, at *4. Indeed, the Court is unaware of any

authority that *does* find punitive or mental anguish damages part of the remedies afforded under USERRA.

Though Plaintiff urges the Court to look to other anti-discrimination statutes, such as Title VII, that offer more extensive remedies, his authorities simply do not persuade the Court that it is prudent to ignore both the clear language of the statute and the case law before it. See Pl.'s Resp. 3; *Carder*, 636 F.3d at 175 ("Statutory interpretation begins with the statute's plain language."). What's more, the recent expansion of USERRA to which Plaintiff refers—namely, the VOW to Hire Heroes Act of 2011, did not include any changes to the law's remedial scheme. See VOW to Hire Heroes Act § 251. If Congress had intended courts to award punitive or mental anguish damages for violations of USERRA, it could easily have expressed that intent by adding such remedies to the statute's text. That Congress made no such changes, however, weighs against reading such remedies into what has already been written.

Because the Court finds that punitive and mental anguish damages are not available under USERRA, Defendant's partial motion to dismiss Plaintiff's claim with respect to these damages is **GRANTED**.³

I must agree that USERRA, as presently written, does not provide for punitive and mental anguish damages. I have called upon Congress to amend USERRA to broaden the kinds of damages that can be awarded to a successful USERRA plaintiff.⁴ For now, we must deal with USERRA as it is written, not as how we want it to be written.

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³ [Carter v. UPS, No. 3:13-CV-2802-B, 2014 U.S. Dist. LEXIS 49181, at *4-8 \(N.D. Tex. Apr. 8, 2014\)](#)

⁴ See Law Review 15088 (October 2015) and Law Review 07054 (October 2007). See also Law Review 13108 (August 2013), by Lieutenant Colonel Brian Lawler, USMCR.

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