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EMPLOYMENT LAW—THE FIFTH CIRCUIT'S SHAKY LANDING PROHIBITS A HOSTILE WORK ENVIRONMENT CLAIM UNDER USERRA FOR PILOTS WITH MILITARY OBLIGATIONS

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THE UNIFORMED Services Employment and Reemployment Rights Act (USERRA) protects military service members from discrimination; yet in a case of first impression, the Fifth Circuit recently held that USERRA did not provide members of the U.S. Armed Forces Reserves or the Air National Guard with a claim against their employer, Continental Airlines, Inc. (Continental), for a hostile work environment.[1] This decision has a significant impact on the airline industry since military veterans and reservists have long made up a meaningful portion of commercial airline pilots, with some airlines reporting between 35–45%.[2]

The Fifth Circuit erred in its narrow interpretation of USERRA in *Carder v. Continental Airlines, Inc.* because a hostile work environment claim is consistent with legislative intent, Supreme Court precedent, and the language of the statute. USERRA prohibits an employer from denying any "benefit of employment" to a service member because of his or her military service.[3] While district courts have varied in their interpreta-

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[1] Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301(a)(3) (2006); Carder v. Cont'l Airlines, Inc., 636 F.3d 172, 173 (5th Cir. 2011).

[2] David Larter, *Commercial Pilot Job Market Ready for a Boom*, AIR FORCE TIMES (July 22, 2011), http://www.airforcetimes.com/news/2011/07/air-force-commercial-pilot-market-boom-072211w/ (about 45% of the 6,100 pilots at Southwest Airlines are veterans or reservists and about 35% of the 600 pilots at Frontier Airlines are veterans).

[3] 38 U.S.C. § 4311(a).

tions of USERRA,[4] the Fifth Circuit concluded that the omission of the phrase "terms, conditions, and privileges of employment" (which appears in other antidiscrimination statutes) indicates Congress purposefully excluded hostile work environment claims from being actionable under the statute.[5] Thus, according to the Fifth Circuit, a service member is only protected under USERRA if the harassment results in denial of a contractual benefit or forces the employee to quit his or her job, resulting in a claim for constructive discharge, despite the statute's explicit purpose of protecting service members from discrimination on the basis of their military service.[6]

The appellants in this case are pilots, who were members of the U.S. Armed Forces Reserves and the Air National Guard, employed by Continental.[7] These pilots experienced various forms of harassment regarding their military obligations, including restrictions on military leave and attempts to cancel military leave,[8] denial and disapproval of military leave notices, and phone calls to pilots' homes to question them about their military leave.[9] In addition, Continental managers verbally harassed pilots by making "derisive and derogatory comments" regarding the pilots' military obligations.[10] For example: "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;" and "You need to choose between [Continental] and the Navy."[11]

In response to the conduct described above, the pilots filed a class action in the U.S. District Court for the Southern District of Texas alleging multiple claims under USERRA.[12] The district court partially granted Continental's 12(b)(6) motion to dismiss regarding the hostile work environment claim, holding that the

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[4] *See* Steenken v. Campbell Cnty., No. 04-224-DLB, 2007 WL 837173, at *3 (E.D. Ky. Mar. 15, 2007) (broadly construing the term "benefit of employment" to include the right to be free from harassment in the workplace); Baerga-Castro v. Wyeth Pharm., No. 08-1014 (GAG/JA), 2009 WL 2871148, at *12 (D.P.R. Sept. 3, 2009) (finding no claim for hostile work environment under USERRA).

[5] *Carder*, 636 F.3d at 178.

[6] *Id.* at 181–82; *see* 38 U.S.C. § 4301(a)(3).

[7] *Carder*, 636 F.3d at 173.

[8] *Id.* at 174.

[9] Petition for Writ of Certiorari at *6, *Carder*, 636 F.3d 172 (5th Cir. 2011) (No. 10-1546), 2011 WL 2533824.

[10] *Carder*, 636 F.3d at 174.

[11] *Id.* (quotations omitted).

[12] *Id.* at 173.

plain meaning of the term "benefits of employment" does not include freedom from harassment.[13] The appellants filed an interlocutory appeal on the question of whether USERRA provides for a hostile work environment claim, and the Court of Appeals for the Fifth Circuit granted the appeal.[14]

The Fifth Circuit affirmed the dismissal of the hostile work environment claim, but asserted a different rationale.[15] Unlike the district court, the Fifth Circuit did not conclude that the plain language of the statute was clear-cut.[16] On the contrary, a direct conflict existed between the statute's stated purpose of protecting service members from discrimination because of their military service and the lack of reference to any form of workplace harassment as a violation of the statute.[17] Thus, in determining that USERRA does not provide a cause of action for a hostile work environment, the court compared the language used in USERRA to other antidiscrimination statutes and looked to USERRA's legislative history and underlying policy goals.[18] Although the court acknowledged that the legislative history showed that Congress intended for the statute to be broadly construed to prevent discrimination, it ultimately concluded that the failure to include the phrase "terms, conditions, or privileges of employment," as used in other antidiscrimination statutes, demonstrated Congress's clear intention to exclude hostile work environment claims under USERRA.[19] In addition, the court found that the purpose of USERRA is to '"encourage people to join the reserves"' and not to combat a widespread social problem of discrimination and harassment against military service members.[20]

In concluding that USERRA provides no cause of action for a hostile work environment, the Fifth Circuit first identified and analyzed the relevant sections of the statute.[21] Section 4311(a)

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[13] *Id.* at 173–74.

[14] *Id.* at 174.

[15] *Id.* at 182.

[16] *Id.* at 176; *see* Carder v. Cont'l Airlines, Inc., No. H-09-3173, 2009 WL 4342477, at *11 (S.D. Tex. Nov. 30, 2009).

[17] *Carder*, 636 F.3d at 176.

[18] *Id.*; for additional information on USERRA and its history, see *Rogers v. City of San Antonio*, 392 F.3d 758, 762–69 (5th Cir. 2004); Konrad S. Lee, *When Johnny Comes Marching Home Again Will He Be Welcome at Work?*, 35 PEPP. L. REV. 247, 252–59 (2008).

[19] *Carder*, 636 F.3d at 177–78.

[20] *Id.* at 179 (quoting Velasquez v. Frapwell, 160 F.3d 389, 392 (7th Cir. 1998)).

[21] *Id.* at 175–76.

states that a service member "'shall not be denied . . . *any benefit of employment* by an employer'" because of his or her military status.[22] Section 4303(2) defines "benefit of employment" as "'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.'"[23] Finally, § 4301(a)(1)–(3) lists the three purposes of the statute: to encourage service in the reserves, to minimize disruption to the lives of military service members and their employers by providing prompt reemployment, and to prohibit discrimination against persons because of their military service.[24]

According to the Fifth Circuit, while the term "benefit of employment" used in § 4311(a) and defined in § 4303(2) does not include any express reference to "harassment, hostility, insults, derision, derogatory comments, or any other similar words," the statute's clear ban on discrimination against service members in § 4301(a)(3) required the court to go outside the plain meaning of the statute and consider next Congress's legislative intent.[25] The court acknowledged that USERRA's legislative history commanded the statute to be broadly construed in favor of service members and that an administrative body, the Merit Systems Protection Board (MSPB), had placed great weight on the legislative history in determining that USERRA provides a hostile work environment claim.[26] However, the court determined that this was not enough to decide the issue, particularly since the MSPB's decision was not binding.[27] Instead, the court looked to case law interpreting other antidiscrimination statutes.[28] When the Supreme Court allowed the first claim for a hostile work environment in 1986 under Title VII of the Civil Rights Act (Title VII) in *Meritor Savings Bank, FSB v. Vinson*, the Court relied on "language prohibiting discrimination with respect to the '*terms, conditions, or privileges of employment*,'" with particular emphasis on the word "conditions."[29] The use of the

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[22] *Id.* at 175 (quoting 38 U.S.C. § 4311(a) (2006)).

[23] *Id.* (quoting 38 U.S.C. § 4303(2) (2006)).

[24] *Id.* at 175–76 (citing 38 U.S.C. § 4301(a)(1)–(3)).

[25] *Id.* at 176.

[26] *Id.* at 176–77; *see* Petersen v. Dep't of Interior, 71 M.S.P.B. 227, 239 (1996).

[27] *See Carder*, 636 F.3d at 176 & n.3, 177, 181 & n.9.

[28] *Id.* at 177–78.

[29] *Id.* at 177 (emphasis added) (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63–66 (1986)).

same or similar phrase in the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act provided the source for hostile work environment claims under these statutes.[30] While Title IX of the Education Amendments of 1972 and the Rehabilitation Act of 1974 lack the specific language, the court noted that these were passed before the Supreme Court's decision in *Meritor* and have been interpreted in conjunction with a companion statute (either Title VII or the ADA) that includes the specific language.[31] Thus, the court found that because USERRA was passed after the Supreme Court had interpreted the language in Title VII and the ADA, Congress necessarily intended to exclude a hostile work environment claim under USERRA when it used the term "benefits of employment" instead of "terms, conditions, or privileges of employment."[32]

The court next found that the policies and goals of USERRA differed drastically from other antidiscrimination statutes.[33] The court stated that the primary purpose of USERRA is to "encourage people to join the reserves" rather than prohibit discrimination based on military service since "[t]here is simply 'little evidence that employers harbor a negative stereotype about military service or that Congress believes they do.'"[34] The court used the conclusion that USERRA was not intended to resolve a "widespread social problem" of discrimination against historically disadvantaged groups to distinguish it from Title VII.[35] The court also noted that the Department of Labor (DOL) regulations implementing USERRA make no mention of harassment or hostile work environment claims—in contrast to the guidelines issued by the Equal Employment Opportunity Commission, which defined harassment as a form of discrimination prohibited by Title VII.[36] The court rejected the policy ar-

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[30] *Id.* at 178 & n.5.

[31] *Id.* at 180 & n.8.

[32] *Id.* at 178.

[33] *See id.* at 179.

[34] *Id.* (quoting Velasquez v. Frapwell, 160 F.3d 389, 392 (7th Cir. 1998)).

[35] *Id.*

[36] *Id.* at 181. However, the DOL recently issued a report making clear its intention for USERRA to include hostile work environment claims. Reply to Respondent's Brief in Opposition at *6, *Carder*, 636 F.3d 172 (No. 10-1546), 2011 WL 3978768 (citing VETERANS' EMP'T AND TRAINING, U.S. DEP'T OF LABOR, USERRA FISCAL YEAR 2010 ANNUAL REPORT TO CONGRESS, at 18–19 (2011), *available at* http://www.dol.gov/vets/programs/userra/FY2010%20USERRA%20Annual%20Report.pdf).

gument that USERRA's express purpose of protecting service members from discrimination could be circumvented if the claim for a hostile work environment were unavailable, reasoning that service members would still have a claim for constructive discharge if they were forced to quit due to the harassment.[37]

The Fifth Circuit erred in concluding that USERRA does not allow a hostile work environment claim when it dismissed the legislative intent to broadly interpret the language of the statute. Although not mandatory authority, the MSPB's decision in *Petersen v. Department of the Interior* provides strong guidance on the issue of legislative intent. *Petersen* cites the legislative record for the proposition that Congress "intends . . . [for the] anti-discrimination provisions [to] be broadly construed and strictly enforced."[38] Furthermore, the list of "benefits of employment" included in the statute "is illustrative and not intended to be all inclusive."[39] The legislative history makes it clear that Congress did indeed intend a broad interpretation of the term "benefit of employment." Considered in light of the statute's policy to protect service members from discrimination, this should include freedom from workplace harassment and would allow a claim for a hostile work environment.

The Fifth Circuit's conclusion that USERRA provides no hostile work environment claim ignores the language expressly stating the statutory purposes to encourage enlistment in the military reserves and protect service members from discrimination by their employers. The court held that USERRA's purpose was not frustrated or circumvented because service members potentially have a claim for constructive discharge if they are forced to quit due to harassment.[40] Yet this line of reasoning does not achieve either of USERRA's express purposes. If an employee knows he or she could be subject to harassment in the workplace, he or she will be less likely to enlist in the reserves, frustrating the statute's first purpose.[41] Furthermore, if employees have no means of redress against their employers for harassment due to their military obligations, the statute fails to protect

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[37] *Carder*, 636 F.3d at 181.

[38] Petersen v. Dep't of Interior, 71 M.S.P.B. 227, 236 (1996) (citing H.R. REP. No. 103-65, pt. 1, at 21 (1993)).

[39] *Id.*

[40] *Carder*, 636 F.3d at 181.

[41] *See* Lee, *supra* note 18, at 276–77.

service members from discrimination.[42] Given that the legislature clearly directed that USERRA be interpreted broadly in favor of the service member, this outcome cannot be intended. Supreme Court precedent supports this argument because case law has consistently found that the term discrimination encompasses harassment.[43] The important commonality among the antidiscrimination statutes is that they allow a hostile work environment claim, not that they use the same exact language.[44]

The Fifth Circuit's attempt to distinguish USERRA from Title VII based on the different policy goals and beneficiaries of the statutes is improper. The court states that, unlike antidiscrimination statutes designed to prevent harassment of historically disadvantaged minorities in need of special protection, Congress had no similar purpose in USERRA.[45] However, this argument clearly fails when considering the history of USERRA and its predecessors, which provided protection to military service members for over fifty years.[46] One of USERRA's express purposes is to protect military service members from discrimination due to their military obligations.[47] Although service members can potentially be distinguished from historically disadvantaged groups due to their "choice" to join the group, this distinction is not meaningful. Instead, service members are disadvantaged in the workplace due to their military obligations requiring them to be absent from work more frequently than nonservice members and have been subject to retaliation and hostility from employers.[48] It is precisely because this group is in need of special protections that Congress passed this legislation.

After the Fifth Circuit's decision that a hostile work environment claim does not exist under USERRA, the service members petitioned for a writ of certiorari from the Supreme Court on June 17, 2011 to decide the issue and give guidance to the lower courts.[49] The Supreme Court denied certiorari on October 3, 2011.[50]

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[42] *See* Petition for Writ of Certiorari, *supra* note 9, at *17–18.

[43] Reply to Respondent's Brief in Opposition, *supra* note 36, at *10–11.

[44] *Petersen*, 71 M.S.P.B. at 237–39.

[45] *Carder*, 636 F.3d at 179.

[46] Rogers v. City of San Antonio, 392 F.3d 758, 762 (5th Cir. 2004).

[47] 38 U.S.C. § 4301(a) (2006).

[48] *See Rogers*, 392 F.3d at 764–65.

[49] *See generally* Petition for Writ of Certiorari, *supra* note 9.

[50] *See* Petition for Writ of Certiorari Denied, *Carder*, 636 F.3d 172 (No. 10-1546), 2011 WL 4536541.

The high proportion of commercial airline pilots who are veterans or reservists means the Fifth Circuit's recent decision has a significant impact on the airline industry. Given the practical effects of the court's decision, and the Fifth Circuit's errors in overlooking the express purpose of the statute to protect service members from discrimination and evidence of legislative intent to provide broad protections to military service members, courts in other circuits should diverge from the Fifth Circuit and allow a hostile work environment claim under USERRA.