

**Harassment, Hostile Work Environment and Available Damages or
Equitable Relief under the Uniformed Services Employment and Reemployment Rights Act**

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1.2—USERRA forbids discrimination

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1.8—Relationship between USERRA and other laws/policies

Congress enacted the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”)³ as a long-overdue replacement to the Veterans’ Reemployment Rights Act (VRRRA), which was originally enacted in 1940. Although Congress always intended the statute to be interpreted broadly and in favor of service members,⁴ it was only recently clarified to include protection from harassment in the workplace and hostile work environment. Despite this clarification, the question still remains: what, exactly, constitutes harassment or hostile work environment based on one’s military service, and what damages are available to an aggrieved service member?

USERRA’s Purpose and Evolution

One of the primary purposes of USERRA is “to prohibit discrimination against persons because of their service in the uniformed services.”⁵ USERRA affords broad protections to service members against employment discrimination, providing that members “shall not be denied ... any *benefit of employment* by an employer on the basis of that membership....”⁶ A violation of USERRA occurs when a person’s “membership, application for membership, application for service, or obligation for service in the uniformed services is a motivating factor in the employer’s action...”⁷

When it enacted USERRA in 1994, the legislative history indicated that “[t]he Committee⁸ intends that these anti-discrimination provisions be broadly construed and

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³ Public Law 103-353, codified at 38 U.S.C. 4301-4335.

⁴ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

⁵ 38 U.S.C. 4301(a).

⁶ 38 U.S.C. 4311(a) (emphasis supplied).

⁷ *Leisek v. Brightwood Corp.*, 278 F.3d 895, 899 (9th Cir. 2002), quoting from 38 U.S.C. 4311(c)(1).

⁸ House Committee on Veterans’ Affairs.

strictly enforced and the intent has always been to have an expansive interpretation.”⁹ The legislative history goes on to say, “These rights are broadly defined to include all attributes of the employment relationship which are affected by the absence of a member of the uniformed services because of military service. The list of benefits is illustrative and not intended to be all inclusive.”¹⁰ Confusion arises, however, and as will be discussed in greater detail below, from how Congress initially defined “benefit of employment.”

Prior to 2011, there were several published opinions that held or opined that freedom from a hostile work environment or harassment was actionable under USERRA. The court in *Vickers v. City of Memphis*¹¹ held that USERRA’s prohibition against discrimination included the right to be free from harassment and hostile work environment. In *Miller v. City of Indianapolis*,¹² the court assumed *arguendo* that a cause of action for harassment exists under USERRA, but found that the plaintiff’s claims were insufficiently severe or pervasive to allow the case to go forward. *Petersen v. Dep’t of Interior*¹³ was a Merit Systems Protection Board case in which the Board recognized the appellant’s hostile work environment claims based on an “expansive interpretation” of the USERRA term “benefit.” In *Dees v. Hyundai Motor Mfg. Alabama LLC*,¹⁴ the court held that “a claim for harassment on account of military service is cognizable under USERRA.” The court in *Steenken v. Campbell County*¹⁵ held that “[b]ecause the right to be free from a hostile work environment, broadly construed, is a benefit of employment, [...] Plaintiff’s hostile work environment claim is cognizable under USERRA.” And finally, in *Maher v. City of Chicago* the court stated that “[h]arassment on account of prior military service can be a violation of USERRA.”¹⁶

In response to an ever-growing body of law that was split on the issue of whether a service member can successfully assert a cause of action for harassment and hostile work environment, Congress stepped in and on November 21, 2011, passed The VOW to Hire Heroes Act of 2011.¹⁷ This Act, which was a direct response to the Fifth Circuit Court of Appeal’s opinion in *Carder v. Continental Airlines, Inc.*¹⁸, clarified that hostile work environment claims are cognizable under USERRA. The *Carder* court held that a cause of action for hostile work environment did not exist under USERRA and in its analysis, put particular emphasis on the absence of the phrase “terms, conditions, or privileges of employment” in USERRA’s provisions. Accordingly, and at the request and with the concurrence of the Department of Labor, the Department of Justice and Office of Special

⁹ H.R. Rep. No. 103-65, at 19 (1993), *reprinted in 1994 United States Code Congressional & Administrative News* 2449, 2452, 2456.

¹⁰ *Id.*, at 21.

¹¹ 368 F. Supp. 2d 842 (W.D. Tenn. 2005).

¹² 281 F.3d 648, 653 (7th Cir. 2002). *See also Figueroa v. Hospital San Pablo del Este*, 389 F. Supp. 2d 205, 213 (D.P.R. 2005).

¹³ 71 M.S.P.R. 227, 236 (1996). Under section 4324, USERRA cases against federal executive agencies (as employers) are adjudicated by the Merit Systems Protection Board, not by federal or state courts.

¹⁴ 605 F. Supp. 2d 1220, 1227 (M.D. Ala. 2009).

¹⁵ 2007 WL 837173, AT *3 (E.D. Ky. 2007).

¹⁶ 406 F. Supp. 2d 1006, 1023 (N.D. Ill. 2006).

¹⁷ Public Law 112-56, 125 Stat. 711 (Nov. 21, 2011).

¹⁸ 636 F.3d 172 (5th Cir. 2011).

Counsel, Congress redefined “benefit of employment” in Section 4303(2) of USERRA to include the phrase “terms, conditions, or privileges of employment.”

The genesis for the change was provided, in part, by the Department of Labor’s Annual Report to Congress published in July 2011. In the report, the DOL asked Congress to “[c]larify that USERRA prohibits workplace harassment and the creation of a hostile work environment, and creates an obligation to take prompt and effective action to correction harassing conduct.”¹⁹ The DOL further noted:

The Department of Labor 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 services 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 the recommendation.²⁰

USERRA’s definition of “benefit of employment” now mirrors the definition in Title VII of the Civil Rights Act of 1964²¹ (“Title VII”) under which causes of action for hostile work environment are unquestionably cognizable.²² It is evident from Congress’ swift action after the *Carder* decision that it strongly disagreed with the Fifth Circuit and that it intended to make harassment and hostile work environments actionable under USERRA to the same extent as Title VII and the Americans with Disabilities Act (“ADA”).²³ “[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 matter, the intent to incorporate its judicial interpretation as well.’”²⁴ Although the 2011 clarification of USERRA is not a “new statute,” it still should be, and is with increasing regularity, judicially interpreted as the progeny of Title VII and ADA cases.

Given that the VOW to Hire Heroes Act was only recently enacted, it is not surprising that there is little case law on the issue, but there is some and new cases continue to be published. One of the most well-reasoned and persuasive opinions on the progression of harassment and hostile work environment claims under USERRA post-*Carder* was rendered by the Supreme Court of New York in February, 2013. In *Wang v. New York State Department of Health*²⁵, the court discussed in depth the *Carder* court’s analysis of USERRA before disagreeing with its holding. “[T]his Court respectfully disagrees and concludes that Congress

¹⁹ United States Department of Labor, Fiscal Year 2010 Report to Congress on USERRA.

²⁰ *Id.*

²¹ 42 U.S.C. 2000e *et seq.*

²² See *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 63-66 (1986).

²³ 42 U.S.C. 12101 *et seq.*

²⁴ *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85-86 (2006).

²⁵ 966 N.Y.S. 2d 327 (N.Y. 2013).

did intend to allow a military member who is subjected to a hostile work environment on account of her military service to obtain redress under USERRA.”²⁶ As a clear statement in support of service members, *Wang* will almost certainly be cited as persuasive authority in future USERRA hostile work environment cases and the *Wang* court should be applauded for its efforts to affirm the purpose of the statute.

Analyzing Hostile Work Environment Claims

Title VII makes it “an unlawful employment practice for an employer...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex, or national origin.”²⁷ The seminal case regarding hostile work environment claims under Title VII is *Meritor Savings Bank, FSB v. Vinson*.²⁸ In *Meritor*, the Supreme Court relied heavily on Title VII’s language prohibiting discrimination with respect to the “terms, conditions, or privileges of employment” stating, “[t]he phrase terms, conditions, or privileges of employment in Title VII is an expansive concept that sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.”²⁹ The *Carder* court, in rejecting plaintiffs’ hostile work environment cause of action, also discussed anti-discrimination statutes that rely on the phrase “terms, conditions, or privileges of employment” to infer a cause of action for hostile work environment, such as the Americans with Disabilities Act (“ADA”).³⁰

Given the significance that courts have placed on this phrase in their interpretations of other anti-discrimination statutes and in light of Congress’ statutory clarification in 2011, it is clear that a “benefit of employment” includes freedom from harassment or hostile work environment. Accordingly, causes of action for harassment or hostile work environment under USERRA should be analyzed similarly to those brought under Title VII.

There are generally two types of harassment/hostile work environment claims; one where the employee continues to work for the employer (whether the harassing conduct has ceased or not) and one where the employee is forced to quit, also called “constructive discharge.” Although the two categories are readily discernible on their faces, the requirements for proving each, and the damages available to each differ, so the distinction is important. This article will focus on the latter.

The Supreme Court has held and subsequently reaffirmed that to establish a hostile work environment claim the plaintiff must show harassing behavior “sufficiently severe or pervasive to alter the conditions of [his or her] employment.”³¹ To establish “constructive discharge,” plaintiffs must show that the abusive working environment became so intolerable that their resignations qualified as a fitting response.³²

²⁶ *Id.* At 332.

²⁷ 42 U.S.C. 2000e-2(a)(1).

²⁸ 477 U.S. 57, 63-66 (1986).

²⁹ *Id.* at 66, quoting *Rogers v. Equal Employment Opportunity Commission*, 454 F.2d 234, 238 (5th Cir. 1971).

³⁰ *Carder*, 636 F.3d at 178.

³¹ *Pennsylvania State Police v. Suders*, 542 U.S. 129, 133 (2004), quoting *Meritor*, 477 U.S. at 67.

³² *Id.* at 134.

An employer has an affirmative defense against the first type of a hostile work environment claim by showing both that it had installed a readily accessible and effective policy for reporting and resolving complaints of harassment and that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus.³³ This affirmative defense *will not be available* to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation—for example a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions.³⁴ “In so ruling today, we follow the path marked by our 1998 decisions in *Faragher v. City of Boca Raton*,³⁵ and in *Burlington Industries, Inc. v. Ellerth*.³⁶

Clearly, the analyses courts have used to interpret the provisions of Title VII and the ADA in hostile work environment cases are applicable to the same analyses under USERRA, and the current language in the statute is obviously intended to allow these causes of action to proceed. But conspicuously absent from USERRA is specific language as to what damages, if any, are available to these plaintiffs. Fortunately, there is an answer, using the same analysis and reasoning found in Title VII and the ADA and the cases that interpret them.

Damages and Equitable Relief

If a court determines that an employer has violated USERRA, it may require the employer to compensate the employee for any loss of wages or *benefits* suffered by reason of that employer's failure to comply with USERRA.³⁷ Assume an employee was constructively discharged because of the hostile work environment and took a new job that paid far less. Those lost wages likely would be compensable economic damages, and relatively easy to calculate. A court may also utilize its full equity powers including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the employee's rights or *benefits*.³⁸ So what is the difference, and how can an aggrieved service member be compensated for the harassment or hostile work environment he or she endured, especially if the employee found other, similarly compensated employment immediately, negating a pure lost wages measure of damages? Although the two provisions above seem to provide different relief, many courts are interpreting USERRA such that both may take the form of monetary compensation.

“[T]he Court may order injunctive relief, such as reinstatement or front pay, if Plaintiff is able to prove Defendant violated USERRA by perpetuating a hostile work environment.”³⁹ “Among the myriad of remedies available to individuals who prevail on their claims of employment discrimination are two alternative types of equitable relief—reinstatement and

³³ *Id.*

³⁴ *Id.*

³⁵ 524 U.S. 775 (1998).

³⁶ 524 U.S. 742 (1998).

³⁷ 38 U.S.C. 4323(d)(1)(B).

³⁸ 38 U.S.C. 4323(e).

³⁹ *Montoya v. Orange County Sheriff's Department*, 987 F. Supp. 2d 981, 1015 (C.D. Cal. 2013), citing *Wriggelsworth v. Brumbaugh*, 129 F. Supp. 2d 1106, 1109 (W.D. Mich. 2001).

front pay.”⁴⁰ So the most typical question asked by employees in this situation is, “what is ‘front pay’?”

Front pay compensates the employee for the future effects of discrimination when reinstatement would be an appropriate, but not feasible, remedy or for the estimated length of the interim period before the employee could return to her former position.⁴¹ Although reinstatement is generally preferred, front pay may be awarded in lieu of reinstatement when (1) no position is available; (2) a subsequent working relationship between the parties would be antagonistic; or (3) the employer has a record of long-term resistance to anti-discrimination statutes.⁴² In cases in which reinstatement is not a viable option, courts have ordered front pay as a substitute for reinstatement. In other words, front pay is the monetary equivalent of the equitable remedy of reinstatement intended to compensate the employee for the hostile work environment he or she was forced to endure, to which she should not reasonably be expected to return, or from which she ultimately was forced to quit.⁴³

Despite its widespread status as the preferred remedy, virtually every circuit court of appeals has recognized that, under certain circumstances, reinstatement may be an inappropriate-if not an impracticable or impossible-remedy.⁴⁴ “The United States Court of Appeals for the Eighth Circuit has recognized that although reinstatement is the preferred remedy, “extraordinary circumstances [may] warrant denial of reinstatement.”⁴⁵ A substantial degree of hostility or animosity between the parties has been the most frequently cited example of such an “extraordinary circumstance” in this circuit.⁴⁶

The Third Circuit has observed that reinstatement “is not the exclusive remedy, because it is not always feasible, such as when there exists ‘irreparable animosity between the parties.’”⁴⁷ The First, Second, Ninth, and Tenth Circuits have also cited hostility between the parties as a factor weighing against reinstatement.⁴⁸ The Fourth Circuit held that reinstatement may not be proper when the employer has demonstrated such extreme hostility that, as a practical matter, a productive and amicable working relationship would be impossible.⁴⁹ The Fifth Circuit has approved as permissible consideration of factors such as

⁴⁰ *Ogden v. Wax Works, Inc.*, 29 F. Supp. 2d 1003, 1007 (N.D. Iowa 1998), citing *Newhouse v. McCormick & Co., Inc.*, 110 F.3d 635, 641 (8th Cir. 1997).

⁴¹ *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 850 (2001).

⁴² See, e.g., *Abuan v. Level 3 Communications, Inc.*, 353 F.3d 1158, 1179 (10th Cir. 2003) (upholding the award of front pay because the plaintiff should not be forced into an employment relationship with a hostile employer); *Salitros v. Chrysler Corp.*, 306 F.3d 562, 573 (8th Cir. 2002) (finding front pay appropriate because the employer’s harassment of the plaintiff made a return to work impracticable).

⁴³ *Traxler v. Multnomah County*, 596 F.3d 1007, 1012 (9th Cir. 2010). See also *Abuan*, 353 F.3d at 1179); *Salitros*, 306 F.3d at 573.

⁴⁴ *Ogden*, 29 F. Supp. 2d at 1008, citing *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1423-24 (4th Cir. 1991).

⁴⁵ *Id.* (internal citation omitted).

⁴⁶ *Id.* See also *United Paperworkers International Union, AFL-CIO, Local 274 v. Champion International Corp.*, 81 F.3d 798, 805 (8th Cir. 1996) (observing that “[s]ubstantial hostility, above that normally incident to litigation, is a sound basis for denying reinstatement.”)

⁴⁷ *Id.*, quoting *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 374 (3rd Cir. 1987).

⁴⁸ *Criado v. IBM Corp.*, 145 F.3d 437, 445 (1st Cir. 1998); *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 169 (2d Cir. 1998); *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1347 (9th Cir. 1987), cert. denied, 484 U.S. 1047 (1988); *James v. Sears, Roebuck & Co., Inc.*, 21 F.3d 989, 997 (10th Cir. 1994).

⁴⁹ *Duke*, 928 F.2d at 1423.

“discord and antagonism” between the parties, the availability of positions, the displacement of innocent employees, a plaintiff’s success in securing other similar employment, and the need for certainty and predictability in personnel decisions in determining whether to award reinstatement.⁵⁰ The Sixth Circuit has observed that reinstatement may not be appropriate in cases where the “plaintiff has found other work, where reinstatement would require displacement of a non-culpable employee, or where hostility would result.”⁵¹ The Sixth Circuit further observed that even though the plaintiff in that case was not seeking reinstatement, the defendant had failed to produce any evidence that it had offered reinstatement to the plaintiff or that reinstatement was a “viable remedy given the apparent hostility [between the plaintiff and an offending co-worker].⁵²

In short, front pay is often the only form of relief available to an aggrieved servicemember when she is forced to endure harassment or a hostile work environment based on her military service, and courts are well within their rights, and one could argue bound by overwhelming precedent, to award such equitable relief.

Conclusion

As Congress intended in 1994, USERRA is often and correctly interpreted broadly in favor of the service member. And as the 2011 VOW to Hire Heroes Act clarification takes hold, many more Reserve and Guard personnel who are forced to endure harassment and hostile work environments based on their military service now have redress available in the judicial system. While in a perfect world there would be no discrimination of any kind, there are now adequate and necessary legal remedies to protect our men and women in uniform.

⁵⁰ *Ogden*, 29 F. Supp. 2d at 1009, citing *Ray v. Iuka Special Municipal Separate School District*, 51 F.3d 1246, 1254-55 (5th Cir. 1995).

⁵¹ *Roush v. KFC National Management Co.*, 10 F.3d 392, 398 (6th Cir. 1993), *cert. denied*, 513 U.S. 808 (1994).

⁵² *Id. Cf., Best v. Shell Oil Co.*, 4 F. Supp. 2d 770, 774 (N.D. Ill. 1998) (stating that the parties “agree reinstatement is not appropriate in this case” and proceeding directly to consideration of plaintiff’s claim for front pay).