Georgia State University Law Review

Volume 28
Issue 3 *Spring 2012*

Article 14

March 2013

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Elizabeth A. Leyda*

INTRODUCTION

Ours is a country born out of war. America achieved her independence through the sacrifice of the first citizen-soldiers, epitomized by our first president and most celebrated general in American history, George Washington.[1]The tradition of an American citizen military forms a central pillar of our national identity and has shaped our military history, policy, and law.[2] Thus, Americans have always been—and continue to be—challenged with balancing the lives they lead as ordinary civilians and the experiences millions have had defending our country at war.[3] From the very beginning of our history our leaders have acknowledged this tension. At the conclusion of the Revolutionary War George Washington addressed his troops, who felt disgruntled that they could not resume their normal lives for lack of pay and guaranteed pension.[4] Hoping to

* J.D. Candidate, 2012, Georgia State University College of Law. Special thanks to Dean Kelly Timmons for her guidance and encouragement.

1. Andy P. Fernandez, *The Need for the Expansion of Military Reservists' Rights in Furtherance of the Total Force Policy: A Comparison of the USERRA and ADA*, 14 ST. THOMAS L. REV. 859, 861 (2002).

2. *See* Daniel B. Denning, *Building and Sustaining America's Army*, 56 ARMY 49, 49 (2006) (describing America's all-volunteer military personnel as "the centerpiece of our great Army"); *Military Reserve—Manpower Problems in the Past*, 34 CONG. DIG. 100, 100, 128 (1955) [hereinafter *Manpower Problems*] (describing the origins of American reserve forces and their role in war from the Revolutionary period through 1955).

3. Mathew B. Tully & Ariel E. Solomon, *Ensuring the Employment Rights of America's Citizen-Soldiers*, 35 HUM. RTS. 6, 6 (2008) ("The challenges of reintegration are not novel."). The Department of Veterans Affairs estimates that as of 2006 there were approximately twenty-four million veterans living in the United States. U.S. DEP'T VETERANS AFF., *Table 5L: Veterans 2000–2036 by Race/Ethnicity, Gender, Period Age*, (Sept. 30, 2006), http://www.va.gov/VETDATA/docs/Demographics/5l.xls.

4. George Washington, Farewell Address to His Officers at Newburgh, New York (Mar. 15, 1783),

appease them, he remarked that maintaining peace in light of these setbacks was "one more distinguished proof of unexampled patriotism and patient virtue, rising superior to the pressure of the most complicated sufferings."[5]

Congress has since acted to relieve the suffering, particularly of the economic sort, felt by American soldiers returning home to resume their normal work and family lives.[6] The Uniformed Services Employment and Reemployment Rights Act (USERRA) is the most recent incarnation of legislation designed to protect service members from employment discrimination.[7] USERRA requires employers not only to rehire, but also to retain employees who return from active duty for a specific period of time.[8] Laws designed to protect veterans' civilian employment demonstrate our country's long-standing commitment to a citizen military.[9] The changing nature of war, as well as the military's response to it,[10] have inevitably increased

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in WORDS THAT CHANGED AMERICA: GREAT SPEECHES THAT INSPIRED, CHALLENGED, HEALED, AND ENLIGHTENED 21 (Alex Barnett ed., 2003).

5. *Id.* at 24.

6. 38 U.S.C. § 4301(a) (2006). The statute specifically enumerates the following purposes of USERRA:

> (1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;
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> (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and
>
> (3) to prohibit discrimination against persons because of their service in the uniformed services.

Id.

7. *See* 38 U.S.C. §§ 4301–4335 (2006).

8. 38 U.S.C. § 4311(a) (2006) ("[Service members] 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 . . . ."); 38 U.S.C. § 4316(c) (2006) (describing the timeframe during which employers are required to retain returning service member employees).

9. *See* Tully & Solomon, *supra* note 3, at 6 ("Veterans benefits statutes designed to assuage the strain of reintegration have a lengthy history, predating the culmination of World War II."). The fact that the U.S. maintains this commitment in light of significant ongoing military pursuits around the world underlines its social and historical significance. *See* Denning, *supra* note 2, at 50 (describing U.S. involvement in the global war on terror as "long" and "protracted").

10. *See generally* Denning, *supra* note 2 (describing changes proposed by the Secretary of the Army to restructure the Army with an emphasis on reserve forces as a means of achieving greater overall efficiency).

tension between civilian life and military service, creating an environment ripe for new challenges.[11]

The United States' large and growing reliance on noncareer military personnel,[12] as well as its recent protracted campaigns in Iraq and Afghanistan,[13] have strained the relationship between military and civilian life.[14] Thousands of citizen soldiers, especially Reservists, have fluctuated between civilian employment and active military duty at previously unheard-of rates.[15] In 2007, the Department of Defense (DOD) officially changed its policy on the length of active duty the military can require Reservists and National Guardsmen to serve within a five-year period.[16] The effect of this policy change was twofold—it greatly extended the duration of Reservists' absences from their civilian jobs to up to two years at a time and it meant that the same soldiers could be called back up for duty as many times as the military deemed necessary.[17]

These policy shifts, imposed on an already stressed Reserve and National Guard,[18] together with the economic downturn that hit

11. Michele A. Forte, *Reemployment Rights for the Guard and Reserve: Will Civilian Employers Pay the Price for National Defense?*, 59 A.F. L. REV. 287, 290–91 (2007) (asserting that recent military restructuring in favor of reservist troops over permanent active-duty soldiers has placed a burden on employers to absorb some of the cost of our national defense); Tully & Solomon, *supra* note 3, at 6 ("[R]eliance on members of the Reserve and Guard . . . has created an unparalleled urgency to confront the unique challenges faced by noncareer soldiers returning home to civilian employment.").

12. Forte, *supra* note 11, at 289; Konrad S. Lee, "*When Johnny Comes Marching Home Again" Will He Be Welcome at Work?*, 35 PEPP. L. REV. 247, 248 (2008).

13. Denning, *supra* note 2, at 50; *see* Kathryn Watson, *Returning Troops Face New Fight for Old Jobs: Federal Law Easy for Employers to Ignore*, WASH. TIMES, July 5, 2010, at A1.

14. Forte, *supra* note 11, at 291 ("The activation of hundreds of thousands of guard and reserve troops following September 11, 2001, and the subsequent prolonged military actions in Afghanistan and Iraq, brought employment issues involving non-career military members to the forefront of legal and public attention.").

15. *Id.* (calling the number of soldiers called up for duty in the last ten years "unprecedented"); Lee, *supra* note 12, at 251.

16. David S. Cloud, *Military Eases Its Rules for Mobilizing Reserves*, N.Y. TIMES, Jan. 12, 2007, at A13. In order to address troop shortages in Iraq, the DOD suspended its previous policy of limiting the duration of active duty to no more than twenty-four cumulative months, instead only limiting deployment for noncareer service members to twenty-four *consecutive* months at a time. *Id.*

17. *Id.* The practical effect of removing the twenty-four month cap on Reservist deployment within a five-year period is that active duty could theoretically become unlimited. In practice, the DOD limited deployment duration to fifteen consecutive months in 2007 and then to twelve consecutive months in August 2008. These limits do not dictate how many fifteen or twelve month deployments a Reservist would have to serve within five years. *Twelve Months Is Too Long*, ARMY TIMES, June 21, 2010, at 20.

18. Bradley Graham, *Reservists May Face Longer Tours of Duty*, WASH. POST, Jan. 7, 2005, at A1

bottom in 2009,[19] drove a wedge between employee service members and many employers.[20] At a time when businesses already felt financial strain, accommodating their Reservist and Guardsmen employees' disruptive and unpredictable schedules created costly logistical difficulties.[21] In the past three years, returning service members have been met with increasing problems reintegrating into the workforce,[22] as evidenced by disproportionately high unemployment rates among veterans as compared to civilians,[23] as well as increasing numbers of employment-related inquiries and complaints lodged with the Departments of Labor and Defense.[24]

More and more employers are resisting their obligations to returning service member employees, either out of ignorance of

(describing National Guard forces as "close to being 'tapped out'"); Mark Thompson & Phil Zabriskie, *Does the U.S. Need the Draft?*, TIME, Oct. 18, 2004, at 61 ("Deployed in more than 120 nations around the world, from Iraq to Mongolia, the nation's fighting forces are stretched, by all accounts, to the breaking point.").

19. *See* Watson, *supra* note 13, at 1 (noting that higher unemployment rates are a factor contributing to the uptick in USERRA-related complaints).

20. Forte, *supra* note 11, at 289; Scott Canon, *Returning Reservists Find Military Duty Clashes with Job Protection*, RICHMOND TIMES DISPATCH (June 6, 2009) http://www2.timesdispatch.com/lifestyles/2009/jun/06/i-rese0518_20090604-232204-ar-41291/ ("Ted Daywalt, the president of the VetJobs online employment service, said it had gotten harder for businesses as the Pentagon increased the length of deployments. 'It's hard to run a company when your employees are being taken away for two years,' . . ."); Jill Carroll, *While Reservists Serve, Their Jobs Don't Always Wait*, CHRISTIAN SCI. MONITOR (Apr. 10, 2008), http://www.csmonitor.com/USA/Military/2008/0410/p01s03-usmi.html ("As the wars in Iraq and Afghanistan grind on, tensions are mounting between the military's civilian volunteers, trying to step back into their professions, and employers, straining at times to cope with a growing cadre of workers who are away at war for months then expect to regain their former jobs."); *see* Lee, *supra* note 12, at 251 ("With the armed forces increased dependency on 'weekend warriors' and the significant toll on employers, the resulting tension in the workplace is inevitable . . . .").

21. Forte, *supra* note 11, at 289 ("[T]he absence of [service members] from their civilian employment can cause serious hardship to the employer and to the members' ability to maintain their civilian jobs.").

22. *Id.* ("Despite the enactment of [USERRA], guard and reserve members continue to report instances of discrimination and adverse action as a result of their military service."); *see also* Lee, *supra* note 12, at 251; Watson, *supra* note 13, at 1 ("'We've seen the number of intentional violations skyrocket in the past three years' . . . .").

23. *See* Tully & Solomon, *supra* note 3, at 6 (describing unemployment rates among returning veterans as approximately one to three percent higher compared to their civilian counterparts in 2008); Watson, *supra* note 13, at 1 (noting Department of Labor statistics citing unemployment rates among veterans approximately three to seven percent higher than their civilian counterparts in May 2010).

24. Tully & Solomon, *supra* note 3, at 6; Watson, *supra* note 13, at A1 (noting the number of USERRA-related inquiries the Department of Defense received has increased by the thousands each year for the years 2008 to 2010).

USERRA's requirements[25] or objection to the labor-related costs that compliance imposes upon them.[26] Some employers refuse to reemploy their former service member employees, while others try to avoid hiring Reservists and National Guardsmen at all.[27] Still others seem to comply with USERRA by allowing employees to return to work, yet these returning veterans increasingly sense that they are unwanted because of their military obligations.[28] Despite being rehired, these returning service members assert that they are not really welcome at their old jobs, facing adverse changes and disparaging treatment.[29] In recent years, returning veterans' claims against their civilian employers for harassment on the basis of military status have markedly increased.[30] While it is clear that employers violate USERRA when they refuse to rehire service member employees, prematurely terminate them, or demote them,[31] it is not clear whether USERRA precludes an employer from creating a hostile work environment for the employee it agrees to reemploy.[32]

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25. Tully & Solomon, *supra* note 3, at 7 ("The most prominent reason for this is the overt lack of information provided to even the most well-intentioned employers.").

26. *Id.* ("[T]he strain of losing key members of the work force[] often dictate[s] undesirable employment decisions for service members."); Watson, *supra* note 13, at 1 (noting that a "prime reason" employers fail to hire military personnel is financial, and that certain airline companies refuse to hire service members due to higher labor costs).

27. Canon, *supra* note 20 ("[S]ome employers are quietly shying away from workers who might get called to active duty out of fear of the cost and inconvenience of making do during deployments.").

28. *See* Carroll, *supra* note 20 ("A GAO analysis of Defense Department surveys in 2004 and 2006 showed that some 70 percent of reservists who said they had problems getting rehired or promotions or raises did not seek redress.").

29. *Id.*; Lee, *supra* note 12, at 251 ("[M]ore reservists [are] facing hostility when notifying employers of deployment orders or upon return from deployment.").

30. Lee, *supra* note 12, at 251 ("After reporting a decrease in the number of USERRA complaints for several years in a row, the Department of Labor is now reporting an increase in complaints since 2001 and the initiation of the 'Global War on Terrorism.'").

31. USERRA expressly prohibits "deni[al][of] initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of [veteran status]." 38 U.S.C. § 4311(a) (2006) (emphasis added).

32. Dees v. Hyundai Motor Mfg. Ala., LLC, 605 F. Supp. 2d 1220, 1226 (M.D. Ala. 2009) ("The courts have not yet resolved whether freedom from [hostile work environment] properly constitutes a 'benefit of employment' under the statute. The Eleventh Circuit Court of Appeals has not weighed in on the question; indeed, only a smattering of courts nationwide has done so."), *aff'd*, 368 F. App'x 49 (11th Cir. 2010). Constructive discharge is a cause of action arguably similar to hostile work environment "where an employee quits under circumstances where the working conditions made remaining with the employer intolerable." Miller v. City of Indianapolis, No. IP-99-1735-CMS, 2001 WL 406346, at *8 (S.D. Ind. Apr. 13, 2001), *aff'd*, 281 F.3d 648 (7th Cir. 2002). Constructive discharge requires the injured party actually resign their employment, however, and is therefore not a substitute for the hostile

The purpose of this Note is to examine the availability of a claim for hostile work environment under USERRA. Part I will briefly describe the history of American military manpower, as well as the history of USERRA and case law interpreting it, the history of the hostile work environment claim, and the recent cases exemplifying the disagreement among courts as to such claims under USERRA.[33] Part II discusses in greater detail the issues courts consider in deciding hostile work environment claims under USERRA, including legislative history and purpose, methods of statutory interpretation, availability of remedies, and comparison to other federal statutes prohibiting employment discrimination.[34] Part III proposes an approach to hostile work environment claims that best accounts for the issues courts consider and supports the objectives USERRA was meant to achieve.[35]

I. BACKGROUND OF VETERANS' RIGHTS

A. A Very Brief History of American Military Manpower and Reserve Forces

The traditional militia system of the early American Army was vital to our military success, reflecting an appreciation for the value of reserve power.[36] George Washington relied heavily on state militiamen, effectively employing America's first reserve force.[37] During the Civil War, military exigencies demonstrated the need for more permanent, centralized reserves.[38]

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work environment claim, which does not require the employee to quit. *See id.*

33. *See infra* Part I.

34. *See infra* Part II.

35. *See infra* Part III.

36. Abbott A. Brayton, *American Reserve Policies Since World War II*, 36 MILITARY AFF. 139, 144 (1972) ("Early American reserve policies were characterized by a reliance upon a traditional militia system, a true citizen-army which would augment the Regular Army upon mobilization . . . ."). Massachusetts established the first state militia in the United States in 1633. *Manpower Problems*, *supra* note 2, at 100. State militias soon followed in all thirteen original colonies. *Id.*

37. *See Manpower Problems*, *supra* note 2, at 100.

38. *See id.*

American reserve forces as we know them today began to take shape in the late nineteenth century and early twentieth century.[39] In 1903, Congress categorized every American militiaman into one of two groups: the National Guard (organized by state) and the Reserve Militia.[40] Reserve Officer Training Corps (ROTC) programs got their start in response to the manpower needs posed by the American entry into World War I.[41]

In 1940, Congress passed America's "first peacetime draft," the Selective Training and Service Act (STSA).[42] In anticipation of World War II, the Act authorized conscription of nearly one million Americans and made both the Reserves and National Guard available for call-up.[43] Through the STSA, over thirteen and a half million Americans joined the war effort.[44] The Act also established the first protections against employment discrimination for service members under federal law.[45] USERRA is the most recent in a series of amendments and recodifications of the STSA.[46]

The National Guard and Reserves were largely demobilized following World War II.[47] In 1952, Congress reorganized the Reserves into three categories according to readiness: the Ready Reserves, the Standby Reserves, and the Retired Reserves.[48] These

39. Brayton, *supra* note 36, at 144 (noting the period of 1880 through World War II as the "zenith" of the organized reserves).

40. *Manpower Problems*, *supra* note 2, at 100.

41. *Id.* at 128. Prior to American entry into World War I, the National Defense Act of 1916 established the federal ROTC with the cooperation of universities and soldiers. *Id.* In 1917, the Selective Draft Act instituted conscription for the American Armed Forces in World War I and authorized the President to call up the National Guard. *Id.*

42. Selective Training and Service Act of 1940, 50 U.S.C. app. §§ 301–308 (1940) (repealed 1948); *Manpower Problems*, *supra* note 2, at 128.

43. *Manpower Problems*, *supra* note 2, at 128.

44. *Id.*

45. Monroe v. Standard Oil Co., 452 U.S. 549, 554 (1981) ("Statutory re-employment rights for veterans date from the Nation's first peacetime draft law, passed in 1940 . . . .").

46. *See* Maher v. City of Chi., 406 F. Supp. 2d 1006, 1011 n.1 (N.D. Ill. 2006), *aff'd*, 547 F.3d 817 (7th Cir. 2008).

47. Brayton, *supra* note 36, at 140. Through the 1950s and 60s reserves and guardsmen were considered lowest priority within the military and acquired a reputation as being unprepared and unprofessional. *See id.* at 144. These inefficiencies were likely due to a Reserve designed to fight a conventional war, which was ultimately not the main threat of the time. *Id.* at 141.

48. Armed Forces Reserve Act, ch. 608, 66 Stat. 481 (1952) (repealed 1956); Brayton, *supra* note 36, at 140. The Ready Reserves were subject to being called to service by the President in times of emergency, the Standby Reserves subject to being called to service by Congress in war or serious

distinctions persist today.[49] In the period leading up to the Vietnam conflict, the Reserves and National Guard served some less-conventional functions.[50] The Reserves were noticeably absent from Vietnam, likely in a political effort to downplay the extent of U.S. involvement.[51] The relationship between the Reserves and the regular Armed Forces during that time was strained, at best.[52]

Following the Vietnam conflict, the DOD instituted a plan to alter the structure of manpower in favor of heavier reliance on the Reserves called the Total Force policy.[53] Total Force was intended to amplify the National Guard and Reserve components and integrate them more closely with regular active forces.[54] Some believed that tying non-career service members more closely to American military pursuits (unlike in Vietnam) would improve public sentiment about the military[55] and deliver the same quality of fighting capability of full-time soldiers at a fraction of the cost.[56] It was not until the Global War on Terror,[57] including our military involvements in Iraq and

national emergency, and the Retired Reserve were former military personnel subject to mobilization only by Congress. Brayton, *supra* note 36, at 140; *see also* CONG. BUDGET OFFICE, THE EFFECTS OF RESERVE CALL-UPS ON CIVILIAN EMPLOYERS 3–4 (2005) ("The Ready Reserve, with more than a million members, is the largest component, comprising the Selected Reserve, the Individual Ready Reserve, and the Inactive National Guard. All reservists may be mobilized for national security reasons under certain circumstances.").

49. *See* CONG. BUDGET OFFICE, *supra* note 48, at 3–4.

50. Brayton, *supra* note 36, at 142–43. In the 1950s, the U.S. Navy Reserve manned nuclear submarines in domestic harbors to reduce the threat of nuclear attack on home soil. *Id.* at 143. In response to the Cuban Missile Crisis the Air Reserve trained for an air assault on Cuba, the first step in the U.S. military's unrealized plan to invade the island. *Id.* at 142. Perhaps most notably, throughout the 1960s the National Guard was deployed on federal missions to over one hundred civil disturbances, including riots, caused by the social unrest of the era. *Id.*

51. *Id.* at 141–42.

52. *Id.* at 143–44. Animosity between Reserves and regular forces was likely a factor detracting from the effectiveness of the Reserves at the time. *Id.* Reserves require less investment than a permanent force, making them attractive to military leaders for economic efficiency, while not endearing them to career military personnel who fear replacement by cheaper substitutes. *Id.*

53. Kevin D. Hartzell, *Voluntary Warriors: Reserve Force Mobilization in the United States and Canada*, 29 CORNELL INT'L L.J. 537, 539–40 (1996).

54. *Id.* at 540 ("Operational use of reserve forces was not to be a last resort; reserve forces were envisioned in the vanguard, fighting alongside active duty units.").

55. John O'Shea, *America's Citizen-Warriors*, OFFICER, Oct. 2003, at 24.

56. Hartzell, *supra* note 53, at 541 ("Reserve units manifestly reduce the cost of maintaining armed forces, while ostensibly providing the same, or nearly so, fighting capabilities.").

57. The Global War on Terror is not a declared war, but instead the term used to describe American military operations initiated in response to the terror attack of September 11, 2001. *Counterterrorism Technology Sharing: Hearing Before the Subcomm. on Terrorism, Unconventional Threats &*

Afghanistan, that the effectiveness of the Total Force policy's heavy reliance on the Reserves was truly called into question.[58]

Over 800,000 Reservists and National Guardsmen have been deployed since September 11, 2001, with almost 75,000 still active.[59] On August 31, 2010, President Obama declared an end to official U.S. military involvement in Iraq.[60] By the time of his announcement, the number of troops in Iraq was less than one third the number present at the height of involvement in 2007.[61] As the effort in Iraq winds down, thousands of troops are returning home to resume their lives. USERRA's ability to facilitate this transition will likely come under more intense scrutiny than ever before.[62]

B. The History of USERRA—A Survey of Veterans' Reemployment Rights

The first federal statute enacted to protect veterans' reemployment rights was the STSA.[63] Congress included employment protections for soldiers with the draft so draftees could return to their normal lives after hostilities ended.[64] Between 1948 and 1967, Congress

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Capabilities of the H. Comm. on Armed Servs., & Before the Subcomm. on Emergency Preparedness, Sci. & Tech. of the H. Comm. on Armed Servs., 109th Cong. 1 (2005) (statement of Peter Verga, Principal Deputy Assistant Secretary of Defense for Homeland Defense), *available at* www.dod.gov/dodgc/olc/docs/Test05-07-21Verga.doc. Testifying before Congress, a Defense Department official described it thus: "The main elements of our national strategy in this global conflict include: (1) protecting the homeland; (2) disrupting and attacking terrorist networks; and (3) countering ideological support for terrorism." *Id.* at 2.

58. *See supra* note 18 and accompanying text. Initially the Total Force concept was generally considered a success, as judged by its only true test prior to September 11, 2001, the Persian Gulf conflict. O'Shea, *supra* note 55.

59. DEP'T OF DEF., RESERVE COMPONENTS NOBLE EAGLE/ENDURING FREEDOM/NEW DAWN (Feb. 7, 2011), *available at* http://www.defense.gov/news/d20120207ngr.pdf.

60. Helene Cooper & Sheryl Gay Stolberg, *Obama Declares an End to Iraq Combat Mission*, N.Y. TIMES, Sept. 1, 2010, at A1; Press Release, White House Office of Commc'ns, Excerpts from President Barack Obama's Address to the Nation on the End of Combat Operations in Iraq (Aug. 31, 2010), http://www.whitehouse.gov/the-press-office/2010/08/31/excerpts-president-barack-obamas-address-nation-end-combat-operations-ir.

61. Cooper & Stolberg, *supra* note 60, at A1.

62. *See* Carroll, *supra* note 20 ("USERRA had been a lightly used law until 9/11 'changed our priorities completely,' says John Muckelbauer, regional director . . . for the Labor Department's Veterans' Employment and Training Service, which investigates complaints. 'It pushed USERRA right up to the top and it's been up there ever since.'").

63. Selective Training and Service Act of 1940, 50 U.S.C. app. §§ 301–308 (1940) (repealed 1948).

64. Anthony H. Green, Note, *Reemployment Rights Under the Uniform Services Employment and*

modified and amended versions of the STSA to extend protection to trainees, the Reserves, National Guard, and those fulfilling temporary obligations.[65]

In 1974, veterans' reemployment rights were reinforced by the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA).[66]After a few ad hoc amendments to reemployment rights, in 1994 Congress decided to streamline, centralize, and expand upon existing law with the Uniformed Services Employment and Reemployment Rights Act (USERRA).[67]

C. History of the Hostile Work Environment Claim

Courts first acknowledged hostile work environment harassment under Title VII of the Civil Rights Act of 1964.[68] While the first major case recognizing hostile work environment involved racial discrimination,[69] the claim evolved, in large part, within the context

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Reemployment Act (USERRA): Who's Bearing the Cost? 37 IND. L. REV. 213, 217 (2003).

65. Monroe v. Standard Oil Co., 452 U.S. 459, 554–55 (1981).

66. 38 U.S.C. §§ 2021–2026 (1976), *superseded by* Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4311–4316.

67. Forte, *supra* note 11, at 294. USERRA differs from the VRRA in its cohesive organization, as well as provisions Congress added to relax the burden of proof plaintiffs must carry in discrimination claims and add a liquidated damages remedy. 38 U.S.C. § 4311(c) (2006) (military service need only be a "motivating factor" in discrimination, as opposed to the sole cause); 38 U.S.C. § 4323(d)(1)(c) (2006) ("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."); *see* Maher v. City of Chi., 463 F. Supp. 2d 837, 840–41 (N.D. Ill. 2006) ("[I]n an obvious effort to strengthen the rights of service men and women, Congress added § 4323(d)(1)(C) to USERRA [for] liquidated damages . . . ."); Maher v. City of Chi., 406 F. Supp. 2d 1006, 1012 (N.D. Ill. 2006) ("USERRA's principal innovation is that Congress replaced the 'sole cause' standard of the VRRA . . . ."), *aff'd*, 547 F.3d 817 (7th Cir. 2008). USERRA has been amended once. Pub. L. No. 104–275, 110 Stat. 3334 (1996) (codified as amended at 38 U.S.C. §§ 4301–4335 (1996)).

68. 42 U.S.C. §§ 2000e–2000e-4 (2006). Title VII provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise 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 . . . .

42 U.S.C. § 2000e-2(a); *see also* Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834 (6th Cir. 1996).

69. *Crawford*, 96 F.3d at 834 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1984)) ("The 'hostile environment' cause of action was first recognized in *Rogers v. EEOC*, when the court held that an employee of Spanish origin had a cause of action against an employer for 'the practice of creating a working environment heavily charged with ethnic . . . discrimination.'" (citation omitted)).

of sexual harassment.[70] Starting from the more straightforward quid pro quo harassment claim,[71] courts eventually recognized that employees could experience harassment without suffering discrete adverse actions, such as dismissal.[72]

The Supreme Court describes hostile work environment as a form of harassment "so 'severe or pervasive' as to 'alter the conditions of the victim's employment and create an abusive working environment.'"[73] Courts have interpreted Title VII, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA) to permit claims arising from a hostile work environment.[74] Initially endorsed by the D.C. Circuit[75] and Eleventh Circuit[76] in the early 1980s, the Supreme Court officially recognized the claim in the landmark case *Meritor Savings Bank v. Vinson*.[77] The Court held that severe verbal and physical abuse by a supervisor, including forcible rape, interfered with the employee's "term[s], condition[s], or privilege[s] of employment," which are protected by Title VII.[78] To resolve questions about how severe and pervasive conduct must be to create a hostile work environment, in 1993, the Supreme Court in *Harris v. Forklift Systems, Inc.* held that while the harassment must be both subjectively and objectively offensive, it need not rise to the level of seriously harming an employee's psychological well-being before it is actionable.[79]

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70. *See* Kelly Cahill Timmons, *Sexual Harassment and Disparate Impact: Should Non-Targeted Workplace Sexual Conduct Be Actionable Under Title VII?*, 81 NEB. L. REV. 1152, 1156–60 (2003) (detailing the history and rationale of major sexual harassment cases contributing to the development of the hostile work environment claim since *Rogers*).

71. *Id.* at 1156 ("[Q]uid pro quo sexual harassment [occurs] where supervisors condition[] employment benefits on sexual favors.").

72. *Id.* at 1160 (quoting Bundy v. Jackson, 641 F.2d 934, 939 (D.C. Cir. 1981)) ("[U]nless [courts] held that hostile work environment sexual harassment was actionable, 'an employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking any other tangible actions against her in response to her resistance.'").

73. Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).

74. Lee, *supra* note 12, at 260.

75. *Bundy*, 641 F.2d 934.

76. Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

77. *Meritor Sav. Bank*, 477 U.S. 57.

78. *Id.* at 67 (internal quotation marks omitted).

79. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) ("Title VII comes into play before the harassing conduct leads to a nervous breakdown.").

Following *Harris*, courts now generally agree that a prima facie case for hostile work environment requires four elements: that "the harassment was (1) unwelcome, (2) because of [protected status], (3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere, and (4) imputable to the employer."[80]

D. Hostile Work Environment and USERRA

The courts disagree on whether a claim for hostile work environment is actionable under USERRA.[81] The leading case recognizing the claim is *Petersen v. Department of Interior*,[82] a case before the Merit Systems Protection Board, which has jurisdiction over USERRA cases involving federal government agencies as parties.[83] In *Petersen*, a disabled veteran employed as a park ranger sued for hostile work environment on the basis of his military status when his law enforcement commission was disqualified.[84] In acknowledging the claim, *Petersen* outlined several reasons why hostile work environment should be cognizable under the statute, including congressional intent to construe veterans' protections broadly[85] and to prohibit discrimination based on military status.[86] The Board also demonstrated that other federal statutes prohibiting

80. E.E.O.C. v. Sunbelt Rentals, Inc., 521 F.3d 306, 313 (4th Cir. 2008); *see also*, Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 276–77 (3d Cir. 2001).

81. Figueroa Reyes v. Hosp. San Pablo del Este, 389 F. Supp. 2d 205, 212 (D.P.R. 2005) ("The law is unsettled as to whether hostile work environment claims are cognizable under USERRA.").

82. Petersen v. Dep't of Interior, 71 M.S.P.R. 227 (M.S.P.B. 1996).

83. The Merit Systems Protection Board is the administrative court empowered to hear certain claims under USERRA. 38 U.S.C. § 4324(a)(1) (2006) (for employees of federal executive agencies, "[a] person [whose claim is not resolved by the Department of Labor] may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board").

84. *Petersen*, 71 M.S.P.R. at 230. "[Petersen] asserts that a supervisor informed him that the agency was forced to hire him because he was a disabled veteran. The appellant further alleged that he and other veterans were belittled by agency workers, that he was called various derogatory names, such as 'psycho,' 'baby killer,' and 'plate head' . . . ." *Id.* at 235.

85. *Id.* at 236 n.8 ("[T]he Supreme Court has broadly construed the predecessors to USERRA." (citing Coffy v. Republic Steel Corp., 447 U.S. 191, 196 (1980))).

86. *Id.* at 239 ("Just as Congress sought to prohibit discrimination on various bases in Title VII, Title IX, the Rehabilitation Act, and the ADA, it sought through USERRA, 'to prohibit discrimination against persons because of their service in the uniformed services.'" (quoting 38 U.S.C. § 4301(a)(3) (2006))).

discrimination have been construed to permit the claim,[87] particularly highlighting Title IX and the Rehabilitation Act of 1973, both of which have statutory language similar to USERRA.[88] Cases recognizing hostile work environment have largely followed *Petersen*.[89]

In contrast, another line of cases, exemplified by the recent Fifth Circuit case *Carder v. Continental Airlines*, rejects hostile work environment claims on the basis of statutory interpretation, legislative history, and the purpose of USERRA.[90] The plaintiffs in *Carder* filed suit against Continental raising several claims of discriminatory treatment, including a claim for hostile work environment for making it especially difficult for service member employees to take military leave and repeatedly verbally deriding them for their service obligations.[91] The district court argued that

87. *Petersen*, 71 M.S.P.R. at 237 ("We note that the courts have consistently construed anti-discrimination statutes as proscribing harassment in the workplace.").

88. *Id.* at 238–39. Both Title IX and the ADA, like USERRA, characterize employment protections in terms of "benefits" of employment. *Id.* Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be *denied the benefits of*, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2006) (emphasis added). Similarly, under the Rehabilitation Act,

> [n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be *denied the benefits of*, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

29 U.S.C. § 794(a) (2006) (emphasis added).

89. *See* Yates v. M.S.P.B., 145 F.3d 1480 (Fed. Cir. 1998); Dees v. Hyundai Motor Mfg. Ala., LLC, 605 F. Supp. 2d 1220 (M.D. Ala. 2009), *aff'd*, 368 F. App'x 49 (11th Cir. 2010); Vickers v. City of Memphis, 368 F. Supp. 2d 842 (W.D. Tenn. 2005).

90. Carder v. Cont'l Airlines, Inc., 636 F.3d 172 (5th Cir. 2011). Interestingly, the Federal District Court of Puerto Rico has been very active in deciding cases of hostile work environment under USERRA, refusing to adopt the rationale offered in *Petersen*. *See* Baerga-Castro v. Wyeth Pharm., No. 08-1014 (GAG/JA), 2009 WL 2871148, at *12 (D.P.R. Sept. 3, 2009); Ortiz Molina v. Rimco, Inc., No. 05-1181 (JAF), 2006 WL 2639297, at *5 (D.P.R. Sept. 13, 2006); Figueroa Reyes v. Hosp. San Pablo del Este, 389 F. Supp. 2d 205, 212–13 (D.P.R. 2005). *But see* Vega Colon v. Wyeth Pharm., 611 F. Supp. 2d 110, 117 (D.P.R. 2009), *rev'd on other grounds*, 625 F.3d 22, 32 (1st Cir. 2010) (assuming without deciding that hostile work environment was a cognizable claim under USERRA but dismissing for insufficient severity and pervasiveness).

91. *Carder*, 636 F.3d at 173–74. Plaintiffs alleged that their supervisors "placed onerous restrictions on taking military leave and arbitrarily attempt[ed] to cancel military leave," along with making comments to service member employees such as accusing them of "taking advantage of the [leave] system," running "scams," and announcing that "[i]t's getting really difficult to hire you military guys because you're taking so much military leave," and "[y]ou need to choose between [Continental] and the Navy." *Id.* at 174.

recognizing the claim would require courts to look outside the plain meaning of the statute, stretching the language of USERRA beyond its reasonable limits.[92] In affirming the district court's rejection of the claim, the Fifth Circuit appeared to broaden its analysis beyond such strict construction, but nevertheless reached the same conclusion.[93] Written almost as a direct response to the fifteen-year-old *Petersen* decision, *Carder* addresses and refutes most of the arguments advanced by the Merit Systems Protection Board in support of acknowledging hostile work environment under USERRA.[94]

The Eleventh Circuit recently considered the issue of hostile work environment under USERRA in the case *Dees v. Hyundai Motor Manufacturing Alabama, LLC*.[95] The court reached a novel conclusion without deciding whether the claim was viable[96] by finding that the petitioner lacked standing for failure to plead entitlement to one of USERRA's three enumerated remedies.[97] Such

92. Carder v. Cont'l Airlines, No. H-09-3173, 2009 WL 4342477, at *11 (S.D. Tex. Nov. 30, 2009) ("USERRA expressly prevents the denial of benefits of employment to members of the uniformed service by their employers. However, under a plain language analysis, the scope of this protection does not include safeguarding from a hostile work environment.").

93. *Carder*, 636 F.3d at 176 ("Given the statute's express prohibition of discrimination against service members, however, we must also consider the statute's legislative history and its underlying policy objectives in an attempt to gain insight into whether Congress intended to create a cause of action under USERRA for harassment of service members.").

94. *Id.* at 176–77.

> An administrative decision of the Merit Systems Protection Board . . . put heavy emphasis on Congress's intent that the statute should be broadly construed. . . . We agree with Appellants that we cannot ignore the Congressional mandate that the statute be broadly construed to prevent discrimination of service members. But we are not satisfied that this carries the day for them.

Id.

95. Dees v. Hyundai Motor Mfg. Ala., LLC, 368 F. App'x 49 (11th Cir. 2010).

96. While the decision does not specifically hold on the issue of the availability of hostile work environment, the court's substantial discussion of the merits of the petitioner's claim (before rejecting it on jurisdictional grounds) suggests an openness to the cause of action. *Id.* at 52.

97. USERRA allows for the following remedies:

> (A) The court may require the employer to comply with the provisions of this chapter.
>
> (B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.
>
> (C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

38 U.S.C. § 4323(d) (2006).

failure undermined the petitioner's standing because his claim presented an unredressible injury.[98]

While *Petersen*'s analysis of the availability of a claim for hostile work environment under USERRA is persuasive, it has not been completely reconciled with cases arguing against the claim for statutory interpretation or procedural reasons, among others.[99] Given the heightened attention this issue has attracted due to recent military events and the importance of resolving employment issues for veterans in an economic climate where jobs are particularly scarce, it is likely that harassment claims under USERRA will grow in importance in the coming years.[100]

II. ANALYSIS OF HOSTILE WORK ENVIRONMENT IN THE CONTEXT OF USERRA

A. Centrality of Legislative History and Purpose to Veterans' Reemployment Rights

It is helpful to begin examination of the availability of a hostile work environment claim under USERRA with the statute's history and overarching purpose.[101] Congress intended for USERRA to

98. *Dees*, 368 F. App'x at 52 (defining one of the constitutional requirements for standing as "injury or threat of injury must likely be redressible by a favorable court decision" (quoting Fla. State Conference of NAACP v. Browning, 522 F.3d 1153, 1159 (11th Cir. 2008))).

99. As an interlocutory appeal, the court in *Petersen* did not confront the issue of remedies under USERRA. Petersen v. Dep't of Interior, 71 M.S.P.R. 227, 231 n.4 (M.S.P.B. 1996). *Petersen* also does not articulate a specific method of statutory interpretation employed other than what can be inferred from its extensive examination of legislative history. *See id.* at 235–39.

100. *See supra* note 63 and accompanying text.

101. Supreme Court cases interpreting veterans' reemployment rights statutes consistently emphasize statutory purpose and history in their analysis. Monroe v. Standard Oil Co., 452 U.S. 549, 554–66 (1981) (detailing the extensive legislative history of various veterans' reemployment statutes beginning in 1940, including House and Senate Committee reports and hearings); Coffy v. Rep. Steel Corp., 447 U.S. 191, 196 (1980) (relying both on interpretations of previous versions of veterans' reemployment statutes and the legislative purpose articulated in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946)); Ala. Power Co. v. Davis, 431 U.S. 581, 583 (1977) ("Section 9 of the Act evidences Congress' desire to minimize the disruption in individuals' lives resulting from the national need for military personnel. It seeks to accomplish this goal by guaranteeing veterans that the jobs they had before they entered the military will be available to them upon their return to civilian life."); *Fishgold*, 328 U.S. at 284 ("We turn then to the merits. The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job.").

encourage non-career military service, minimize employment disadvantages and disruptions due to military service, and prohibit discrimination against military personnel.[102] In 1946, the Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corp*. articulated a principle of interpretation for veterans' reemployment rights still valid today[103]—that such "legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."[104] This principle was reiterated and strengthened in USERRA's legislative history.[105] In recommending passage of the bill, the Committee on Veterans' Affairs made clear that it "intend[ed] that these anti-discrimination provisions be broadly construed and strictly enforced."[106]

In the realm of veterans' reemployment law, courts have frequently relied on case law interpreting predecessor statutes when confronted with questions under the version of the statute presently before the court.[107] USERRA's history demonstrates that Congress intended this practice to continue, declaring:

> [T]he Committee [on Veterans' Affairs] wishes to stress that the extensive body of case law [pertaining to service member's reemployment rights] that has evolved over [the last fifty years], to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions.

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102. 38 U.S.C. § 4301(a) (2006); H.R. REP. NO. 103–65, at 56 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2486 ("If the United States is going to rely on reservists to shoulder a larger share of our national defense, those reservists must know that their jobs are secure while they are serving their country.").

103. *E.g.*, Dees v. Hyundai Motor Mfg. Ala., LLC, 605 F. Supp. 2d 1220, 1227 (M.D. Ala. 2009) (citing *Coffy*, 447 U.S. at 196) (reiterating the Court's principle of liberal construction under *Fishgold*), *aff'd*, 368 F. App'x 49 (11th Cir. 2010).

104. *Fishgold*, 328 U.S. at 285.

105. H.R. REP. NO. 103–65, at 24 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2452 ("[T]he Committee wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be 'liberally construed.'" (quoting *Fishgold*, 328 U.S. at 285)).

106. H.R. REP. NO. 103–65, at 24 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2456.

107. Monroe v. Standard Oil Co., 452 U.S. 549, 554 (1981) ("We have . . . frequently interpreted somewhat analogous statutory provisions entitling the returning veteran to reinstatement . . . ." (citing Coffy v. Rep. Steel Corp., 447 U.S. 191 (1980) and Ala. Power Co. v. Davis, 431 U.S. 581 (1977))).

> This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed."[108]

While courts universally acknowledge *Fishgold*'s interpretive mandate,[109] they have varied in their application of the broad construction principle.[110] Two issues relevant to hostile work environment analysis—particularly the interpretation of USERRA's "benefits of employment" language and the role of employment contracts and policies—illustrate courts' tendencies to approach USERRA from either broader or narrower perspectives.[111]

B. The "Benefits of Employment" Conundrum

USERRA prohibits denial of "initial employment, reemployment, retention in employment, promotion, or *any benefit of employment* by an employer on the basis of [military status]."[112] USERRA cases, and those examining hostile work environment in particular, largely involve determining exactly what qualifies as a "benefit of employment."[113] Though not specifically addressing the issue of hostile work environment, two Supreme Court cases have discussed how "benefits of employment" should be interpreted under the statute.[114]

In *Alabama Power Co. v. Davis*, the Court considered whether the denial of pension credit for the period of time spent away from civilian employment for military service was actionable under the

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108. H.R. REP. NO. 103–65, at 24 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2452.

109. *E.g.*, *Coffy*, 447 U.S. at 196.

110. *Compare, e.g.*, Petersen v. Dep't of Interior, 71 M.S.P.R. 227 (M.S.P.B. 1996), *with* Carder v. Continental Airlines, Inc., No. H-09-3173, 2009 WL 4342477 (S.D. Tex. Nov. 30, 2009).

111. *See, e.g.*, *Carder*, 2009 WL 4342477; *Petersen*, 71 M.S.P.R. 227.

112. 38 U.S.C. § 4311(a) (2006) (emphasis added).

113. Dees v. Hyundai Motor Mfg. Ala., LLC, 605 F. Supp. 2d 1220, 1226 (M.D. Ala. 2009) ("The courts have not yet resolved whether freedom from harassment properly constitutes a 'benefit of employment' under the statute."), *aff'd*, 368 F. App'x 49 (11th Cir. 2010); *Petersen*, 71 M.S.P.R. at 237 ("Although the appellant's hostile environment claim does not clearly fall within the term 'benefit,' we are persuaded that an 'expansive interpretation' of that term, as intended by Congress, leads to the conclusion that it does.").

114. *See* Monroe v. Standard Oil Co. 452 U.S. 549 (1981); Ala. Power Co. v. Davis, 431 U.S. 581 (1977).

Military Selective Service Act of 1967, a predecessor of USERRA.[115] In finding that the statute protected the credit, the Court explained "no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act,"[116] and that courts should look at the nature of the benefit[117] at issue to avoid "overly simplistic" conclusions.[118] In *Monroe v. Standard Oil Co.*, the Court found that the Vietnam Era Veterans' Readjustment Act did not require employers to provide preferential work schedules to reservists when employees could already change schedules with coworkers to accommodate personal scheduling needs.[119] While reservist employees were not entitled to preferential treatment because of their service obligations, the Court nonetheless emphasized that the statute entitled reservist-employees to treatment equal to that of non-reservists, and that service members should not suffer penalties for their service.[120] *Monroe* examined the statute's legislative history and found "the purpose of the legislation was to protect employee reservists from discharge, denial of promotional opportunities, or other comparable *adverse* treatment solely by reason of their military obligations."[121]

USERRA defines "benefit of employment" as "any advantage, profit, privilege, gain, status, account, or interest . . . that accrues by

115. Military Selective Service Act of 1967, 50 U.S.C. app. § 459(b) (recodified at 38 U.S.C. § 2021 (1970 Supp. V)); *Ala. Power*, 431 U.S. at 582.

116. *Ala. Power*, 431 U.S. at 584–85.

117. *Id.* at 589 ("The nature of the benefits 'the common conception of a vacation as a reward for and respite from a lengthy period of labor' . . . was decisive." (quoting Foster v. Dravo Corp., 420 U.S. 92, 101 (1975))).

118. *Ala. Power*, 431 U.S. at 592.

119. *Monroe*, 452 U.S. at 564 ("If Congress had wanted to impose an additional obligation upon employers, guaranteeing that employee-reservists have the opportunity to work the same number of hours, or earn the same amount of pay that they would have earned without absences attributable to military reserve duties, it could have done so expressly.").

120. *Id.* at 559–60 ("Congress wished . . . to insure that employers would not penalize or rid themselves of returning reservists . . . and the consistent focus . . . was on the need to protect reservists from the temptation of employers to deny them the same treatment afforded their co-workers without military obligations.").

121. *Id.* at 562. *Monroe* also quoted a 1966 House Report asserting "If these young men are essential to our national defense, then certainly our Government and employers have a moral obligation to see that their economic well being is disrupted to the minimum extent possible." *Monroe*, 452 U.S. at 561 (quoting H.R. REP. NO. 89-1303, at 3 (1966)).

reason of an employment contract or agreement or an employer policy, plan, or practice."[122] As illustrated below, courts addressing hostile work environment as a denial of a benefit of employment have taken somewhat varying approaches.[123]

1. The Broad View of Benefits

Petersen v. Department of Interior makes the clearest case for acknowledging that a hostile work environment denies a statutorily protected benefit of employment.[124] *Petersen* argues that § 4303(2) broadly defines "benefits," and that legislative history supports an expansive interpretation.[125] The opinion specifically emphasized the House Report on the bill, explaining "[t]hese rights are broadly defined to include *all attributes of the employment relationship* . . . . The list of benefits is illustrative and not intended to be all inclusive."[126] While accepting that freedom from a hostile work environment did not squarely fall into the category of a "benefit," *Petersen* found that Congress's purposefully broad interpretation of USERRA provided that it did.[127]

Circuit courts recognizing hostile work environment under USERRA have followed *Petersen* to varying degrees.[128] Two

122. 38 U.S.C. § 4303(2) (2006) ("[Included are] 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.").

123. *See infra* Part II.B.1–2.

124. Petersen v. Dep't of Interior, 71 M.S.P.R. 227 (M.S.P.B. 1996); *see* Yates v. M.S.P.B., 145 F.3d 1480, 1484 (Fed. Cir. 1998) (endorsing *Petersen's* expansive interpretation of "benefits of employment" based on statutory language and history while not itself addressing the issue of hostile work environment); Dees v. Hyundai Motor Mfg. Ala., LLC, 605 F. Supp. 2d 1220, 1227 (M.D. Ala. 2009) ("One case to address the question squarely is *Petersen v. Department of Interior*."), *aff'd*, 368 F. App'x 49 (11th Cir. 2010).

125. *Petersen*, 71 M.S.P.R. at 236 ("The legislative history of this section [38 U.S.C. § 4303(2)] reaffirms that an expansive interpretation was intended.").

126. *Id.* at 236 (quoting H.R. REP. NO. 103-65, pt. 1, at 21 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2454) (emphasis added).

127. *Id.* at 237 ("Although the appellant's hostile environment claim does not clearly fall within the term 'benefit,' we are persuaded that an 'expansive interpretation' of that term, as intended by Congress, leads to the conclusion that it does.").

128. *Compare Dees*, 605 F. Supp. 2d at 1227–28 (adopting *Petersen* more or less in its entirety), *with* Vickers v. City of Memphis, 368 F. Supp. 2d 842, 845 (W.D. Tenn. 2005) (qualifying endorsement of *Petersen* with the requirement that plaintiffs demonstrate express prohibition of discrimination in

Seventh Circuit cases, *Miller v. City of Indianapolis*, and *Maher v. City of Chicago*, though not specifically holding on the issue, accept the availability of hostile work environment under USERRA.[129] Both cases affirm district court decisions that acknowledged hostile work environment but found the requirements of the claim unsatisfied.[130] While reflecting *Petersen*'s broad construal of "benefits of employment," neither opinion dwells on the specifics of § 4311(a).[131] In *Dees*, the Eleventh Circuit recently touched on the issue of hostile work environment under USERRA.[132] While the court specifically declined to determine whether the claim was available, it affirmed a district court decision acknowledging hostile work environment's viability endorsing the rationale offered in *Petersen.*[133] Emphasizing USERRA's overarching purpose, the district court pointedly observed, "assurance that employees cannot be fired on account of their military service is meaningless without assurance that the work environment will not be so intolerable that they will feel forced to quit."[134]

2. The Narrow View of Benefits

On the other side of the spectrum, some courts reject *Petersen*'s rationale for hostile work environment as it pertains to benefits of

employment policy).

129. Maher v. City of Chi., 547 F.3d 817, 825 (7th Cir. 2008); Miller v. City of Indianapolis, 281 F.3d 648, 653 (7th Cir. 2002). In *Vega-Colon v. Wyeth Pharmaceuticals*, 625 F.3d 22 (1st Cir. 2010), the First Circuit also recently assumed hostile work environment to exist under USERRA. The court affirmed a District of Puerto Rico case dismissing the claim for inadequate severity and pervasiveness with little additional discussion. *Id.* at 32.

130. Maher v. City of Chi., 406 F. Supp. 2d 1006, 1024–25 (N.D. Ill. 2006), *aff'd*, 547 F.3d 817 (7th Cir. 2008); Miller v. City of Indianapolis, No. IP-99-1735-CMS, 2001 WL 406346, at *8 (S.D. Ind. Apr. 13, 2001), *aff'd*, 281 F.3d 648 (7th Cir. 2002); *see also* Vega-Colon v. Wyeth Pharm., 611 F. Supp. 2d 110, 116–17 (D.P.R. 2009), *rev'd on other grounds*, 625 F.3d 22 (1st Cir. 2010).

131. *Maher*, 406 F. Supp. 2d at 1023 (expressing hostile work environment under USERRA as requiring proof of severity and pervasiveness altering conditions of employment); *Miller*, 2001 WL 406346, at *7–8 (examining whether military leave qualifies as "benefit of employment" while not addressing hostile work environment); *see also Vega-Colon*, 611 F. Supp. 2d at 117 (same).

132. Dees v. Hyundai Motor Mfg. Ala., LLC, 368 F. App'x 49, 53 (11th Cir. 2010) ("Assuming without deciding that harassment or hostile work environment is a cognizable claim under USERRA . . . .").

133. *Id.*

134. Dees v. Hyundai Motor Mfg. Ala., LLC, 605 F. Supp. 2d 1220, 1227–28 (M.D. Ala. 2009), *aff'd*, 368 F. App'x 49 (11th Cir. 2010).

employment by ascribing a narrower purpose to USERRA.[135] In an unpublished decision, the Ninth Circuit in *Church v. City of Reno* rejected hostile work environment under USERRA in the context of construing a consent decree requiring an employer to refrain from discrimination under the statute.[136] Adhering closely to § 4311(a), the court reasoned that because the veteran had provided no proof of any specific employment contract, policy, plan, or practice, freedom from hostile work environment was not a "benefit" denied.[137] While refusing to hold on the issue, the Ninth Circuit made clear that "USERRA does not specifically include a nonhostile work environment in its definition of 'benefit of employment.'"[138] The District of Puerto Rico used similar language in *Baerga-Castro v. Wyeth Pharmaceuticals* to reject hostile work environment under USERRA.[139] While the statute proscribes denial of benefits of employment, "it does not specifically prohibit an employer from subjecting an employee to harassment or a hostile work environment."[140]

In *Carder v. Continental Airlines, Inc*., the Southern District of Texas followed *Baerga-Castro* after considering and rejecting the rationale offered in *Petersen* and endorsed by other courts.[141] The

135. Church v. City of Reno, No. 97-17097, 1999 WL 65205 (9th Cir. Feb. 9, 1999); Carder v. Cont'l Airlines, Inc., No. H-09-3173, 2009 WL 4342477 (S.D. Tex. Nov. 30 2009); Baerga-Castro v. Wyeth Pharm., No. 08-1014 (GAG/JA), 2009 WL 2871148 (D.P.R. Sept. 3, 2009).

136. *Church*, 1999 WL 65205 at *1–2.

137. *Id.* at *1 ("Church has pointed to no 'employment contract or agreement or an employer policy, plan, or practice' that specifically provides the 'benefit' of being free from caustic comments by coworkers." (quoting 38 U.S.C. § 4303(2) (2006))); *cf.* Vickers v. City of Memphis, 368 F. Supp. 2d 842, 845 (W.D. Tenn. 2005) (employing basically the same rationale—requiring plaintiffs to prove the existence of an employment policy or agreement to establish denial of a "benefit of employment"—to find that hostile work environment was in fact cognizable under USERRA).

138. *Church*, 1999 WL 65205, at *1.

139. *Baerga-Castro*, 2009 WL 2871148, at *12 ("USERRA prohibits the denial of any benefit of employment by an employer to members of the uniformed service based on their membership and/or performance of service, but does not specifically prohibit an employer from subjecting an employee to harassment or a hostile work environment due to the employee's military status." (quoting Ortiz Molina v. Rimco, Inc., No. 05-1181 (JAF), 2006 WL 2639297, at *5 (D.P.R. Sept. 13, 2006)) (internal quotation marks omitted)).

140. *Baerga-Castro,* 2009 WL 2871148, at *12 (relying on two cases that in fact assumed the availability of hostile work environment, *Ortiz Molina*, 2006 WL 2639297, at *5, and *Figueroa Reyes v. Hosp. San Pablo Del Este*, 389 F. Supp. 2d 205, 212 (D.P.R. 2005), to stand for the unavailability of the claim).

141. Carder v. Cont'l Airlines, Inc., No. H-09-3173, 2009 WL 4342477, at *10–11 (S.D. Tex. Nov.

Carder court approached interpreting USERRA with a "plain language" rule.[142] The court found that because the dictionary defined "benefit" as either an "advantage or privilege" or a "profit or gain," and a non-hostile work environment fit into neither of these categories, the court need not consult any legislative history to determine its meaning.[143]

The Fifth Circuit affirmed the district court's rejection of the claim, but expanded its statutory construction analysis by interweaving it with an examination of hostile work environment claims under other statutes.[144] Rejecting the *Petersen* opinion's analysis of legislative history, the Fifth Circuit asserted that case law interpreting other anti-discrimination statutes, rather than Congress's own report on the statute, was actually a better indicator of congressional intent with the passage of USERRA.[145] Because Congress passed USERRA years after the landmark Supreme Court case acknowledging hostile work environment under Title VII, the court reasoned, Congress's failure to employ the exact same statutory language indicated an intent *not* to incorporate judicial interpretations recognizing the claim.[146]

C. How USERRA Stacks Up Against Other Anti-Discrimination Statutes

Another important argument frequently made in support of recognizing hostile work environment under USERRA is the

30, 2009).

142. *Id.* at *11 ("[T]he Court returns to the maxim that 'when interpreting statutes, we begin with the plain language used by the drafters.'" (quoting Waggoner v. Gonzales, 488 F.3d 632, 636 (5th Cir. 2007))).

143. *Carder*, 2009 WL 4342477 at *11 ("When the plain language of a statute is unambiguous, there is no need to resort to legislative history for aid in its interpretation." (quoting Tidewater Inc. v. United States, 565 F.3d 299, 303 (5th Cir. 2009))). The court reasoned that because a veteran "gains" nothing by avoiding a hostile work place, the claim is not cognizable. *Carder*, 2009 WL 4342477 at *11 ("In no way does avoiding a hostile work place grant . . . a gain.").

144. *See* Carder v. Cont'l Airlines, Inc., 636 F.3d 172, 177–81 (5th Cir. 2011) (comparing USERRA to Title VII, the ADA, the ADEA, Title IX, and the Rehabilitation Act).

145. *Id.* at 177 ("We believe the analysis most likely to provide a more accurate assessment of Congress's intent on the narrow question presented to us lies in examination of the case law interpreting other anti-discrimination statutes.").

146. *Id.* at 178.

availability of the claim under other federal anti-discrimination statutes.[147] *Petersen* argues that courts' "consistent" recognition of the claim across the board coincides with the "expansive interpretation" of USERRA mandated by Congress.[148] Beginning with Title VII, the court cites landmark harassment cases to demonstrate that an employer's offensive or abusive working conditions can violate the "terms, conditions, or privileges of employment" proscribed by Title VII.[149] Acknowledging that Title VII's "terms, conditions, and privileges" vary somewhat from the language of USERRA,[150] the opinion looks to Title IX and the Rehabilitation Act of 1973, which characterize protection from discrimination in terms of "benefits,"[151] as well as the Americans with Disabilities Act.[152] The court argues that hostile work environment has been recognized under each statute.[153] *Petersen* makes clear that USERRA was designed to prohibit discrimination, and hostile work environment is a widely recognized form of discrimination.[154]

147. Petersen v. Dep't of Interior, 71 M.S.P.R. 227, 237 (M.S.P.B. 1996) ("We note that the courts have consistently construed anti-discrimination statutes as proscribing harassment in the workplace."); *see* Dees v. Hyundai Motor Mfg. Ala., LLC, 605 F. Supp. 2d 1220, 1228 (M.D. Ala. 2009) ("USERRA-harassment claims, like those under Title VII, should be analyzed using the principle announced by the Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) . . . ."), *aff'd*, 368 F. App'x 49 (11th Cir. 2010).

148. *Petersen*, 71 M.S.P.R. at 237.

149. *Id.* at 237–38.

150. 38 U.S.C. 4311(a) (2006) (USERRA reads "any benefit of employment").

151. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2006) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity . . . ."); The Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2006) ("No otherwise qualified individual with a disability in the United States . . . shall . . . be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .").

152. The Americans With Disabilities Act also proscribes a hostile work environment. The Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a) (2006) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."). While not addressed in *Baerga-Castro*, the language of the ADEA is more similar to Title VII than USERRA, proscribing discrimination regarding the "terms, conditions, or privileges of employment." 29 U.S.C. § 623(a) (2006); Baerga-Castro v. Wyeth Pharm., No. 08-1014 (GAG/JA), 2009 WL 2871148.

153. *Petersen*, 71 M.S.P.R. at 237–39.

154. *Id.* at 239 ("Congress intended [to] be given to USERRA . . . the well-established principle that discrimination encompasses hostile environment claims. . . .").

Baerga-Castro, a case in which a veteran asserted claims under both USERRA and the ADEA, demonstrates that courts are not necessarily persuaded by the availability of hostile work environment claims under other statutes as it pertains to USERRA.[155] There, the court found that even though the plaintiff could sue for hostile work environment under the ADEA,[156] the claim was not available under USERRA,[157] despite the claims effectively deriving from the same events.[158]

The Middle District of Alabama submitted another argument against the relevance of other anti-discrimination statutes to USERRA in an opinion affirming a discovery order.[159] In a 2007 decision in *Dees,* the court ruled that a veteran suing for hostile work environment was not entitled to discover evidence relating to an employer's violations of other anti-discrimination laws (with limited exceptions).[160] The court reasoned that USERRA's purpose was fundamentally different from statues like Title VII: "Congress did not enact USERRA primarily 'to combat an ignorant or vicious stereotyping of [members of the armed services] as undependable employees' but intended only 'to encourage people to join' the armed services.'"[161] Thus, discrimination against returning veterans is likely attributable to employers' desire to avoid logistical inconvenience

155. *Baerga-Castro,* 2009 WL 2871148, at *1, *12, *13. The plaintiff in *Baerga-Castro* alleged a variety of negative consequences resulting from multiple absences from work for military service, including his workload doubling with clerical tasks while his original duties were assigned to someone less qualified, assignment to the second shift despite conflicting family medical obligations, being subjected to derisive comments and name-calling about his military status and age, losing his office to another employee and having his belongings packed into boxes, being refused approval for technical training courses despite a company-wide policy encouraging such training, losing of half of the employees under his supervision, and being passed over for promotion twice. *Id.* at *2–8.

156. *Id.* at *13.

157. *Id.* at *12.

158. While some of the treatment Baerga complained of was clearly related to his military status, such as being called "Rambo," other incidents, such as moving him to a different shift and assigning his office to another employee without his knowledge, were not clearly distinguishable as being motivated by his age or his military status. *Id.* at *4–5.

159. Dees v. Hyundai Motor Mfg. Ala., LLC, 524 F. Supp. 2d 1348, 1350 (M.D. Ala. 2007).

160. *Id.* at 1352 ("There may be circumstances—such as, for example, an employer's reticence to hire women because of concerns that they would take too much time off for child-rearing—where the comparison between USERRA and Title VII discrimination claims might bear relevance.").

161. *Id.* at 1351 (quoting Velasquez v. Frapwell, 160 F.3d 389, 392 (7th Cir. 1998)).

rather than general negative attitudes towards veterans themselves.[162] While this argument has support in USERRA's stated purposes,[163] the Middle District arguably undermined its own point when, in a later decision specifically addressing the severity and pervasiveness of the conduct at issue, it found that the plaintiff *could* prove that he was subjected to a hostile work environment.[164] It is difficult to believe that Dees's supervisors harbored no negative feelings towards him when they demanded that he produce non-existent military orders for his weekend National Guard training, barraged him with derogatory comments about the Guard, tried to force his co-workers to submit false disciplinary reports against him, and assigned him to harder, more dangerous work than his co-workers.[165]

Echoing arguments voiced in district court cases, the Fifth Circuit argued vociferously in *Carder* that a comparison between USERRA and other anti-discrimination statutes highlighted their differences, rather than their similarities.[166] The court devoted extensive discussion to the Supreme Court's interpretation of the phrase "terms and *conditions* of employment" as the *sine qua non* of harassment jurisprudence, while dismissing more similarly-worded statutes recognizing hostile environment claims as irrelevant to analysis under USERRA.[167] The court further asserted that differences between the classes protected under USERRA when compared to

162. *Id.* ("USERRA's primary focus is thus not on negative opinions of certain groups but on the reality that employers may not wish to hire employees who, as members of the armed services, could frequently be absent for long periods of time.").

163. 38 U.S.C. § 4301(1)(a) (2006).

164. *See* Dees v. Hyundai Motor Mfg. Ala., LLC, 605 F. Supp. 2d 1220, 1228 (M.D. Ala. 2009), *aff'd*, 368 F. App'x 49 (11th Cir. 2010).

165. *Id.* at 1223.

166. Carder v. Cont'l Airlines, Inc., 636 F.3d 172, 180–81 (5th Cir. 2011) (arguing that differences in statutory language and the characteristics of protected classes "supports [the] conclusion that Congress's decision not to extend the broad protection to military service members against discrimination . . . was not an oversight and should be given effect").

167. *Id.* at 178–80. Despite acknowledging that both Title IX (prohibiting discrimination in education) and the Rehabilitation Act of 1974 (prohibiting employment discrimination based on disability) permit claims for hostile environment and employ statutory language implicating "benefits," just like USERRA, the Fifth Circuit argued that both of these statutes were distinguishable from USERRA because of their affiliation with a "companion" statute, i.e., Title VII and the ADA, respectively, which characterize discrimination with "terms and conditions" language. From there the court reasoned that acknowledgment of harassment under either statute actually flowed from its "companion," and not from either Title IX or the Rehabilitation Act itself. *Id.*

other anti-discrimination statutes indicated Congressional intent not to afford service members protection from workplace harassment.[168] Like the Middle District of Alabama, the Fifth Circuit insisted that USERRA was not meant to prohibit the same kind of "invidious and irrational" discrimination of "historically disadvantaged minorities" that Title VII or the ADA were meant to address.[169]

From a factual perspective, the conduct and events that can trigger liability for severe and pervasive hostile work environments under other statutes appear to be happening to returning veterans as well.[170] Like the veteran in *Steenken v. Campbell County,* who was frequently profanely derided by his superiors in public,[171] the Ninth Circuit has held that frequent, profane, public shouting at an employee can contribute significantly to a hostile work environment.[172] The Eighth Circuit has found that repeated name-calling and comments demonstrating animus can be sufficient to find a hostile work environment.[173] In *Petersen*, the plaintiff was belittled for his disabled veteran status, as well as referred to by co-workers as "psycho," "baby killer," and "plate head."[174] Further, the Tenth Circuit has twice found that putting employees in physical danger can indicate the existence of a hostile work environment.[175] Similarly, the

168. *Id.* at 179 ("There is simply 'little evidence that employers harbor a negative stereotype about military service or that Congress believes they do.'" (quoting Velasquez v. Frapwell, 160 F.3d 389, 392 (7th Cir. 1998))).

169. *Carder*, 636 F.3d at 179 (quoting *Velasquez*, 160 F.3d at 392) (internal quotation marks omitted).

170. *Compare*, *e.g.*, EEOC v. Nat'l Educ. Ass'n, Alaska, 422 F.3d 840 (9th Cir. 2005), *with* Steenken v. Campbell Cnty, No. 04-224-DLB, 2007 WL 837173 (E.D. Ky. Mar. 15, 2007).

171. *Steenken*, 2007 WL 837173, at *1 ("Plaintiff also claims that during his first year, he was ridiculed for the number of arrests he made, and Lieutenant Straman cursed at him in front of witnesses, including a fellow officer and an inmate."). Steenken also alleged other incidents of hostile conduct including citizens telling him he would be fired, his supervisor "tailing" him and singling him out for discipline, his coworkers disseminating personal information about him, and creating and posting a parodied "WANTED" poster of him. *Id.* at *1–2.

172. *Nat'l Educ. Ass'n,* 422 F.3d at 843 ("The record reveals numerous episodes of [the employer] shouting in a loud and hostile manner at female employees. The shouting was frequent, profane, and often public."). Plaintiffs also complained that their boss would shake his fist at them and invade their "personal space." *Id.*

173. Delph v. Dr. Pepper Bottling Co., 130 F.3d 349, 356 (8th Cir. 1997) ("Delph was called racist names and racial comments were made to him throughout his tenure with the company. . . . The evidence . . . demonstrated [an] ongoing pattern of racial harassment . . . .").

174. Petersen v. Dep't of Interior, 71 M.S.P.R. 227, 235 (M.S.P.B. 1996).

175. Apgar v. Wyoming, No. 99-8029, 2000 WL 1059444, at *6 (10th Cir. Aug. 2, 2000) (finding a female police officer's male co-workers' refusal to assist her on the job created a dangerous work place,

veteran in *Dees* was required to perform more difficult and dangerous work than his co-workers.[176] While a single act or event alone may not determine whether an employee was subjected to a hostile work environment,[177] factual overlap of conduct exists for claims under USERRA and other anti-discrimination statutes.[178]

D. Addressing USERRA's Remedies

Even if courts determine that USERRA's language, purpose, and history permit a viable claim for hostile work environment, plaintiffs may still hit a stumbling block when it comes to remedies.[179] USERRA provides three types of remedies: injunctive relief requiring an employer to comply with USERRA, compensation for lost wages or benefits due to an employer's violation of USERRA, or, in the case of willful violations, liquidated damages equal to lost wages or benefits.[180] As the Eleventh Circuit explained in *Dees*, failure to demonstrate actual entitlement to one of these remedies jeopardizes a plaintiff's constitutional standing in court if his "injury [is not] redressible by a favorable court decision."[181] The court in *Dees* found that the plaintiff would not benefit from an injunction since he no longer worked for the defendant.[182] Despite his legitimate claim for hostile work environment,[183] because Dees lost no

explaining, "a reasonable person in Ms. Apgar's position could perceive the environment as hostile. This is especially true when considered in light of what Ms. Apgar describes as the failure to back her up during her search for the escapees"); Semsroth v. City of Wichita, 304 F. App'x 707, 725–26 (10th Cir. 2008) (finding that plaintiff's evidence could be severe and pervasive, as her "[co-worker's] failure to provide backup could have put Semsroth in physical danger").

176. Dees v. Hyundai Motor Mfg. Ala., LLC, 605 F. Supp. 2d 1220, 1223 (M.D. Ala. 2009), *aff'd*, 368 F. App'x 49 (11th Cir. 2010).

177. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 103 (2002) ("Hostile work environment claims are different in kind from discrete acts. . . . [I]n direct contrast to discrete acts, a single act of harassment may not be actionable on its own.").

178. *See supra* text accompanying notes 171–79.

179. *Dees*, 605 F. Supp. 2d at 1229 ("[USERRA's] remedial scheme conspicuously omits any recovery for mental anguish, pain and suffering, and punitive damages.").

180. 38 U.S.C. § 4323(d)(1) (2006); Dees v. Hyundai Motor Mfg. Ala., LLC, 368 F. App'x 49, 52–53 (11th Cir. 2010).

181. *Dees*, 368 F. App'x at 52 (quoting Fla. State Conference of NAACP v. Browning, 522 F.3d 1153, 1159 (11th Cir. 2008)).

182. *Dees*, 368 F. App'x at 53; *Dees*, 605 F. Supp. 2d at 1229.

183. *Dees*, 605 F. Supp. 2d at 1228 ("[T]he court finds that a reasonable jury could find that the harassment Dees faced was sufficiently severe and pervasive to alter the terms and conditions of his

compensation while employed, he was therefore not entitled to liquidated damages, even if the defendant's conduct had been willful.[184] The court left open the idea that were he still employed, Dees could plead for injunctive relief and thus satisfy the requirements for standing.[185]

While not fully addressing the remedies dilemma posed by *Dees*, a district court decision in *Maher* addressing the plaintiff's entitlement to a jury trial under the Seventh Amendment offers a more flexible characterization of remedies under USERRA.[186] The court stressed "Congress intended the protection of the Nation's military—which was to be achieved through protection of individual reservists' rights–'to be afforded the highest of priorities.'"[187] In that vein, the court argued that by adding the liquidated damages provision to USERRA, previously lacking in predecessor statutes, Congress intended go beyond the back-pay type of remedies already available to allow remedies beyond simple restitution.[188] Analogizing to the Supreme Court's interpretation of liquidated damages under the ADEA as punitive, the court submitted that USERRA's liquidated damages were also intended to be punitive in nature[189] "to deter willful violations of the Act."[190] Thus, the court reasoned, USERRA is "enforceable in an action for damages in the ordinary course of law" in a way the statute's predecessor was not.[191]

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employment.").

184. *Dees*, 368 F. App'x at 53; *Dees*, 605 F. Supp. 2d at 1229.

185. *Dees*, 605 F. Supp. 2d at 1229.

186. Maher v. City of Chi., 463 F. Supp. 2d 837 (N.D. Ill. 2006).

187. *Id.* at 846 n.15 (quoting TVA v. Hill, 437 U.S. 153, 174 (1978)).

188. *Maher*, 463 F. Supp. 2d. at 841.

> Nothing in the legislative history, the text or the structure of USERRA supports the suggestion that the Congress' addition of the liquidated damage provision in § 4323(d)(2)(A)—a remedy that was unavailable under prior veterans' reemployment rights statutes . . . was intended to be a component of the restitutionary remedies carried over from VRRA.

Id.

189. *Id.* ("[T]he Supreme Court held that Congress intended for double damage liquidated liability for willful violations of the ADEA to be punitive in nature. . . . [I]n the instant case there is no principled distinction between the ADEA's double damage remedy and that in USERRA.").

190. *Id.* at 842 ("[T]he ADEA was intended to be punitive and thereby to deter willful violations of the Act.").

191. *Id.* at 844.

III. HOW COURTS SHOULD APPROACH HOSTILE WORK ENVIRONMENT UNDER USERRA

A. Recognizing Hostile Work Environment Accords with Broad Congressional Intent

USERRA's legislative history and purpose are unique in light of the various iterations of veterans' reemployment rights statutes that have been enacted over the last seven decades.[192] The most remarkable aspect of such history has been the continuity of purpose expressed by Congress and the courts, reiterated and incorporated into successor statutes over time.[193] The consistent expansion of veterans' reemployment protections indicates that Congress intended such rights to grow over time, responding to social developments as new issues arise.[194] The "broad construction" mandated by Congress indicates an elasticity of protection more than generous enough to incorporate protection of veterans against hostile work environment concerns.[195] Courts that read USERRA without reference to its

192. *See, e.g.*, Selective Training and Service Act of 1940, 50 U.S.C. app. §§ 301–308 (1940) (repealed 1948); Military Selective Service Act of 1967, 85 Stat. 348 (1967) (recodified 1974); Vietnam Era Veterans' Readjustment Assistance Act of 1974, 88 Stat. 1578 (1974) (amended and recodified by USERRA 1994); Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4311–4316 (2006); Monroe v. Standard Oil Co., 452 U.S. 549, 554 (1981) ("Statutory re-employment rights for veterans date from the Nation's first peacetime draft law, passed in 1940 . . . .").

193. *See, e.g.*, *Monroe*, 452 U.S. at 568 (examining the legislative history of a predecessor statute to find that the Vietnam Era Veterans' Readjustment Assistance Act "does not demonstrate a congressional intent to confine the statute's application to 'discriminations like discharge and demotion'"); Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285, 289 (1946) (examining legislative history and finding the STSA "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need"); Dees v. Hyundai Motor Mfg. Ala., LLC, 524 F. Supp. 2d 1348, 1351 (M.D. Ala. 2007) ("As stated in the legislative history of a predecessor statute, 'If these young men are essential to our national defense, then certainly our Government and employers have a moral obligation to see that their economic well being is disrupted to the minimum extent possible.'" (quoting H.R. REP. NO. 1303, 89th Cong. (1966) and *Monroe*, 452 U.S. at 561, 569)). *See generally* H.R. REP. NO. 103-65 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449 (citing and emphasizing the legislative intent and history of predecessor statutes from 1966, 1968, 1974, 1986, and 1990).

194. *See* Monroe v. Standard Oil Co., 613 F.2d 641, 644 (6th Cir. 1980), *aff'd*, 452 U.S. 549 (1981) ("The problem to be addressed under this statute and the nature of the remedy it was to provide were stated in a report of the Senate Armed Forces Committee. In Senate Report No. 1477, it said: 'Employment practices that discriminate against employees with reserve obligations have become an increasing problem in recent years.'").

195. *See* H.R. REP. NO. 103-65, at 24, 25 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2453–54 (emphasizing Congress's intent to incorporate *Fishgold*'s mandate that veterans' reemployment rights be "liberally construed," and that "[t]hese rights are broadly defined to include *all attributes of the*

legislative history, or without consideration for the possibility of expanding upon USERRA's protections, ignore decades of congressional instructions to the contrary.[196] In contrast, courts find *Petersen*'s analysis of the availability of hostile work environment claims under USERRA persuasive in light of the decision's thorough treatment of the statute's legislative history and purpose.[197] *Petersen* makes clear that USERRA should not be read in a vacuum, but with an eye toward the goals Congress sought to accomplish with it.[198]

Reading USERRA narrowly, particularly with regard to "benefits of employment," permits employers to harass veterans on the basis of military status in the workplace, a result clearly antithetical to Congress's goals for the statute.[199] Arguments rejecting the availability of hostile work environment claims in light of a court's general disbelief as to the existence or degree of animosity directed at veterans in our society are question-begging: given the fact that plaintiffs must prove that all violations of USERRA, regardless of type, are "on the basis of" military status, why would Congress bother passing a federal statute to protect service members from

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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*" (emphasis added)).

196. *See id.* Limiting the interpretation of "benefits" to mean only those categories listed in 38 U.S.C. § 4311(a) ignores Congress's intention that the list was not intended to be exhaustive. *See id.*; 38 U.S.C. § 4303(2) (2006).

197. Yates v. M.S.P.B., 145 F.3d 1480, 1484 (Fed. Cir. 1998) ("In *Petersen*, the Board also noted that "Congress intended that the term 'benefit of employment' be given an expansive interpretation. . . . The Board's approach finds support in the broad language of the statute and the legislative history."); Dees v. Hyundai Motor Mfg. Ala., LLC, 605 F. Supp. 2d 1220, 1227 (M.D. Ala. 2009) ("*Petersen* examined the legislative history of the term 'benefit of employment' and found that Congress intended the phrase to be interpreted expansively in order to support veterans, . . . and also noted that the Supreme Court has broadly construed predecessor statutes. . . . The court agrees with *Petersen*'s logic."), *aff'd*, 368 F. App'x 49 (11th Cir. 2010).

198. The *Petersen* court quotes § 4301(a)(3), USERRA's defined purpose "to prohibit discrimination against persons because of their service in the uniformed services," twice in their decision. Petersen v. Dep't of Interior, 71 M.S.P.R. 227, 235, 239 (M.S.P.B. 1996). *Petersen* also quotes *Fishgold*'s statement of purpose that the statute have "as liberal a construction for the benefit of the veteran as . . . [the statute] permits." *Id.* at 236 n. 8.

199. *Compare* 38 U.S.C. § 4301(a) (2006) (defining one of USERRA's goals "to prohibit discrimination against persons because of their service in the uniformed services"), *with* Baerga-Castro v. Wyeth Pharm., No. 08-1014 (GAG/JA), 2009 WL 2871148, at *12, *13 (D.P.R. Sept. 3, 2009), *and supra* text accompanying note 159.

employment discrimination at all if no such problem really exists?[200] The logic of such arguments, followed to their natural conclusion, leads to a grossly inappropriate intrusion upon the legislative purview of Congress and blatant rejection of decades of Supreme Court precedent acknowledging Congress's goal of protecting veterans from adverse employment actions.[201]

Supreme Court cases on USERRA show no indication that "benefits" should be so narrowly understood; to the contrary, both *Alabama Power* and *Monroe* arguably would permit the broadening of "benefits" to encompass a non-hostile work environment.[202] In fact, *Alabama Power* includes a warning of sorts to employers not to interfere with veterans' protections under the pretense of employment agreements.[203] *Monroe* emphasizes that veterans should suffer no punishment for their military status, but deserve to be treated the same as their civilian counterparts.[204] Read together, these cases support the idea that employers are not to make excuses for treating veteran employees differently from civilian employees[205]—for

200. Carder v. Cont'l Airlines, 636 F.3d 172, 178 (5th Cir. 2011). Indeed, the *Carder* court arguably revealed the arbitrariness of its argument that Congress did not pass USERRA to combat "negative stereotype[s]" against service members when, in the same decision, it acknowledged that plaintiffs still had valid USERRA claims for defendant's restricting military leave, denying flight time, and denying retirement benefits "because of [plaintiffs'] service obligations." *Id.* at 182. Questions about whether the treatment of service members by their employers was truly severe or pervasive would be more appropriately addressed in a merits analysis of employees' claims, and not as a threshold question of cognoscibility of the claim itself.

201. *See* cases *supra* note 122.

202. *See* Monroe v. Standard Oil Co., 452 U.S. 549, 562 (1981) ("[Legislative history makes] it abundantly clear that the purpose of the legislation was to protect employee reservists from discharge, denial of promotional opportunities, or *other comparable adverse treatment* solely by reason of their military obligations . . . ." (emphasis added)); Ala. Power Co. v. Davis, 431 U.S. 581, 584–85, 588 n.10, 592 (1977) (referring twice to principle that employers may not infringe upon veterans' benefits through employment agreements, and noting that ambiguity about the meaning of "benefits" should be resolved to add to veterans' protections, not decrease them).

203. *See Ala. Power*, 431 U.S. at 584 ("This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. . . . And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." (quoting Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946))).

204. *Monroe*, 452 U.S. at 5559–60 ("Congress wished to provide protection to reservists . . . to insure that employers would not penalize or rid themselves of returning reservists after . . . mere pro forma compliance with [the statute].").

205. *Id.* at 554 (asserting that veterans' reemployment statutes "require[] that reservists be treated equally or neutrally with their fellow employees without military obligations").

example by subjecting them to a hostile work environment—by pointing to employment contracts or agreements that do not explicitly proscribe harassment in the workplace. Further, Congress's explanation of USERRA's meaning does not distinguish between positives and negatives when explaining the nature of benefits, but instead suggests that "benefit" has a broad meaning, touching all facets of the employment relationship generally.[206] Arguing that hostile work environments are not denials of a "positive"[207] is to ignore the Court's emphasis on equality among employees regardless of veteran status[208] and implicitly suggest that freedom from harassment in the workplace is more than employees should reasonably expect at work.[209]

Further, it is not necessarily clear that acknowledgement of hostile work environment under USERRA requires that the claim be read into the language of benefits.[210] Both Seventh Circuit cases that discuss the issue do so by describing a hostile work environment as discrimination—a wrong the statute intends to prevent.[211] From this perspective, there is little difficulty in finding that hostility towards

206. H.R. REP. NO. 103-65, at 25 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2454 ("These rights are broadly defined to include all attributes of the employment relationship . . . .").

207. *See* Carder v. Cont'l Airlines, Inc., No. H-09-3173, 2009 WL 4342477, at *11 (S.D. Tex. Nov. 30, 2009).

208. *Monroe*, 452 U.S. at 554.

209. *See Carder*, 2009 WL 4342477, at *11 ("The Court recognizes that USERRA expressly prevents the denial of benefits of employment to members of the uniformed service by their employers. However, under a plain language analysis, the scope of this protection does not include safeguarding from a hostile work environment.").

210. *Compare* Petersen v. Dep't of Interior, 71 M.S.P.R. 227, 238 (M.S.P.B. 1996) (emphasizing the construal of the term "benefits of employment" as central to whether or not hostile work environment is cognizable under USERRA), *with* Miller v. City of Indianapolis, 281 F.3d 648 (7th Cir. 2002) (generally omitting reference to "benefits" in its consideration of hostile work environment under USERRA), *and* Maher v. City of Chi., 547 F.3d 817 (7th Cir. 2008) (same).

211. Maher v. City of Chi., 406 F. Supp. 2d 1006, 1023 (N.D. Ill. 2006) ("Some of the factors that must be considered in assessing a claim of harassment 'are the frequency of the discriminatory conduct, its severity, whether it was physically threatening or humiliating, and whether it unreasonably interfered with the employee's work performance.'" (quoting *Miller*, 281 F.3d at 653)), *aff'd*, 547 F.3d 817 (7th Cir. 2008); Miller v. City of Indianapolis, No. IP-99-1735-CMS, 2001 WL 406346, at *8 (S.D. Ind. Apr. 13, 2001) (dismissing USERRA claim as insufficiently severe and pervasive because "[u]nder other federal laws that have a similar purpose of prohibiting discrimination in employment, any harassment must be based upon a protected characteristic and must be 'sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment'" (quoting Hostetler v. Quality Dining, Inc., 218 F.3d 798, 806 (7th Cir. 2000))), *aff'd*, 281 F.3d 648 (7th Cir. 2002).

veterans in the workplace is proscribed under the statute.[212] In fact, cases refusing to acknowledge the existence of a hostile work environment under USERRA conspicuously tend to omit the statute's language making direct reference to discrimination.[213]

B. Treatment Under Other Statutes Should Inform Courts as to USERRA

Analyzing hostile work environment under other anti-discrimination statutes also supports the idea that fitting the claim into the "benefits of employment" concept is not necessarily determinative.[214] Courts' willingness to seek guidance from statutes employing language different from USERRA's suggests that so long as the hostile treatment a veteran endures can be characterized as discriminatory, it will be proscribed by a statutory regime explicitly designed to prevent discrimination, regardless of precisely how the statute's proscriptions are phrased.[215] Courts have interpreted a denial of benefits under both Title IX and the Rehabilitation Act as a form of harassment, and analytical attempts to distinguish their wording from USERRA strain reason.[216] The Supreme Court has

212. *See* 38 U.S.C. § 4301(a)(3) (2006) (listing one of USERRA's purposes as "prohibit[ing] discrimination against persons because of their service in the uniformed services").

213. *See* Church v. City of Reno, No. 97-17097, 1999 WL 65205, at *1–2 (9th Cir. Feb. 9, 1999) (avoiding any reference to the statutory purpose prohibiting discrimination in § 4301(a)(3)); Baerga-Castro v. Wyeth Pharm., No. 08-1014 (GAG/JA), 2009 WL 2871148, *1–14 (D.P.R. Sept. 3, 2009) (same).

214. *See Miller*, 2001 WL 406346, at *8 (finding that the issue of hostile work environment under USERRA depends on severity and pervasiveness, because that is the analysis "[u]nder other federal laws that have a similar purpose of prohibiting discrimination in employment").

215. *See Petersen*, 71 M.S.P.R. at 237–39 (discussing hostile work environment claims under anti-discrimination statutes with slightly varying language); *supra* text accompanying notes 211–14.

216. In *Carder*, the Fifth Circuit attempted to dispose of the inconvenient similarity between cognizable claims for harassment under both Title IX and the Rehabilitation Act and the yet-unrecognized USERRA harassment claim. Carder v. Cont'l Airlines, 636 F.3d 172, 180–81 (5th Cir. 2011). The court argued that a 1992 amendment incorporating ADA standards into the Rehabilitation Act meant that permission of hostile work environment claims under the Rehabilitation Act was in fact simply an interpretation of the congressional intent to permit such claims under the ADA. *Id.* What the court did not mention, however, or perhaps even consider, is that no circuit court had interpreted the ADA to permit a claim for hostile work environment in 1992, making attribution of such claim-specific congressional intent unlikely. *See* Flowers v. S. Reg'l Physician Servs., 247 F.3d 229, 232–33 (5th Cir. 2001) (acknowledging that the Fifth Circuit itself was the first circuit court to recognize hostile work environment under the ADA in 2001). With regard to Title IX, the court asserted its own precedent that "Title IX's proscription of sex discrimination, when applied in the employment context, does not differ

acknowledged the existence of a hostile environment claim under Title IX,[217] and, in a recent case, indicated that USERRA bears strong similarity to Title VII, the statute from whence flows all federal harassment law.[218] Thus, USERRA's necessarily broad construction, plus the flexibility afforded to hostile work environment claims in general, means that the claim *can* be cast as a denial of benefits of employment.[219] Regardless of that characterization, though, it is still discrimination that the statute—and other statutes like it—do not allow.[220] The factual resemblance between the profanity,[221] name-calling,[222] and subjection to physical danger[223] suffered by claimants under USERRA to conduct that

from Title VII's." *Carder*, 636 F.3d at 180 (quoting Lakoski v. James, 66 F.3d 751, 757 (5th Cir. 1995)). Despite its earlier insistence on the preeminence of Supreme Court interpretations of federal statutes, the court apparently ignored the clear and repeated instruction that "Congress modeled Title IX after *Title VI*" (a federal statute prohibiting race discrimination in education employing "benefits" language and interpreted to permit harassment claims), *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) (emphasis added) (citing Cannon v. Univ. of Chi., 441 U.S. 677, 694–95 (1979)), and that "[t]he drafters of Title IX *explicitly assumed* that it would be interpreted and applied as Title VI." *Cannon*, 441 U.S. at 696 (emphasis added).

217. Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 649–50 (1999); Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 76 (1992).

218. Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011) ("The statute is very similar to Title VII, which prohibits employment discrimination 'because of . . . race, color, religion, sex, or national origin . . . .'" (quoting 42 U.S.C. §§ 2000e-2(a), (m) (2006))).

219. *Petersen*, 71 M.S.P.R. at 237 ("Although the appellant's hostile environment claim does not clearly fall within the term 'benefit,' we are persuaded that an 'expansive interpretation' of that term, as intended by Congress, leads to the conclusion that it does. We note that the courts have consistently construed anti-discrimination statutes as proscribing harassment in the workplace.").

220. *Id.* at 239 ("Based on . . . the well-established principle that discrimination encompasses hostile environment claims, we conclude that harassment on account of prior service in the uniformed services, which is sufficiently pervasive to alter the conditions of employment and create an abusive working environment, is a violation of 38 U.S.C. § 4311(a).").

221. *Compare* EEOC v. Nat'l Educ. Ass'n, Alaska, 422 F.3d 840, 843 (9th Cir. 2005) (Title VII case where plaintiff alleged profane shouting), *with* Steenken v. Campbell County, No. 04-224-DLB, 2007 WL 837173, at *1 (E.D. Ky. Mar. 15, 2007) (USERRA case where plaintiff alleged supervisor "cursed at him in front of witnesses").

222. *Compare* Delph v. Dr. Pepper Bottling Co., 130 F.3d 349, 356 (8th Cir. 1997) (Title VII claim where plaintiff alleged he was "called racist names"), *with Petersen*, 71 M.S.P.R. at 235 (USERRA claim where plaintiff alleged "he was called various derogatory names, such as 'psycho,' 'baby killer,' and 'plate head'").

223. *Compare* Apgar v. Wyoming, No. 99-8029, 2000 WL 1059444, at *6 (10th Cir. Aug. 2, 2000), *and* Semsroth v. City of Wichita, 304 F. App'x 707, 726 (10th Cir. 2008) (Title VII claim where police officer plaintiff alleged her co-workers refused to provide her with backup), *with* Dees v. Hyundai Motor Mfg. Ala., LLC, 605 F. Supp. 2d 1220, 1223 (M.D. Ala. 2009), *aff'd*, 368 F. App'x 49 (11th Cir. 2010) (USERRA claim where plaintiff alleged supervisors "assigned [him] to difficult and dangerous work more frequently than they did for other employees").

courts have deemed to indicate unlawful workplace discrimination under other statutes supports this point as well.[224]

To prohibit disparaging treatment under one statute and permit the same conduct under another very similar anti-discrimination statute is to draw arbitrary distinctions about appropriate conduct in the work place.[225] Such distinctions will likely strain judges and confuse employers about exactly which objectionable comments, gestures, or conduct to prohibit or allow.[226] Denying hostile work environment claims under USERRA when they are permitted under so many other statutes not only presents illogical legal dilemmas, it also creates practical confusion about how employers and employees can and should conduct themselves every day.[227]

C. USERRA's Remedial Provisions Do Not Preclude Hostile Work Environment Claims

The question of what sort of remedies a plaintiff claiming hostile work environment could be entitled to is arguably not clear, but that ambiguity alone should not serve to prevent the claim all together.[228] Since resigning from employment is not required by the hostile work environment claim, plaintiffs can benefit from injunctive relief barring future harassment, a remedy clearly available under the statute.[229] Whether those plaintiffs could get pecuniary damages in addition to injunctive relief, or whether plaintiffs who sever employment before the conclusion of trial (and are therefore not entitled to injunctive relief) could get pecuniary damages remain open questions.[230] The addition of liquidated damages to USERRA, as well as a higher level of deference to courts' discretion regarding

224. *See supra* notes 171–79 and accompanying text.

225. *See supra* note 159 and accompanying text.

226. One of the biggest hurdles veterans face enforcing USERRA is employers' general lack of understanding of the statute's requirements. *See* Tully & Solomon, *supra* note 3, at 7. Leaving the issue of whether or not hostile work environment claims are cognizable unresolved does not serve to clarify USERRA's mandate. *Id.*

227. *Id.*

228. *See supra* discussion Part II.D.

229. *See supra* notes 181–86 and accompanying text.

230. *See* Dees v. Hyundai Motor Mfg. Ala., LLC, 368 F. App'x 49, 53 (11th Cir. 2010); Dees v. Hyundai Motor Mfg. Ala., LLC, 605 F. Supp. 2d 1220, 1229 (M.D. Ala. 2009), *aff'd*, 368 F. App'x 49.

remedies, has been interpreted as a significant expansion of the statute's protections.[231] This suggests that liquidated damages were intended to be available for a broader range of violations than those traditionally calling for restitution.[232] This interpretation also reflects USERRA's overarching mandate that protections be interpreted broadly for the benefit of returning service members.[233] Regardless of how the remedies question plays out, it should not prevent plaintiffs entitled to injunctive relief—when subjected to hostile treatment on the basis of their military status—from receiving it under USERRA.[234]

D. Other Considerations Weigh In Favor of Acknowledging Hostile Work Environment

In *Carder*, the Fifth Circuit made much of the fact that as of the date of its decision, the Department of Labor had not included a specific reference to harassment in the federal regulations promulgated to implement USERRA.[235] The court argued that unlike harassment under Title VII, which the Equal Employment Opportunity Commission defined as discrimination in its own agency guidelines before the claim was recognized by the courts, the absence of such reference in the DOL's regulations "serve[d] as additional support for our conclusion that USERRA should not be interpreted to provide for such a cause of action."[236] Leaving aside the fact that federal regulations and administrative guidelines do not share equal legal authority,[237] the Department of Labor has now made explicitly clear its support for the acknowledgement of hostile work environment claims under USERRA. In response to *Carder*, the DOL asserts that it "considers it a violation of USERRA for an employer to

231. Maher v. City of Chi., 463 F. Supp. 2d 837, 840–41 (N.D. Ill. 2006).
232. *Id.*
233. *Id.* at 840.
234. *See Dees*, 605 F. Supp. 2d at 1229.
235. Carder v. Cont'l Airlines, 636 F.3d 172, 181 (5th Cir. 2011).
236. *Id.*
237. Although worthy of deference, "[t]he EEOC Guidelines are not administrative regulations' promulgated pursuant to formal procedures established by the Congress." Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

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."[238] The agency further clarified that it considers "the right not to suffer workplace harassment or the creation of a hostile working environment" to fall within the meaning of "benefit[s] of employment" under 38 U.S.C. § 4303(2).[239] It is now undisputed that the agency charged with enforcing USERRA has interpreted the statute to embrace claims for hostile work environment.

The *Carder* court also insisted that even without a claim for hostile work environment, veterans nevertheless enjoy more than adequate protection from discrimination under USERRA because of the availability of claims for constructive discharge under the statute.[240] The court explained that allowing plaintiffs to sue for "intolerable form[s] of harassment" (i.e. those sufficient to support claims for constructive discharge), but not "lesser levels of harassment" would be enough to deter employers from circumventing USERRA's purposes.[241] As discussed above, however, the constructive discharge cause of action does not effectively substitute for the hostile environment claim, and relying on constructive discharge alone risks creating a cohort of service member employees subjected to adverse conduct by their employers but without legal remedy.[242]

"A hostile work environment is an ongoing nightmare for the employee victim . . . ."[243] With that in mind, it would seem an understatement to say such an experience is one of the

238. OFFICE OF THE ASSISTANT SEC'Y FOR VETERANS' EMP'T & TRAINING, U.S. DEP'T OF LABOR, UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994 (USERRA): FISCAL YEAR 2010 ANNUAL REPORT TO CONGRESS 19 (2011) [hereinafter USERRA ANNUAL REPORT]. The Veterans' Employment and Training Service (VETS) is a sub-agency of the Department of Labor responsible for administering USERRA. VETS, USERRA POCKET GUIDE (2011), *available at* http://www.dol.gov/vets/programs/userra/USERRA%20Pocket%20Guide.html#23.

239. USERRA ANNUAL REPORT, *supra* note 239, at 18.

240. *Carder*, 636 F.3d at 181–82.

241. *Id.* at 182.

242. *See supra* note 32 and accompanying text.

243. Delph v. Dr. Pepper Bottling Co., 130 F.3d 349, 355–56 (8th Cir. 1997) (quoting Gipson v. KAS Snacktime Co., 83 F.3d 225, 229 (8th Cir. 1996)).

"disadvantages" or "disruptions" to civilian life Congress meant to prohibit by enacting USERRA.[244] Moreover, permitting employers to subject service member employees to hostile work environments has harmful, real-world implications beyond the lives of the individual veterans themselves. First, the more employment-related difficulties potential service members anticipate as a result of their military obligations, the less likely they may be to volunteer for non-career military service. If fewer men and women volunteer for the Reserves and National Guard, the Armed Forces may suffer serious manpower shortages jeopardizing military readiness and national security.[245] Second, workplace harassment can have detrimental economic effects.[246] "A discriminatorily abusive work environment . . . can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."[247] In addition to compelling legal reasons, these consequences reflect important practical reasons why veterans should be protected from subjection to hostile treatment in the workplace under USERRA.

CONCLUSION

The American tradition of a citizen military coupled with the implementation of the Armed Forces' Total Force manpower strategy have led to tensions between veterans and employers when citizen-soldiers come home.[248] In light of historically unprecedented

244. *See* 38 U.S.C. § 4301(a)(1)–(2) (2006).

245. *See* Maher v. City of Chi., 463 F. Supp. 2d 837, 846 n.15 (N.D. Ill. 2006) ("USERRA was enacted against a backdrop of perceived national crisis. According to the Reserve Forces Policy Board, which advises the Department of Defense, the Department 'cannot enforce any element of the National Security Strategy without National Guard and Reserve forces . . . . [and] a smaller Total Force has led to an increased role for the Reserve component.'" (quoting DEP'T OF DEFENSE, ANNUAL REPORT OF THE RESERVE FORCES POLICY BOARD (2001)) (alteration in original).

246. *See* Vivek Wadhwa, *The True Cost of Discrimination*, BUSINESSWEEK ONLINE (June 6, 2006), http://www.businessweek.com/smallbiz/content/jun2006/sb20060606_087038.htm (discussing damaged reputation, limited internal competition, diminished morale, increased turnover, alienation of clients, limited hiring pools, ethical quandaries, and legal liabilities as factors economically harming businesses who discriminate in the workplace).

247. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

248. *See supra* notes 18–24 and accompanying text.

deployment and subsequent civilian reintegration, veterans are complaining of increasingly hostile treatment at work.[249] The question of whether claims for hostile work environment should be recognized under the veterans' reemployment rights statute, USERRA, needs to be resolved to settle disagreement among courts on the issue.[250]

USERRA's legislative history and purpose clearly indicate Congress's intent that the statute be interpreted broadly.[251] With this in mind, some courts have rightly observed the parallels between other anti-discrimination statutes permitting claims for hostile work environment and similar potential claims under USERRA.[252] Courts also heed USERRA's clear mandate to protect veterans' employment rights when they resolve questions of the statute's remedial provisions in a way that allows veterans to enforce the rights Congress intended them to have.[253] USERRA's purpose is paramount—therefore, in order to comply with it, courts should recognize that hostile work environment claims are cognizable under USERRA.[254]

249. *See supra* notes 19, 24 and accompanying text.

250. *See* Figueroa Reyes v. Hospital San Pablo del Este, 389 F. Supp. 2d 205, 212 (D.P.R. 2005) ("The law is unsettled as to whether hostile work environment claims are cognizable under USERRA.").

251. *See* discussion *supra* Part II.B.2.

252. *See* Petersen v. Dep't of Interior, 71 M.S.P.R. 227, 237 (M.S.P.B. 1996).

253. *See* discussion *supra* Part III.C.

254. H.R. REP. NO. 103-65, at 24 (1993), reprinted in 1994 U.S.C.C.A.N. 2449, 2452.