

NO. 10-20105

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**DEREK CARDER, an Individual, on Behalf of Himself and all Others
Similarly Situated; MARK BOLLETER, an Individual, on Behalf of Himself
and all Others Similarly Situated; DREW DAUGHERTY, an Individual, on
Behalf of Himself and all Others Similarly Situated; ANDREW KISSINGER,
an Individual, on Behalf of Himself and all Others Similarly Situated,**

Plaintiffs - Appellants

v.

CONTINENTAL AIRLINES, INC., a Delaware Corporation,

Defendant - Appellee

**On Permissive Appeal from the United States District Court for
the Southern District of Texas, Houston Division
Civil Action No. H-09-3173**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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3. Drew Daugherty
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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants respectfully request that this matter be set for oral argument. This case turns on judicial interpretation of the scope of protection under the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”). The issue on appeal is a matter of first impression as it will be the first opportunity for an appellate level court to determine whether harassment on the basis of military service is a violation of USERRA. Oral argument will facilitate the development and resolution of these issues and will aid the Court in determining the proper scope of the federal statute.

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STATEMENT OF JURISDICTION

Plaintiffs filed the underlying suit in the United States District Court for the Southern District of California, alleging violations of the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”), 38 U.S.C. § 4301, *et seq.*, for, *inter alia*, harassing conduct and comments made by Defendant’s employees to Plaintiffs due to their service in the United States Armed Forces and Air National Guard. Thereafter, pursuant to Defendant’s Motion to Transfer, the case was transferred by the Honorable Dana M. Sabraw to the Southern District of Texas (herein referred to as "the District Court") before the Honorable Kenneth M. Hoyt. The District Court had subject matter over Plaintiffs’ claims, including the one at issue in this appeal, pursuant to 38 U.S.C. § 4323(b).

This timely appeal is from an Order entered by the District Court on November 30, 2009 dismissing Plaintiffs’ cause of action under USERRA concerning freedom from a hostile work environment. On February 18, 2010, pursuant to Section 1292(b) of Title 28 of the United States Code, this Court granted Plaintiffs’ Petition for Permission to Appeal the District Court’s November 30, 2009 Order regarding its dismissal of Plaintiffs’ cause of action concerning freedom from a hostile work environment. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1292(b) and F.R.A.P. 5.

STATEMENT OF THE ISSUE

Is harassment on the basis of military service a violation of USERRA?

STATEMENT OF THE CASE

This case involves the violation of Plaintiffs' rights under USERRA, 38 U.S.C. § 4301, *et seq.* Plaintiffs, employees of Defendant as well as members of the United States Armed Forces Reserves and Air National Guard, filed suit against Defendant alleging, *inter alia*, harassment based on their military service. (1 USCA5 19).¹

On July 2, 2009, Plaintiffs filed a Class Action Complaint in the United States District Court for the Southern District of California alleging four separate USERRA violations: (1) discriminatory scheduling practices; (2) deficient retirement contribution payments; (3) hostile work environment; and (4) failure to hire. (1 USCA5 19). On September 28, 2009, pursuant to Defendant's Motion to Transfer, the case was transferred by the Honorable Dana M. Sabraw to the Southern District of Texas before the Honorable Kenneth M. Hoyt. (2 USCA5 258-264). Shortly thereafter, on October 12, 2009, Defendant filed a Motion to Dismiss moving, in part, for an Order dismissing Plaintiffs' third cause of action which alleged violations of USERRA arising out of Defendant's harassing, discriminatory and degrading comments and conduct towards Plaintiffs in relation to their service with the United States Armed Services and National Guard. (2 USCA5 293-325). Defendant argued that because freedom from a hostile work

¹ Citation to the record first references the volume number and then page number, as paginated by, and reflected in the record for, the United States Court of Appeals for the Fifth Circuit.

environment is not a “benefit of employment” protected under USERRA, Plaintiffs’ third cause of action did not state a cognizable claim under the statute.

The District Court granted in part and denied in part Defendant’s Motion to Dismiss on November 30, 2009. The District Court held that USERRA does not provide for a hostile work environment cause of action and dismissed Plaintiffs’ third cause of action in its entirety.² (4 USCA5 563-581).

On January 6, 2010, the District Court granted Plaintiffs’ Motion for Certification of Appealability as to its November 30, 2009 Order regarding its dismissal of Plaintiffs’ cause of action concerning freedom from a hostile work environment. (4 USCA5 693-694). On February 18, 2010, pursuant to Section 1292(b) of Title 28 of the United States Code, this Court granted Plaintiffs’ Petition for Permission to Appeal the District Court’s November 30, 2009 Order regarding its dismissal of Plaintiffs’ cause of action concerning freedom from a hostile work environment. (5 USCA5 767).

² Although various other matters were addressed by Defendant in its Motion to Dismiss and subsequently ruled upon by the District Court, Plaintiffs, by this appeal, solely seek appellate review of the District Court’s dismissal of Plaintiffs’ hostile work environment cause of action under USERRA.

STATEMENT OF THE FACTS

Plaintiffs Carder, Bolleter, Daugherty and the putative Plaintiff Class are (or were) employed by Defendant. The majority of Plaintiffs, if not all, are employed by the international air carrier as pilots.³ Plaintiffs also are members of the Armed Forces Reserves or Air National Guard (herein collectively “reservists”) or previously served in the United States military at all relevant times mentioned in Plaintiffs’ Complaint. (1 USCA5 19).

As part of their service in the United States military, Plaintiffs typically are required to drill, at a minimum, one weekend per month and attend annual training for two weeks a year. Plaintiffs also receive orders for lengthier periods of duty and other sporadic duty orders depending on the needs of their military command. Because of their military obligations, Plaintiffs may and have, to varying degrees, been called away from their civilian job at Continental more often than their non-reservist counterparts.

As a direct result of their military service and corresponding absence at work, Plaintiffs have been subjected to Continental’s continuous pattern of harassment in which Continental has demeaned and chastised Plaintiffs for their

³ Plaintiff Kissinger was never employed by Defendant and represents the subclass of individuals who were never hired by Defendant due to their service in the military. This issue is not before this Court on appeal.

military service through the use of discriminatory conduct and derogatory comments. (1 USCA5 36).

Continental's harassing conduct towards Plaintiffs has included the following:

1. Placing onerous restrictions on taking military leave and arbitrarily attempting to cancel military leave. (1 USCA5 18).
2. Comments by Continental management, training and hiring personnel that the company should not hire military pilots due to the inconvenience placed on the airlines' ability to schedule. (1 USCA5 19).
3. Continental's refusal to approve a pilot's military leave request until after that pilot submitted his military orders. (1 USCA5 22).
4. Continental's disapproval and denial of military leave notices. (1 USCA5 22).
5. Phone calls to pilots' homes while off duty in order to question pilots about their military leave. (1 USCA5 22).
6. Comments by the Manager of International Flying, Andy Jost, to members of the Class such as:
 - i. "If you guys take more than three or four days a month of military leave, you're just taking advantage of the system." (1 USCA5 19).
 - ii. Statements that members of the Class should not be taking large blocks of military leave, that ten days a month was too long and that ninety-day deployments should stop. (1 USCA5 19).

- iii. “We don't hire part-time pilots. Their first commitment is to CAL [Continental Airlines].” (1 USCA5 20).
 - iv. “I'm trying to run a business here, and if you're only available to me half the time, then I have to hire another half an employee to make up for you.” (1 USCA5 20).
 - v. “I used to be a guard guy, so I know the scams you guys are running.” (1 USCA5 20).
7. Comments by Assistant Chief Pilot, Geoffrey Bender, to members of Class including but not limited to:
- i. “Your commander can wait. You work full time for me. Part-time for him. I need to speak with you, in person, to discuss your responsibilities here at Continental Airlines.” (1 USCA5 20).
 - ii. “We don't hire part time pilots. Their first commitment is to Continental Airlines.” (1 USCA5 20).
 - iii. “Continental is your big boss, the Guard is your little boss.” (1 USCA5 20).
 - iv. “You don't do anything but protect the state of Michigan against the Canadians” in response to a Michigan Air National Guardsman's request for military leave. (1 USCA5 20).
 - v. “Those Guard guys are scamming.” (1 USCA5 20).
 - vi. “You take too much military leave.” (1 USCA5 20).
 - vii. “I didn't think the military did much over the holidays,” in response to a pilot's military leave request in late December 2005. (1 USCA5 20).

8. Comments by Assistant Chief Pilot, Thomas Pinardo, regarding members of the Class, including but not limited to:
 - i. “Continental is not happy with many military reservists right now. Short notice orders and short notice requests screw up their staffing formula and any short notice issues (in some cases 50 days notice) will throw a monkey wrench in PBS [preferential bidding system].” (1 USCA5 21).
 - ii. “The military doesn’t work on Thanksgiving” in response to a pilot’s military leave notification that occurred during the Thanksgiving holiday. (1 USCA5 21).
9. Comments by Assistant Chief Pilot, Steve Williams, regarding members of the Class, including but not limited to:
 - i. “You need to choose between CAL and the Navy.” (1 USCA5 21).
10. Comments by Continental management such as, “it’s getting really difficult to hire you military guys because you’re taking so much military leave.” (1 USCA5 21).
11. Threats by Continental management to a member of the Class that he “may have to choose between the two jobs.” (1 USCA5 21).

Plaintiff Carder, in particular, was wrongfully accused of submitting a fraudulent leave notification. (1 USCA5 24). The Chief of Naval Air Training at the Department of the Navy later stated, “[O]nce again, our investigation found no inappropriate use or abuse of military leave in LCDR Carder’s case.” (1 USCA5 24).

As a result of the foregoing, Plaintiffs filed suit against Defendant on July 2, 2009 alleging, among other things, a hostile work environment cause of action for violations of USERRA based on Defendant's harassing, discriminatory and degrading comments and conduct towards Plaintiffs in relation to their service with the United States Armed Services and National Guard.

SUMMARY OF THE ARGUMENT

Prohibiting discrimination against persons because of their uniformed service is a primary purpose of USERRA. As such, the District Court erred when it concluded that a hostile work environment claim is not a cognizable claim under USERRA. The District Court concluded that such a claim does not exist under USERRA simply because this type of claim is not specifically described in the text of USERRA, even though other district courts have found valid hostile work environment claims to exist under USERRA and other anti-discrimination statutes similarly comprise such claims. In reaching this conclusion, the District Court erroneously focused its analysis solely on the text of USERRA and neglected to consult the stated purpose of the statute and the intent of Congress, which unambiguously reference the broad scope of the statute and the intended liberality of its interpretation.

The District Court's plain language interpretation was further erroneous in that freedom from a hostile work environment clearly constitutes a "benefit of employment" currently enjoyed by Plaintiffs-Appellants' civilian counterparts and denied to Plaintiffs-Appellants as a result of their military service. The District Court's reliance on a restricted plain language interpretation of USERRA therefore led to an absurd result, in that it would permit employers to harass, humiliate and otherwise improperly treat employees based on the employees' military affiliation,

contradicting the congressional intent underpinning the statute. Such employer behavior would place an undue burden on and severely amplify the already stressful job requirements for military-affiliated employees. Allowing employers to treat military-affiliated employees in such a manner is inconsistent with the policy goals and purposes of USERRA. Accordingly, the District Court erred in finding that freedom from a hostile work environment is not protected under USERRA.

ARGUMENT

I. THE STANDARD OF REVIEW IS *DE NOVO*

The Order at issue on appeal addresses the District Court's dismissal of Plaintiffs' cause of action concerning freedom from a hostile work environment under USERRA. Because the matter on appeal solely challenges the legal conclusions of the District Court, a *de novo* standard of review applies. See *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 742 (5th Cir. 2008) (finding that the appellate court "review[s] the district court's dismissal for failure to state a claim *de novo*"); see also *Adams v. Unione Mediterranea di Sicurta*, 364 F.3d 646, 654 (5th Cir. 2004). Using a *de novo* standard, the "court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Id.* (citing *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)) (internal citations and quotation marks omitted).

Under the *de novo* standard, the appellate court accords no deference to the conclusions of law by the district court and instead independently analyzes the relevant facts to arrive at its own legal conclusion. See Steven Alan Childress & Martha S. Davis, FEDERAL STANDARDS OF REVIEW § 2.14, at 2-80 (3rd ed. 1999) (indicating that a *de novo* review does not entail appellate fact-finding; the court reviews relevant portions of the record to arrive at legal conclusion). The appellate court therefore may substitute its own judgment regarding a conclusion

of law made by the district court. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1990). Thus, the present issue to be addressed under the *de novo* standard is whether the District Court erred in its interpretation of the scope of protections under USERRA and, consequently, whether Plaintiffs can proceed on their cause of action concerning freedom from a hostile work environment under that statute.

II. HARASSMENT ON THE BASIS OF MILITARY SERVICE IS A VIOLATION OF USERRA

A. The District Court Erred in Solely Relying on a Plain Language Interpretation of USERRA When It Concluded That USERRA Does Not Provide for a Hostile Work Environment Cause of Action

Section 4311(a) of USERRA provides that a service member “shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.” 38 U.S.C. § 4311(a). The statute defines “benefit of employment” as:

[A]ny advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

38 U.S.C. § 4303(2). Section 4311(c) further provides:

An employer shall be considered to have engaged in actions prohibited: (1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service....

38 U.S.C. § 4311(c).

In its November 30, 2009 Order, the District Court began its analysis by relying on the maxim that “[w]hen interpreting statutes, we begin with the plain language used by the drafters.” (4 USCA5 666); *Waggoner v. Gonzales*, 488 F.3d 632, 636 (5th Cir. 2007) (citing *United States v. Uvalle-Patricio*, 478 F.3d 699, 703 (5th Cir. 2007)). The District Court further stated that “[w]hen the plain language of a statute is unambiguous, there is no need to resort to legislative history for aid in its interpretation.” (4 USCA5 666); *Tidewater Inc. v. United States*, 565 F.3d 299, 303 (5th Cir. 2009). Notably, however, the District Court acknowledged that a court is “authorized to deviate from the literal language of a statute only if the plain language would lead to absurd results, or if such an interpretation would defeat the intent of Congress.” (4 USCA5 666); *Kornman & Assocs., Inc. v. U.S.*, 527 F.3d 443, 451 (5th Cir. 2008) (citing *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004); *Johnson v. Sawyer*, 120 F.3d 1307, 1319 (5th Cir.1997)).

Despite acknowledging that deviation from the literal language of a statute is proper in order to avoid an absurd result or to adhere to the intent of Congress, the District Court nevertheless limited the scope of its analysis to a plain language reading of USERRA. In concluding that a hostile work environment cause of action is not a cognizable claim under USERRA, the District Court erroneously held the following: “[T]he Court finds that, under a plain language interpretation, USERRA does not provide for a hostile work environment cause of action. As such, it is not necessary to look to extrinsic evidence to construe this statute.” (4 USCA5 667). This decision, as will be shown, constitutes reversible error.

On several prior occasions, this Court has been faced with the task of reviewing district court decisions involving USERRA and has repeatedly relied on legislative history, predecessor statutes and other court decisions to determine the proper scope and application of the statute. Perhaps the single most noteworthy point in illustrating the District Court’s error in this case derives from language used by this Court in the matter of *Rogers v. City of San Antonio*, 392 F.3d 758, 761 (5th Cir. 2004). In an Order filed on December 2, 2004, this Court stated:

In order to decide how USERRA should be interpreted and applied in this case we will set forth an overview of the statute to give perspective to our reading of its parts. Because the statute is subject to different interpretations we will examine its legislative history, predecessor statutes, pertinent court decisions, and postenactment administrative interpretations.

Rogers, 392 F.3d at 761 (matter on appeal concerned review of plaintiffs' allegation that defendant unlawfully discriminated against them in violation of Section 4311(a) of USERRA by implementing certain employment practices). In addition to this Court's previous reliance on extrinsic evidence to interpret USERRA, the very issue presently on appeal makes clear that the words of the statute, and thus the scope of the statute, are ambiguous given the clear disagreement as to what exactly constitutes a "benefit of employment."

In addition to *Rogers*, similar dicta was used in *Sykes v. Columbus & Greenville Railway*, 117 F.3d 287 (5th Cir. 1997), in which this Court specifically cited to "the history and purpose of the VRRRA [Veterans' Reemployment Rights Act, USERRA's predecessor statute], the Supreme Court's consistent admonition to interpret the VRRRA's provisions consistently with its purpose to benefit veterans, [...and] the legislative history of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)" to reach its conclusion as to the proper scope of the statute. *Sykes*, 117 F.3d at 291.

In fact, in citing to several Supreme Court cases, this Court has previously counseled that "[s]tatutory language must *always* be read in its proper context." *Id.* at 290 (quoting *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)) (emphasis added). Moreover, this Court has further confirmed that resorting to legislative history is appropriate to determine "whether there is 'clearly expressed legislative

intention' contrary to that language." *Id.* at 290-291 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433 n. 12 (1987)); *see also Holy Trinity Church v. United States*, 143 U.S. 457, 458-61 (1892) (finding that "[i]t is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers"); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 69-71 (1982) (noting that "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible").

The District Court in this case erred in failing to abide the canons of statutory interpretation enunciated by the Supreme Court and repeatedly followed by this Court. Specifically, the Supreme Court has held that a statute should not be interpreted inconsistently with its purpose and cautioned "not [to] be guided by a single sentence or member of a sentence, but [to] look to the provisions of the whole law, and to its object and policy." *Sykes*, 117 F.3d at 291 (quoting *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 219-21 (1986)).

Congress clearly defined one of the purposes of USERRA as "prohibit[ing] discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(3). Relying on the plain language of the statute to conclude that a hostile work environment cause of action is not a cognizable claim under USERRA directly contravenes the law's very purpose. In instances such as this, a literal construction should be rejected, as it "bring[s] about an end completely at

variance with the purpose of the statute.” *United Steelworkers v. Weber*, 443 U.S. 193, 200-02 (1979) (quoting *United States v. Public Utilities Comm'n*, 345 U.S. 295, 315 (1953)). In essence, in relying on the plain language of the statute to dismiss Plaintiffs’ cause of action concerning freedom from a hostile work environment under USERRA, the District Court determined that USERRA, the primary statute implemented by Congress to protect the rights of servicemembers, permits harassment of the very individuals the statute was implemented to protect. This absurd result, in and of itself, evidences the District Court’s error in solely relying on the plain language of the statute to interpret the proper scope of USERRA.

B. The District Court Further Erred in Its Interpretation of the Language and Scope of USERRA

In addition to erring in failing to resort to extrinsic evidence to determine the proper scope of USERRA’s protections, the District Court further erred in its plain language interpretation of the statute. As noted previously, one of the primary purposes of USERRA is “to prohibit discrimination against persons because of their service in the uniformed services.” 38 U.S.C. § 4301(3). The text of USERRA further mandates that employees “shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer.” 38 U.S.C. § 4311(a).

In its November 30, 2009 Order, the District Court relied solely on the words “benefit of employment” within the statute and held the following:

The term “benefit” is defined as an “[a]dvantage[or] privilege” or a “[p]rofit or gain.” BLACK’S LAW DICTIONARY 178 (9th ed. 2009). The avoidance of a hostile work environment does not fall into either of these definitions. These definitions of “benefit” connote obtaining some gain above the expected status quo. In no way does avoiding a hostile work place grant such a gain.

(4 USCA5 579). The District Court’s analysis, however, stopped there and erroneously ignored the canons of statutory interpretation that require adherence to the context and purpose of the statute even under a plain language interpretation. *Sykes*, 117 F.3d at 290 (quoting *McCarthy*, 500 U.S. at 139) (“[s]tatutory language must *always* be read in its proper context.”) (emphasis added). As a result, the type of analysis performed by the District Court constitutes reversible error.

1. *The District Court Failed to Consider the Context and Purpose of the Statute in Its Plain Language Interpretation of USERRA*

As noted previously, the District Court’s Order specifically states that the conclusions contained therein were based upon its analysis of the single phrase “benefit of employment.” This limited analysis resulted in the District Court ignoring the object and purposes of USERRA as a whole, and ultimately concluding that a hostile work environment cause of action does not exist under USERRA. Even under a plain language interpretation, however, these additional

factors must be taken into account to “avoid untenable distinctions and unreasonable results whenever possible.” *American Tobacco Co.*, 456 U.S. at 69-71; *see also Sykes*, 117 F.3d at 291 (quoting *Offshore Logistics, Inc.* 477 U.S. at 219-21) (indicating that the court is “not [to] be guided by a single sentence or member of a sentence, but [to] look to the provisions of the whole law, and to its object and policy”).

Had the District Court properly consulted the necessary sources to render its opinion, a different conclusion would have been reached. Additional provisions of USERRA yield insight into the meaning intended to be given to the term “benefit of employment.” One of the basic purposes of USERRA is “to prohibit discrimination against persons because of their service in the uniformed services.” 38 U.S.C. § 4301(a); *Peterson v. Dep’t of Interior*, 71 M.S.P.R. 227, 235 (1996). Under no circumstances would it make sense to aim for the prohibition of discrimination, yet permit the proliferation of harassment of military members. To do so would subject military members to increased and unjustified harassment and abuse which may reduce overall participation in the reserves and lead to results that USERRA was specifically enacted to prevent.

Moreover, the limited interpretation undertaken by the District Court in this case directly contradicts other judicial opinions interpreting similarly-purposed statutes, as “courts have consistently construed anti-discrimination statutes as

proscribing harassment in the workplace.” *Id.*; see also *Dees v. Hyundai Motor Mfg. Alabama, LLC*, 605 F. Supp. 2d 1220, 1227 (M.D. Ala. 2009) (noting that “harassment is cognizable under other anti-discrimination statutes, and USERRA is intended to be construed broadly for the benefit of returning veterans”). Title VII, for example, “prohibits employers from discriminating against employees ‘with respect to his compensation, terms, conditions, or privileges of employment.’” *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986). Although the specific words “harass,” “harassment,” or “hostile” are not included in the statute, courts have nevertheless interpreted the scope of Title VII as including the protection of freedom from a hostile work environment. See, e.g., *Harris v. Forklift Systems, Inc.* 510 U.S. 17 (1993) (reaffirming the “pervasive or severe” standard for discriminatory harassment without requiring proof of psychological injury and establishing that a determination of hostile work environment claims arising under Title VII can be made “only by looking at all the circumstances”).

Several district courts have reiterated the need to consult the context of USERRA as well as its purpose in order to reach the proper conclusion. Adopting the reasoning in *Monroe v. Standard Oil Co.*, 613 F.2d 641, 645 (6th Cir. 1980), the Court in *Vickers v. City of Memphis*, 368 F. Supp. 2d 842, 844 (W.D. Tenn. 2005), affirmed that the text of USERRA “is intentionally framed in general terms

to encompass the potentially limitless variation in benefits of employment that are conferred by an untold number and variety of business concerns.” *Vickers* 368 F. Supp. 2d at 844-45 (quoting *Monroe*, 613 F.2d at 645, superseded by statute) (court’s analysis pertained to USERRA’s precursor statute, the Vietnam Era Veterans Readjustment Assistance Act, which protected reservists from discrimination regarding “incidents or advantages of employment”). Moreover, the Court in *Maher v. City of Chicago*, 406 F. Supp. 2d 1006 (N.D. Ill. 2006) held that “USERRA is to be broadly construed in favor of its military beneficiaries” such that “[h]arassment on account of prior military service can be a violation of USERRA.” *Maher*, 406 F. Supp. 2d at 1011 & 1024; *see also Peterson*, 71 M.S.P.R. at 235-36 (citing Statement of Congressman Montgomery, 140 Cong. Rec. H9133 (daily ed. Sept. 13, 1994)) (holding that “the intent has always been to have an expansive interpretation”). When properly examined, the purpose and context of USERRA make clear that freedom from a hostile work environment constitutes a “benefit of employment” and thus falls within the scope of USERRA’s protections as intended by the statute’s plain language.

2. *Even Under a Limited Plain Language Interpretation of USEERRA, a Cause of Action Concerning Freedom from a Hostile Work Environment Exists*

Even if this Court determines that a limited plain language interpretation of USEERRA is proper, the conclusions reached by the District Court under this limited view still are erroneous. As reiterated by the District Court, “[t]he term ‘benefit’ is defined as an ‘[a]dvantage [or] privilege’ or a ‘[p]rofit or gain.’” (4 USCA5 666); BLACK’S LAW DICTIONARY 178 (9th ed. 2009). In the present case, an advantage shared by Plaintiffs’ non-reservist counterparts is an ability to perform their job at Continental without being harassed by Defendant for any reason, whether on the basis of race, gender, religion or an affiliation with the military. Unfortunately, Plaintiffs are not afforded this same benefit but are instead disadvantaged solely by virtue of their military service through repeated demeaning and discriminatory comments and conduct. Plaintiffs therefore do not have the same benefit as their civilian counterparts with regard to working in an environment free from harassment.

If this Court were to go one step further and narrow its interpretation of “benefit of employment” to something that “must accrue by reason of an employment contract or agreement,” as alleged by Defendant in their Motion to Dismiss before the District Court, Plaintiffs’ cause of action concerning freedom

from a hostile work environment still would survive. (2 USCA5 319) (citing 38 U.S.C. § 4303(2)). First, no mention is made that the alleged “employment contract or agreement” must be written. As such, one can surmise that the myriad implied contracts governing employment relationships would constitute the necessary “contract or agreement” referenced in the statute.

Even if a written agreement in support of Plaintiffs’ claim is required, the Collective Bargaining Agreement governing Plaintiffs’ employment states: “There will be no discrimination against employees covered by this Agreement because of age, race, creed, color, sex, sexual orientation, disability, veteran status, Association activity, or national origin.” (3 USCA5 472; *see also* Plaintiffs’ May 26, 2010 Unopposed Motion to Supplement Record on Appeal, at Exh. A Subsection 26(H).⁴ Similarly, Defendant’s own policies, as referenced in Plaintiffs’ Complaint, state: “Continental has a long policy of supporting our pilots with Military Leave obligations....” (3 USCA5 519; 4 USCA5 620). Thus, even under a limited plain reading interpretation of USERRA, freedom of a hostile work environment constitutes a “benefit of employment” within the meaning of the language of the statute, thereby rendering such a cause of action cognizable under USERRA.

⁴ It does not appear from the District Court’s November 30, 2009 Order that this argument was considered by the Court. Plaintiffs-Appellants’ raise this argument herein, however, in anticipation of Defendant-Appellee’s Opposition to Appellants’ brief.

C. The District Court's Dismissal of Plaintiffs' Cause of Action Concerning Freedom from a Hostile Work Environment Constituted Legal Error and Should Be Reversed

In addition to erring in solely relying on a plain language interpretation and further erring in its application of plain language interpretation, the District Court additionally committed reversible error in dismissing Plaintiffs' cause of action concerning freedom from a hostile work environment under USERRA given the legislative history and jurisprudence interpreting the same.

The legislative history supporting the enactment of USERRA is particularly informative with respect to deciphering the intended extent of the Act's "expansive" coverage. *Peterson*, 71 M.S.P.R. at 235-36 (citing H.R. Rep. No. 103-65, at 19 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2452, 2456 ("The Committee intends that these anti-discrimination provisions be broadly construed and strictly enforced" and the intent has always been to have an expansive interpretation.)); *see also* H.R. Rep. No. 65, Part 1, 103d Cong., 1st Sess. 21 (1993) ("These rights are broadly defined to include all attributes of the employment relationship which are affected by the absence of a member of the uniformed services because of military service. The list of benefits is illustrative and not intended to be all inclusive."). The legislative history confirms that the rights protected by USERRA are "broadly defined to include all attributes of the employment relationship which are affected by the absence of a member of the

uniformed services because of military service. The list of benefits is illustrative and *not intended to be all inclusive.*” *Peterson*, 71 M.S.P.R. at 235-36 (citing H.R. Rep. No. 65, Part 1, 103d Cong., 1st Sess. 21 (1993)) (emphasis added).

The expansive intent behind the enactment of USERRA is further evidenced by a comparison to its predecessor, the Vietnam Era Veterans’ Readjustment Assistance Act of 1974. More specifically, “[t]he 1994 enactment [of USERRA] broadened the statute by providing that a violation occurs when a person's military service is a 'motivating factor' in the discriminatory action, even if not the sole factor.” *See* 38 U.S.C. § 4311(c)(1); *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001). As the Court held in *Sheehan*, “[t]he factual question of discriminatory motivation or intent may be proven by either direct or circumstantial evidence.” *Sheehan*, 240 F.3d at 1014. The *Sheehan* Court further noted:

Discriminatory motivation under the USERRA may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, *an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity*, and disparate treatment of certain employees compared to other employees with similar work records or offenses.

Id. (Emphasis added). This reasonable inference not only reveals but confirms that the same type of “expressed hostility” at issue in this case not only is contemplated as part of USERRA, but actually comprises the court’s analysis of USERRA claims.

Although no appellate court has specifically addressed this issue, several district courts in other circuits as well as the Merit Systems Protection Board⁵ already have determined the decision presently before this Court, holding that a cause of action concerning freedom from hostile work environment and harassment exists under USERRA. Of even greater relevance to this Court’s decision is the fact that *Peterson* has been expressly followed by district courts in the Sixth, Seventh and Eleventh Circuits and has yet to receive negative treatment. *See, e.g., Vickers*, 368 F. Supp. 2d 842 (holding that the “Uniform Services Employment and Reemployment Rights Act’s (USERRA) prohibition against discrimination regarding ‘benefits of employment’ included the right to be free from harassment and hostile work environment due to an employee’s military status”); *Steenken v. Campbell County*, 2007 WL 837173 (E.D. Ky. March 15, 2007) (holding that plaintiff’s claim that he was forced to resign due to a hostile work environment was cognizable under USERRA because the right to be free

⁵ Although not binding on this Court, decisions by the Merit Systems Protection Board constitute persuasive authority. *See, e.g., Williams v. U.S. Merit Systems Protection Board*, 55 F.3d 917, 920 n. 3 (4th Cir. 1995) (“Decisions of the Board reported in the Merit Systems Protection Board Reporter, M.S.P.R., are not binding authority on this court, but may be relied upon for their persuasive authority.”).

from harassment, broadly construed, is a “benefit of employment” within the meaning of section 4311); *Maier v. City of Chicago*, 406 F. Supp. 2d 1006 (N.D. Ill. 2006) (holding that “USERRA is to be broadly construed in favor of its military beneficiaries” such that “[h]arassment on account of prior military service can be a violation of USERRA”); *Dees v. Hyundai Motor Mfg. Alabama, LLC*, 605 F. Supp. 2d 1220 (M.D. Ala. 2009) (recognizing that the law is to be liberally construed to benefit the service member, and concluding that harassment is a cognizable claim under USERRA due in part to the fact that “courts’ consistent holdings that other anti-discrimination statutes lacking anti-harassment language... proscribe harassment as a kind of discrimination”).

The legislative history of USERRA is revealing in that it highlights the absurd results that may occur when only a plain language interpretation is applied without taking into account the statute's clear purpose. This is further confirmed by the applicable jurisprudence which weighs heavily in favor of recognizing a hostile work environment cause of action under USERRA. Thus, given that the text of USERRA, both narrowly and liberally construed, as well as the fact that the legislative history supporting the Act contemplates freedom from harassing conduct within its protections, the District Court’s November 30, 2009 Order should be reversed, and Plaintiffs-Appellants should be permitted to proceed on

their cause of action concerning freedom from a hostile work environment under USERRA.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court reverse the District Court's November 30, 2009 Order as to Plaintiffs' hostile work environment cause of action as it was in error to find that freedom from a hostile work environment is not protected under USERRA, and remand this case to the District Court for further proceedings accordingly.

Respectfully Submitted,

By: Andrew S. de Klerk /s/

Dated: May 28, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct hard copies and one electronic copy of this Appellate Brief were served on the attorneys of record for the Appellee via FedEx First Overnight and email, this 28th day of May, 2010:

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CERTIFICATE OF COMPLIANCE

Under 5TH CIR. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitation of 5TH CIR. R. 32.2.7(b)

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