IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-20105

DEREK CARDER, MARK BOLLETER, DREW DAUGHERTY, AND ANDREW KISSINGER, INDIVIDUALLY AND ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Appellants,

VERSUS

CONTINENTAL AIRLINES, INC.,

Appellee.

On Permissive Appeal from the United States District Court for the Southern District of Texas, Houston Division
Civil Action No. 4:09-cv-03173

BRIEF OF APPELLEE CONTINENTAL AIRLINES, INC.

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NO ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PARTIES

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 representatives are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

Parties of Interest

1. Derek Carder, Plaintiff-Appellant.
2. Mark Bolleter, Plaintiff-Appellant.
3. Drew Daugherty, Plaintiff-Appellant.
4. Andrew Kissinger, Plaintiff-Appellant.
5. Continental Airlines, Inc., Defendant-Appellee.

Attorneys of Interest

6. Brian J. Lawler, Counsel for Plaintiffs-Appellants.
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8. Charles M. Billy, Counsel for Plaintiffs-Appellants.
9. Gene J. Stonebarger, Counsel for Plaintiffs-Appellants.
10. Andrew S. de Klerk, Counsel for Plaintiffs-Appellants.
11. Jeffrey C. Londa, Counsel for Defendant-Appellee.
12. Flyn L. Flesher, Counsel for Defendant-Appellee.

/s/ Jeffrey C. Londa
Jeffrey C. Londa
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STATEMENT REGARDING ORAL ARGUMENT

Appellee Continental Airlines, Inc. ("Continental") does not believe that oral argument is necessary for disposition of this appeal. The issue presented in this case is a straightforward question of statutory construction, and oral argument would not significantly aid the decisional process.

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STATEMENT OF JURISDICTION

Continental does not contest that this Court has jurisdiction over this appeal from an interlocutory order under 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Is a hostile work environment cause of action cognizable under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA")?

SUMMARY OF ARGUMENT

The plain, unambiguous language of USERRA provides no legal basis for a hostile work environment cause of action. Appellants tacitly admit this fact by arguing that the district court erred by focusing "its analysis solely on the text of USERRA," rather than looking beyond the plain language of the statute to create a hostile work environment cause of action where none exists. Appellants urge the Court to apply "liberality of . . . interpretation" and look to "extrinsic evidence" to find the existence of a hostile work environment cause of action under USERRA. Appellants' argument fails because "[t]he preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'"[1]

Congress enacted USERRA after the Supreme Court ruled that a hostile work environment cause of action exists under Title VII.[2] However, USERRA neither references a hostile work environment cause of action nor includes the same language from which the Supreme Court inferred Congress's intent to permit hostile work environment causes of action under Title VII and other federal anti-discrimination statutes. The Supreme Court's rationale for permitting hostile work environment claims under other federal anti-discrimination statutes does not apply to USERRA.

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[1] BedRoc Ltd. v. United States, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004).

[2] Meritor Savings Bank v. Vinson, 477 U.S. 57, 64-66 (1986).

The plain language of USERRA is unambiguous, and the Court need look no further to determine whether a hostile work environment cause of action exists. It does not. Moreover, even if the Court were to mistakenly consult USERRA's legislative history, as Appellants urge, the legislative history behind USERRA and its predecessor statute do not support such a claim. Despite lengthy and repeated pleas that the Court consult USERRA's legislative history, Appellants' brief is noticeably devoid of any citation to legislative history suggesting that Congress contemplated the existence of such a cause of action under USERRA.

The district court correctly based its ruling on the plain language of USERRA, which leaves no reason to believe Congress intended to create a hostile work environment cause of action under the statute. Appellants have provided no valid reason why the Court should ignore the statute's plain language and create a hostile work environment claim where none exists. Furthermore, Appellants' allegations would not support a hostile work environment cause of action even if such a claim did exist. This Court should therefore affirm the district court's order dismissing Appellants' hostile work environment cause of action.

ARGUMENT

I. HOSTILE WORK ENVIRONMENT CLAIMS ARE NOT COGNIZABLE UNDER USERRA.

A. The District Court Correctly Based Its Interpretation of USERRA on the Plain Language of the Statute.

Appellants' primary argument in favor of reversal is that "the district court erred in solely relying on a plain language interpretation of USERRA." This argument contradicts the most basic tenets of statutory interpretation, which the district court stated in its order:

> **In determining whether to recognize the hostile work environment cause of action under USERRA, the Court returns to the maxim that "[w]hen interpreting statutes, we begin with the plain language used by the drafters."** 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)). Further, "[w]hen the plain language of a statute is unambiguous, there is no need to resort to legislative history for aid in its interpretation." Tidewater Inc. v. United States, 565 F.3d 299, 303 (5th Cir. 2009). Lastly, the Court recognizes that it 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." 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)).

(4 USCA5 666) (emphasis added).

The district court cited numerous decisions by this Court supporting its application of a plain language interpretation. Those decisions are consistent with guidance from the U.S. Supreme Court regarding statutory interpretation. **"The preeminent canon of statutory interpretation requires us to 'presume that**

[the] legislature says in a statute what it means and means in a statute what it says there.'" BedRoc Ltd. v. United States, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004) (emphasis added) (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)). "[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous." Id. (emphasis added) (citing cases). As the Supreme Court recently stated in a case requiring statutory interpretation:

> As in all [statutory interpretation] cases, we begin by analyzing the statutory language, "assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose." . . . We must enforce plain and unambiguous statutory language according to its terms.

Hardt v. Reliance Standard Life Ins. Co., No. 09-448, 2010 WL 2025127 (U.S. May 24, 2010) (internal citations omitted). This Court has similarly warned, in a case interpreting USERRA, that **"a powerful line of Supreme Court authority suggests that legislative history should rarely be used in statutory interpretation, because only the text of the law has been passed by Congress, not the often-contrived history."** Garrett v. Circuit City Stores, Inc., 449 F.3d 672, 679 (5th Cir. 2006) (emphasis added).

Appellants argue that the district court should have looked beyond the plain language of the statute because "reliance on a restricted plain language interpretation of USERRA therefore led to an absurd result, . . . contradicting the congressional intent underpinning the statute." (Appellants' Br. at 10-11.) This

argument is circular. Appellants argue that the Court must look to the legislative history because the plain language of USERRA conflicts with congressional intent, but they argue that the Court can only determine congressional intent by looking to the legislative history. Thus, Appellants' argument rests on the unsupported suggestion that "the often-contrived [legislative] history" of a statute is a more reliable indicator of congressional intent than "the text of the law [that] has been passed by Congress." See Garrett, 449 F.3d at 679.

Appellants' argument that a plain language interpretation of USERRA leads to an absurd result is also without merit because, as discussed in more detail in section D below, Appellants fail to cite any legislative history suggesting that Congress intended to create a hostile work environment cause of action when it passed USERRA.[3] In fact, the legislative history of USERRA and its predecessor statute, the Veterans' Reemployment Rights act ("VRRA"), confirm that Congress did not intend to create such a cause of action and that the policy considerations underlying those statutes differ from the policy considerations underlying other anti-discrimination statutes. Appellants thus have no support for their conclusory assertion that the district court's interpretation conflicts with congressional intent

[3] Although Appellants cite to USERRA's legislative history on pages 22 and 25 of their brief, these citations do not suggest that Congress intended to create a hostile work environment cause of action when they passed USERRA. Instead, Appellants' citations merely suggest that USERRA should be broadly construed.

and therefore leads to an absurd result. Their argument that the Court should look beyond the plain language of the statute is therefore without merit.

As explained more fully in the following section of this brief, Appellants' suggested interpretation of USERRA would lead to an absurd result because it conflicts with the plain language of the statute and with the remedies provided by Congress. USERRA clearly defines remedies for violations, but no available remedy would compensate for harassment. See 38 U.S.C. § 4323(d)(1); see also Dees v. Hyundai Motor Mf'g Alabama, LLC, No. 09-12107, 2010 WL 675714, at *3 (11th Cir. Feb. 26, 2010) (holding that plaintiff "lack[ed] standing to bring a USERRA harassment claim because he does not allege that he is entitled to any of the relief provided by USERRA"). To hold that harassment causes of action are available under USERRA but that remedies to compensate for harassment are not available would reach an absurd result.

In this case, the district court properly based its interpretation of USERRA on the plain language of the statute, recognizing that any foray into the realm of policy considerations or "extrinsic evidence" would have been improper. As shown in the following section, and as Appellants tacitly admit by entreating the Court to look beyond the plain language of the statute, the Court's analysis of the plain language of USERRA was correct. This Court should accordingly affirm the lower court's order dismissing Appellants' hostile work environment cause of action.

B. The Plain, Unambiguous Language of USERRA Provides No Legal Basis for a Hostile Work Environment Cause of Action.

The text of USERRA does not include any mention of the words harass, harassment, or hostile, nor does it include the same language from which the Supreme Court inferred Congress's intent to permit hostile work environment causes of action under Title VII and other federal anti-discrimination statutes. See generally 38 U.S.C. §§ 4301 et seq. The interpretative regulations under USERRA provide extensive guidance on protection from employer discrimination and retaliation, reemployment, health plan coverage, seniority rights and benefits, and pension plans and benefits, but those regulations also lack any mention of the words harass, harassment, or hostile. See generally 20 C.F.R. Part 1002. Moreover, USERRA "does not allow for the recovery of damages for mental anguish, pain or suffering, nor does USERRA allow for the recovery of punitive damages,"[4] which also indicates that Congress did not intend to permit hostile work environment claims under USERRA. Neither the text of the statute nor the regulations provide any reason to believe that hostile work environment claims are cognizable under USERRA.

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[4] Vander Wal v. Sykes Enterprises, Inc., 377 F.Supp.2d 738, 746 (D.N.D. 2005) (citing Barreto v. ITT World Directories, Inc., 62 F.Supp.2d 387, 395-96 (D.P.R. 1999)). "USERRA provides that a court may award three kinds of relief: (1) an injunction requiring an employer to comply with USERRA's provisions; (2) compensation for lost wages or benefits suffered by reason of the employer's failure to comply with USERRA, and (3) liquidated damages in an amount equal to lost wages or benefits if the employer's failure to comply with USERRA was willful." Dees v. Hyundai Motor Mf'g Alabama, LLC, No. 09-12107, 2010 WL 675714, at *3 (11th Cir. Feb. 26, 2010) (citing 38 U.S.C. § 4323(d)(1)).

Appellants' argument that USERRA permits hostile work environment causes of action can be reduced to the following syllogism:

> Premise 1: "One of the basic purposes of USERRA is 'to prohibit discrimination against persons because of their service in the uniformed services.'" (Appellants' Br. at 20 (quoting 38 U.S.C. § 4301(a)).
>
> Premise 2: "[C]ourts have consistently construed anti-discrimination statutes as proscribing harassment in the workplace." (Appellants' Br. at 20-21 (quoting Petersen v. Dep't of Interior, 71 M.S.P.R. 227, 235 (1996)).
>
> Conclusion: USERRA must prohibit harassment on the basis of service in the uniformed services in the same way that other anti-discrimination statutes prohibit harassment on the basis of other protected categories.

In other words, Appellants argue that the Court should find the existence of a hostile work environment cause of action under USERRA simply because such causes of action exist under other statutes that "prohibit discrimination." Appellants attempt to support this argument by noting the Supreme Court has interpreted Title VII to prohibit hostile work environments despite the fact that "the specific words 'harass,' 'harassment,' or 'hostile' are not included in the statute." (Appellants' Br. at 21.)

One of the fatal flaws in Appellants' argument is that, as the Supreme Court and this Court have both recognized, "[w]hen conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'" Gross v. FBL Financial Services, Inc., 129 S.Ct. 2343, 2349 (2009); see also Fed. Express Corp. v. Holowecki, 128 S.Ct. 1147, 1153 (2008) ("[E]mployees and their counsel must be

careful not to apply rules applicable under one statute to a different statute without careful and critical examination."); Smith v. Xerox Corp., 602 F.3d 320, 329 (5th Cir. 2010). Careful and critical examination of USERRA reveals that it contains completely different language than Title VII and other federal anti-discrimination statutes and that the rationale supporting hostile work environment claims in other statutes does not apply to USERRA. Compare 38 U.S.C. § 4311 with 29 U.S.C. § 623 (a); 42 U.S.C. § 2000e-2 (a)(1); and 42 U.S.C. § 12112 (a).

The Supreme Court first held in Meritor Savings Bank v. Vinson that an individual may establish a violation of Title VII of the Civil Rights Act of 1964 by establishing that discrimination based on sex has created a hostile or abusive work environment. 477 U.S. 57, 64-66 (1986). The Court gave two reasons for this holding. One reason was that EEOC Guidelines supported this view. Id. at 65. As noted above, the regulations governing USERRA lack any mention of hostile work environment claims. The other reason was based on the language of Title VII itself, which prohibits employers from discriminating against employees **"with respect to his compensation, terms, conditions, or privileges of employment."** Id. at 64. The Supreme Court held: "The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." Id. The Age Discrimination in Employment Act ("ADEA") and Americans with Disabilities Act ("ADA"), which also permit hostile work environment claims, also use the

phrase "terms, conditions, or privileges of employment." See 29 U.S.C. § 623; 42 U.S.C. § 12112. The False Claims Act and the Sarbanes-Oxley whistleblower statute both prohibit discrimination **"in the terms and conditions of employment"** and specifically prohibit harassment based on retaliatory motives. See 18 U.S.C. § 1514A (a); 31 U.S.C. § 3730(h).[5]

More specifically, the Supreme Court and the Fifth Circuit have held that a cause of action for a hostile work environment is actionable if and only if it alters the "conditions of employment." The Supreme Court held in Meritor Savings

[5] The relevant provisions of the statutes cited above are as follows:

Statute	General Rule Prohibiting Discrimination
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (a)(1).	"It shall be an unlawful employment practice for an employer – 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 . . . ."
Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112 (a).	"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**."
Age Discrimination in Employment Act, 29 U.S.C. § 623 (a).	"It shall be unlawful for an employer – to fail or refuse to hire or to discharge any individual **or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,** because of such individual's age . . . ."
False Claims Act, 31 U.S.C. § 3730(h).	"Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, **harassed, or in any other manner discriminated against in the terms and conditions of employment** because of lawful acts done by the employee, contractor, or agent . . . ."
The Sarbanes-Oxley Whistleblower Statute, 18 U.S.C. § 1514A (a).	"[No covered entity or individual] may discharge, demote, suspend, threaten, **harass,** or in any other manner **discriminate against an employee in the terms and conditions of employment** because of any lawful act done by the employee . . . ."

Bank: **"For sexual harassment to be actionable,** it must be sufficiently severe or pervasive 'to alter **the conditions of [the victim's] employment . . . ."** 477 U.S. at 67 (emphasis added). Similarly, the Supreme Court noted in Oncale v. Sundowner Offshore Servs., Inc.: "The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; **it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment.** . . . We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace . . . **for discriminatory 'conditions of employment.'"** 523 U.S. 75, 81, 118 S.Ct. 998, 1003 (1998) (emphasis added). This Court has similarly clarified the standard for a harassment cause of action under Title VII: **"To affect a term, condition, or privilege of employment, 'sexual harassment must be sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment.'"** Stewart v. Miss. Transp. Com'n, 586 F.3d 321, 330 (5th Cir. 2009) (emphasis added) (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 116, 122 S.Ct. 2061, 2074 (2002)).

USERRA, on the other hand, does not use the phrase "terms, conditions, or privileges of employment," nor anything to that effect. See generally 38 U.S.C. §§ 4301 et seq. Instead, USERRA provides that individuals protected by the statute "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). Whereas Congress did not define the phrase "terms, conditions, or privileges of employment" in Title VII, the ADEA, or the ADA, it did specifically define the phrase "benefit of employment" in USERRA as "any 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).

Notably absent from the definition of "benefit of employment" is any reference to "freedom from hostility," "freedom from harassment," or "freedom from derogatory comments regarding . . . military service and military leave obligations" (see 1 USCA5 36 (Complaint at ¶ 153)). Moreover, "freedom from harassment" is not a right or benefit "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." When Congress defined the phrase "benefit of employment," it listed only tangible, and mostly economic, benefits. To

hold that intangible protections against harassment exist in the penumbrae of the definition of "benefit of employment" would violate the statutory canon that "'[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114 (2001). Thus, by the unambiguous language of the statute itself, USERRA provides no legal basis for Appellants' hostile work environment claim.

In Gross v. FBL Financial Services, Inc., the Supreme Court compared the textual differences between Title VII and the ADEA and concluded that Title VII decisions like Price Waterhouse and Desert Palace did not govern its interpretation of the ADEA. 129 S.Ct. at 2349. The Court held: "We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." Id. The Supreme Court's reasoning in Gross, applied to this case, reveals that cases interpreting other anti-discrimination statutes are inapplicable to USERRA due to the textual differences between USERRA and other anti-discrimination statutes. Congress enacted USERRA years after the Supreme Court ruled that a hostile work environment cause of action exists under Title VII. If Congress intended to provide protection from harassment to members of the uniformed services, it would have explicitly included such a

provision in the statute[6] or, at the very least, would have phrased the statute with respect to "terms, conditions, or privileges of employment" rather than "benefits of employment." Moreover, Congress drafted USERRA such that it does not allow for the recovery of the kinds of damages that one would expect to be available to a plaintiff alleging a hostile work environment, such as mental anguish, pain or suffering, and punitive damages. The Court must assume that Congress acted intentionally when it worded the provisions of USERRA so differently from other anti-discrimination statutes. The Court should enforce USERRA's plain, unambiguous terms and affirm the district court.

C. An Employer's Written Prohibition against Discrimination Does Not Give Rise to a Hostile Work Environment Cause of Action under USERRA.

Appellants grossly mischaracterize Continental's argument on pages 23-24 of their brief when they caution the Court not to "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 . . . ." (Appellants' Br. at 23.) The phrase "must

[6] The 1986 amendments to the False Claims Act ("FCA") are evidence that Congress knows how to draft a statute to specifically create a cause of action for harassment. On October 27, 1986 (approximately four months after the Supreme Court issued its opinion in Meritor Savings Bank), Congress amended the FCA to create a "private cause of action for an individual retaliated against by his employer for assisting an FCA investigation or proceeding." Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, 545 U.S. 409, 412, 125 S.Ct. 2444, 2447 (2005). In so doing, Congress explicitly provided relief to "[a]ny employee who is discharged, demoted, suspended, threatened, **harassed,** or in any other manner discriminated against in **the terms and conditions of employment** by his or her employer." Id. (quoting 31 U.S.C. § 3730(h)) (emphasis added).

accrue by reason of an employment contract or agreement" occurs nowhere in Continental's Motion to Dismiss. The only two times that the word "accrue" appears in Continental's Motion to Dismiss are on pages 20 and 23 when it quotes 38 U.S.C. § 4303(2), from the definitions section of USERRA:

> **THE TERM "BENEFIT", "BENEFIT OF EMPLOYMENT", OR "RIGHTS AND BENEFITS"** means any 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) (emphasis added); see also 2 USCA5 319, 322.

Appellants also mischaracterize Continental's argument as being that "a written agreement in support of Plaintiffs' claim is required." (Appellants' Br. at 24.) Continental has never argued that the reason why Appellants' claim failed is because they did not have a written agreement prohibiting harassment. Appellants appear to be arguing that freedom from a hostile work environment is a "benefit of employment" at Continental because the collective bargaining agreement states: "There will be no discrimination against employees covered by this Agreement because of . . . veteran status . . ." and because Continental's policies note that "Continental has a long policy of supporting our pilots with Military Leave obligations . . . ." (Appellants' Br. at 24.) This argument is inconsistent with

USERRA's express wording and would truly produce an absurd result: if a hostile work environment claim exists under USERRA if and only if the employer prohibits discrimination in its policies or collective bargaining agreements, then an employer could effectively insulate itself from such claims merely by rescinding those policies or agreements. Conversely, under Appellants' proposal, only those employers who affirmatively stated in writing that they were opposed to discrimination against servicemembers could be sued for harassment under USERRA. Congress surely could not have intended such punishment for employers with veteran anti-discrimination policies, nor could it have intended to protect from suit those employers who did not take steps to eradicate such discrimination.[7]

D. USERRA's Legislative History Does Not Support a Hostile Work Environment Cause of Action.

Appellants complain that the district court failed to consider the legislative history of USERRA. As explained above, resorting to the legislative history is

[7] Furthermore, even if one were to assume for the sake of argument that a hostile work environment cause of action arises from the language of the collective bargaining agreement (i.e., "There will be no discrimination against employees covered by this Agreement because of . . . veteran status . . ."), then that cause of action would not be a USERRA claim, it would be a cause of action for breaching the collective bargaining agreement. See Romero v. Akal Sec., Inc., No. 09-CV-00024, 2010 WL 1688163, at *7 (S.D. Cal. April 23, 2010) (granting summary judgment to the defendant on the plaintiff's claim that the defendant breached its covenant of good faith and fair dealing under the CBA by allegedly discriminating against and harassing Plaintiff based on his service with the National Guard). Appellants' allegations thus would "plainly require[] the Court to interpret the provisions of the CBA and to enforce duties allegedly owed under the CBA." Id. As such, Appellants' allegations would be subject to arbitration under the terms of the collective bargaining agreement and the Railway Labor Act.

inappropriate when interpreting a statute. See Garrett, 449 F.3d at 679 (interpreting whether USERRA supersedes arbitration agreements and warning "that legislative history should rarely be used in statutory interpretation"). However, even if the Court were to mistakenly consult USERRA's legislative history to determine whether a hostile work environment cause of action exists, the legislative history behind USERRA and its predecessor statute do not support such a claim.

Appellants noticeably fail to cite any legislative history in their brief to suggest that Congress specifically contemplated the existence of a hostile work environment cause of action under USERRA. Indeed, the legislative history of USERRA and its predecessor statute leave no reason to believe that Congress specifically contemplated such a cause of action when enacting the statute. The policy considerations that led to the passage of USERRA and its predecessor statute, the VRRA, are fundamentally different from the policy considerations that underlie other anti-discrimination statutes:

> USERRA and Title VII are, in a broad sense, animated by fundamentally different goals. Congress enacted Title VII "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group." Griggs v. Duke Power, 401 U.S. 424, 430-31, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). USERRA, on the other hand, states that its goals include "encourag[ing] noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service" and "minimiz[ing] the disruption to the lives of persons performing service in the

> uniformed services as well as to their employers." 38 U.S.C. § 4301(a).

Dees v. Hyundai Motor Mfg. Alabama, LLC, 524 F.Supp.2d 1348, 1351 (M.D. Ala. 2007). Congress did not enact USERRA "to combat an ignorant or vicious stereotyping of reservists as undependable employees" but "to encourage people to join [the armed services]". Velasquez v. Frapwell, 160 F.3d 389, 392 (7th Cir. 1998) (citing Monroe v. Standard Oil Co., 452 U.S. 549 (1981)), vacated in part on other grounds, 165 F.3d 593 (1999)). As the Seventh Circuit opined: "There is little evidence that employers harbor a negative stereotype about military service or that Congress believes they do." Velasquez, 160 F.3d at 392. **"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."** Dees, 524 F. Supp. 2d at 1351.

Unlike Title VII, in which Congress was trying to eradicate age-old prejudices and hostility against individuals of African descent, "Congress enacted USERRA, like its predecessor, the Veterans' Reemployment Rights Act (VRRA), to encourage noncareer service in the military by minimizing negative repercussions in the civilian workplace potentially prompted by military service." Ortiz Molina v. Rimco, Inc., No. 05-1181, 2006 WL 2639297, at *3 (D.P.R. Sept. 13, 2006) (citing S.Rep. No. 1477 90th Cong., 2d Sess. (1968)). To the contrary, the history of federal statutory attempts to protect the rights of uniformed

servicemembers has always focused on economic protections, not protections from prejudicial hostility: "Statutory re-employment rights for veterans date from the Nation's first peacetime draft law, passed in 1940, which provided that a veteran returning to civilian employment from active duty was entitled **to reinstatement to the position that he had left or one of 'like seniority, status, and pay.'**" Monroe, 452 U.S. 554-55 (emphasis added). As stated in the 1966 House Report on a prior version of the VRRA: "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." H.R. Rep. No. 1303, 89th Cong. (1966) (emphasis added). The legislative history notably talks about servicemembers' "economic well being" rather than servicemembers' mental or psychological well being in the workplace.

The only two instances when Appellants cite USERRA's legislative history are on pages 22 and 25, where they include quotes suggesting that USERRA should be broadly construed. However, even if Congress intended courts to interpret USERRA expansively, it could not have intended to issue a mandate to courts to create new causes of action never contemplated when Congress enacted USERRA and contradicted by the plain language of USERRA. Thus, even if the Court were to mistakenly consult USERRA's legislative history in interpreting its meaning in this case, it still would find no basis for a hostile work environment cause of action.

E. The Few Cases from Other Jurisdictions That Have Found a Hostile Work Environment Cause of Action under USERRA Were Wrongly Decided.

Only five district courts and the Merit Systems Protection Board ("MSPB") have found that a hostile work environment cause of action exists under USERRA. Those cases were wrongly decided, are not binding precedent, and should be disregarded by this Court.

The MSPB concluded that harassment based on prior military service violates USERRA in Petersen v. Dep't of Interior, which Appellants cite heavily in their brief. 71 M.S.P.R. 227 (1996). However, as Appellants admit, decisions of the MSPB are not binding on this Court. In a case addressing whether USERRA creates liability for a hostile work environment, the Ninth Circuit stated: "We recognize that the Merits Systems Protection Board has interpreted the USERRA to create liability for a hostile work environment. The M.S.P.B.'s interpretation of the USERRA is not, however, binding on the City." Church v. City of Reno, No. 97-17097, 168 F.3d 498, 1999 WL 65205, at *1, n.3 (9th Cir. Feb. 9, 1999) (citing Petersen).

In any event, the MSPB's decision in Petersen is fundamentally flawed in that its conclusion was based on what, by the MSPB's own admission, was an "expansive interpretation" of the statute, which it reached by adopting case law from other federal statutes with completely different language. See Peterson, 71 M.S.P.R. at 236-38. Of the five federal district court opinions in which the court

found that a hostile work environment cause of action exists under USERRA, four of those opinions relied blindly on the MSPB's reasoning in Petersen, noting the scarcity of federal case law addressing the issue. See Dees v. Hyundai Motor Mfg. Alabama, LLC, 605 F. Supp. 2d 1220, 1226-28 (M.D. Ala. 2009) (following Petersen's holding that harassment claims are cognizable under USERRA, but dismissing claim due to lack of standing on grounds that plaintiff could not recover damages or injunctive relief)[8]; Maher v. City of Chicago, 406 F. Supp. 2d 1006, 1023 (N.D. Ill. 2006); Vickers v. City of Memphis, 368 F.Supp.2d 842, 844 (W.D. Tenn. 2005); see also Conners v. Billerica Police Dept., 2010 WL 165988 (D. Mass. Jan. 19, 2010). This Court should disregard Petersen, both because it is an administrative opinion that is not binding on this Court and because its "expansive interpretation" of the statute is fundamentally flawed. Similarly, the Court should disregard the district court opinions that blindly relied on Petersen.

In the fifth opinion finding a hostile work environment under USERRA, the court reached its conclusion based on its holding that "the right to be free from a hostile work environment, broadly construed, is a benefit of employment . . . ."

[8] Although the district court in Dees followed Petersen, it nevertheless granted the employer's motion for summary judgment on the plaintiff's hostile work environment claim due to lack of standing. The Eleventh Circuit recently affirmed the district court's grant of summary judgment on the standing issue, "[a]ssuming without deciding that harassment or hostile work environment is a cognizable claim under USERRA." Dees v. Hyundai Motor Mf'g Alabama, LLC, No. 09-12107, 2010 WL 675714, at *4 (11th Cir. Feb. 26, 2010). In ruling that the plaintiff lacked standing to raise a hostile work environment claim, the Eleventh Circuit noted that USERRA "provides for three specific remedies for USERRA violations and does not provide for other 'equitable relief' or attorneys' fees." Id. (citing 38 U.S.C. § 4323 (d)(1)(A)-(C)).

Steenken v. Campbell County, No. 04-224-DLB, 2007 WL 837173, at *3 (E.D. Ky. Mar. 15, 2007). This inclusion of "the right to be free from a hostile work environment" within the statutorily defined phrase "benefit of employment" is not a valid interpretation of USERRA. Such an interpretation would violate "the maxim ejusdem generis, the statutory canon that '[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114 (2001). "Freedom from a hostile work environment" is not even remotely "similar in nature to . . . [the] specific words" in USERRA's definition of "benefit of employment." See Adams, 532 U.S. at 114. Accordingly, the Court should disregard the holding in Steenken because that court erred in finding that freedom from a hostile work environment is a "benefit of employment" as defined in USERRA.

Appellants do not cite the better reasoned federal district court opinions that have declined to find a hostile work environment cause of action under USERRA. See, e.g., Baerga-Castro v. Wyeth Pharmaceuticals, No. 08-1014, 2009 WL 2871148, at *12 (D.P.R. Sept. 3, 2009) (holding that "plaintiff's claim of harassment in the form of a hostile work environment is not cognizable under USERRA" because USERRA "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"). Also, the Ninth Circuit has held as follows in a slightly different context:

> While the consent decree prohibits violations of reservists' statutory rights, **the USERRA does not specifically include a nonhostile work environment in its definition of "benefit of employment."** In addition, neither the Ninth Circuit nor the U.S. Supreme Court has interpreted either the USERRA or the VRRA to create liability for a hostile work environment. The City cannot, therefore, be held in contempt of the consent decree for failing to protect Church from the caustic comments of his coworkers.

Church v. City of Reno, 1999 WL 65205, at *1. Furthermore, as discussed in more detail in the next section of this brief, several federal courts have chosen not to rule on the question of whether hostile work environment claims are cognizable under USERRA and instead dismissed such claims on other grounds. See, e.g., Dees, 2010 WL 675714, at *3 (11th Cir. Feb. 26, 2010).

II. APPELLANTS DO NOT ALLEGE CONDITIONS SUFFICIENTLY SEVERE OR PERVASIVE TO ESTABLISH A HOSTILE WORK ENVIRONMENT CAUSE OF ACTION.

Even if the Court declined to rule on whether USERRA permits a hostile work environment cause of action, Appellants' claims would nevertheless fail. Federal district courts in at least three cases have chosen not to rule on the question of whether USERRA permits a hostile work environment claim, instead dismissing the USERRA harassment allegations because they were not sufficiently severe or pervasive to establish a hostile work environment. See Ortiz Molina, 2006 WL 2639297, at *3; Figueroa Reyes v. Hospital San Pablo del Este, 389 F.Supp.2d 205, 212 (D.P.R. 2005); Miller v. City of Indianapolis, No. IP-99-1735-CMS, 2001

WL 406346 (S.D. Ind. April 13, 2001), aff'd, 281 F.3d 648 (7th Cir. 2002). Appellants' allegations in this case do not rise to the level of severity or pervasiveness necessary to establish a viable claim.

To prevail on a hostile work environment claim under Title VII of the Civil Rights Act, the ADEA, or the ADA, an employee must show that the employer's conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment. Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, 114 S.Ct. 367, 371 (1993); Meritor Sav. Bank, 477 U.S. 57, 67 (1986). All of the hostile environment cases decided by the Supreme Court have involved patterns or allegations of extensive, long lasting, unredressed, and uninhibited threats or conduct that permeated the plaintiffs' work environments. See Indest v. Freeman Decorating, Inc., 164 F.3d 258, 264 (5th Cir. 1999) (citing Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998); Burlington Indus., Inc. v. Ellerth, 118 S.Ct. 2257 (1998); Oncale v. Sundowner Offshore Serv., Inc., 118 S.Ct. 998 (1998); Harris, 114 S.Ct. 367; and Meritor Sav. Bank, 106 S.Ct. 2399). In ruling on a hostile work environment claim, courts consider the frequency of the alleged discriminatory conduct; its severity; whether it was physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfered with the employee's work performance. Harris, 510 U.S. at 23. Courts view these circumstances from an objective perspective to determine whether a reasonable person would perceive the situation as hostile. Id. at 21-22. Assuming without

deciding that USERRA might permit a hostile work environment claim, the courts in Ortiz Molina, Figueroa and Miller applied this standard in ruling that the plaintiffs' claims were without merit.

In Miller, as in this case, some plaintiffs alleged hostile work environment claims under USERRA, claiming that their supervisors had made negative comments about their military status and had pressured employees to leave the military. Id. at *2, 8. In granting summary judgment against the hostile work environment claims, the Court noted that "neither party has directed the Court to authority that a claim for hostile work environment exists under USERRA." Id. at *8. However, the Court ruled that, even if it were to assume that such a cause of action existed under USERRA, the plaintiffs' allegations of isolated comments and pressure to leave the military were not sufficiently severe or pervasive to alter the conditions of plaintiffs' employment and thereby create an abusive working environment. Id. The court accordingly granted the defendant's motion for summary judgment, and the Seventh Circuit affirmed. Miller v. City of Indianapolis, 281 F.3d 648 (7th Cir. 2002).

To withstand a Rule 12(b)(6) motion, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). To satisfy this burden, Appellants must provide "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (citing Twombly, 550

U.S. at 555). In this case, Appellants have alleged that some Continental employees made negative comments about military leave. (See Appellants' Br. at 6-7; 1 USCA5 18-24.) These comments are not sufficiently severe or pervasive to alter the conditions of plaintiffs' employment and thereby create an abusive working environment, whether considered individually or together. They are neither severe, nor physically threatening or humiliating, nor could they have interfered with any reasonable employee's work performance. Appellants' allegations of "[h]arassing acts by Continental" – such as "[c]hastising members of the class for taking 'short notice' military leave," asking questions about military leave, or requiring employees to submit orders for military leave before granting the leave request – are also insufficient to establish that Appellants were in an objectively hostile work environment. The allegations in this case are no more severe than those in Miller, in which the court rejected the Appellants' hostile work environment claims. Thus, even if this Court decides not to rule on the question of whether USERRA permits hostile work environment claims in this case, the Court still should affirm the district court's order because Appellants have failed to state sufficient allegations to establish such a cause of action.

III. CONCLUSION

The district court correctly ruled that a hostile work environment cause of action does not exist under USERRA. Appellee Continental Airlines, Inc. accordingly asks this Court to affirm the district court's order dismissing

Appellants' hostile work environment cause of action and to award Continental its costs and such other relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of Appellee Continental Airlines, Inc. has been served on all counsel of record by placing two copies of the same in the United States First-Class mail, postage prepaid and properly addressed as follows:

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FED. R. APP. P. – FORM 6
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