

1 Brian J. Lawler, CA SBN 221488
2 **PILOT LAW, P.C.**
3 701 B Street, Suite 1170
4 San Diego, CA 92101
5 Telephone: (866) 512-2465
6 Facsimile: (619) 231-4984
7 blawler@pilotlawcorp.com

8
9 *Attorneys for Appellants and the Class*

10 **MERIT SYSTEMS PROTECTION BOARD**

11 BRIAN FERGUSON, an individual,
12 ANDREAS HAU, an individual, ROB
13 BRYANT, an individual, and JASON
14 DUTCHER, an individual, on behalf of
15 themselves and all others similarly situated,

16 Appellants,

17 v.

18 DEPARTMENT OF HOMELAND
19 SECURITY, a Federal executive agency;
20 UNITED STATES CUSTOMS AND
21 BORDER PROTECTION, a Federal
22 executive agency; OFFICE OF AIR AND
23 MARINE, a Federal law enforcement
24 agency,

25 Appellees.

CASE NO.:

CLASS ACTION

**APPEAL FOR VIOLATIONS OF THE
UNIFORMED SERVICES
EMPLOYMENT AND
REEMPLOYMENT RIGHTS ACT
38 U.S.C. § 4301, et seq.;**

REQUEST FOR HEARING

26 **FILING FEE WAIVED PER 38 U.S.C. § 4323(h)**

27 Appellants Brian Ferguson, Andreas Hau, Rob Bryant and Jason Dutcher, on behalf of
28 themselves and a class of all similarly situated persons, by the undersigned attorneys, hereby
file this Class Action Appeal against Appellees Department of Homeland Security, a Federal

1 executive agency, United States Customs and Border Protection, a Federal executive agency,
2 Office of Air and Marine, a Federal law enforcement agency, and each of them, based upon
3 documentary evidence, the investigation of attorneys, interviews of potential witnesses and
4 persons knowledgeable of these events and alleges as follows:

5 **I.**

6 **NATURE OF ACTION**

7 1. This is an appeal brought pursuant to the Uniformed Services Employment and
8 Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301 et seq. (“USERRA”). It is brought by
9 Appellants on behalf of themselves and a nationwide Class of all persons similarly situated,
10 including current and former employees of DEPARTMENT OF HOMELAND SECURITY
11 (“DHS”), UNITED STATES CUSTOMS AND BORDER PROTECTION (“CBP”), and/or
12 OFFICE OF AIR AND MARINE (“OAM”) who were or are currently serving in the Reserve
13 Components of the United States Armed Services (“Reserves”) or National Guard (“Guard”).
14

15 **II.**

16 **PARTIES**

17 2. Appellant, BRIAN FERGUSON (“Ferguson”), is a citizen of the United States
18 and a resident of the State of California. He is currently employed by CBP through its OAM
19 as an Air Interdiction Agent (“AIA”). Ferguson is also a Commander in the United States
20 Navy Reserve. Appellant may be contacted through counsel whose information is detailed
21 above.

22 3. Appellant, ANDREAS HAU (“Hau”), is a citizen of the United States and a
23 resident of the State of California. He is currently employed by CBP through its OAM as an
24 Air Interdiction Agent (“AIA”). Hau is also a Lieutenant Colonel in the United States Air
25 Force Reserve. Appellant may be contacted through counsel whose information is detailed
26 above.

27 4. Appellant, ROB BRYANT (“Bryant”), is a citizen of the United States and a
28 resident of the State of California. He is currently employed by CBP through its OAM as an

1 Air Interdiction Agent (“AIA”). Bryant is also a Captain (Major Select) in the United States
2 Air Force Reserve. Appellant may be contacted through counsel whose information is
3 detailed above.

4 5. Appellant, JASON DUTCHER (“Dutcher”), is a citizen of the United States
5 and a resident of the State of Virginia. He applied to CBP through its OAM for employment
6 in June 2010 but his application was rejected, ostensibly because he failed a polygraph
7 examination. Dutcher was also a Lieutenant Commander in the United States Navy Reserve
8 at the time he applied for initial employment. Appellant may be contacted through counsel
9 whose information is detailed above.

10 6. Appellants are qualified employees and members of the uniformed services for
11 purposes of 38 U.S.C. §4303(3), (9), and (16).

12 7. Appellee DEPARTMENT OF HOMELAND SECURITY (“DHS”) is a Federal
13 executive agency of the United States with its principal office located at 301 7th Street
14 Southwest, Washington, D.C., 20528. At all relevant times DHS was and is an employer for
15 purposes of 38 U.S.C. § 4303(4)(A) and § 4323(i).

16 8. Appellee UNITED STATES CUSTOMS AND BORDER PROTECTION
17 (“CBP”) is a Federal executive agency of the United States and a child agency of DHS, with
18 its principal office located at 1300 Pennsylvania Avenue Northwest, Washington, D.C.,
19 20229. At all relevant times CBP was and is an employer for purposes of 38 U.S.C. §
20 4303(4)(A) and § 4323(i).

21 9. Appellee OFFICE OF AIR AND MARINE (“OAM”) is a Federal law
22 enforcement agency of the United States within CBP, with its principal office located at 1300
23 Pennsylvania Avenue Northwest, Washington, D.C., 20229. At all relevant times OAM was
24 and is an employer for purposes of 38 U.S.C. § 4303(4)(A) and § 4323(i)

25 10. Whenever and wherever reference is made to individuals who are not named as
26 Appellees in this action, but were employees/agents of Appellees, or any of them herein, such
27
28

1 individuals at all times acted on behalf of Appellees named in this action within the scope of
2 their respective employments and agencies.

3 11. Whenever and wherever reference is made in this Appeal to any conduct of
4 Appellees, or any of them, such allegations or references shall also be deemed to mean the
5 conduct of each Appellee, acting individually, jointly and severally.

6 12. Appellants are informed and believe, and on the basis of that information and
7 belief allege, that at all times mentioned in this Appeal, Appellees were the agents and
8 employees of their co-Appellees, and in doing the things alleged in this Appeal were acting
9 within the course and scope of that agency and employment.

10 **III.**

11 **JURISDICTION AND VENUE**

12 13. This appeal arises under USERRA, 38 U.S.C. §§4301-4333, and is brought
13 under 38 U.S.C. §4324. The jurisdiction of this Board is based on 5 C.F.R. §1208.2.

14 14. No grievance or other formal complaint has been filed in this matter. Pursuant
15 to 5 C.F.R. § 1208.11(a), “An appellant may file a USERRA appeal directly with the Board
16 under this subpart.”

17 15. Pursuant to 38 U.S.C. § 4323(h), “No fees or court costs may be charged or
18 taxed against any person claiming rights under [USERRA].”

19 **IV.**

20 **GENERAL ALLEGATIONS**

21 16. DHS, CBP and OAM are Federal executive agencies, employing more than
22 300,000 people total. Appellants are informed and believe and thereon allege that more than
23 one thousand (1,000) of DHS’s, CBP’s and OAM’s employees are members of the United
24 States Armed Services or National Guard.

25 17. Section 4301(b) of USERRA provides: “It is the sense of Congress that the
26 Federal Government should be a model employer in carrying out the provisions of this
27 chapter.”
28

1 18. Section 4311(a) of USERRA provides:

2 A person who is a member of, applies to be a member of, performs, has
3 performed, applies to perform, or has an obligation to perform service in a
4 uniformed service shall not be denied initial employment, reemployment,
5 retention in employment, promotion, or any benefit of employment by an
6 employer on the basis of that membership, application for membership,
7 performance of service, application for service, or obligation.

8 38 U.S.C. 4311(a).

9 19. A “benefit of employment” is defined as:

10 The term ‘benefit’, ‘benefit of employment’, or ‘rights and benefits’ means the
11 terms, conditions, or privileges of employment, including any advantage, profit,
12 privilege, gain, status, account, or interest (including wages or salary for work
13 performed) that accrues by reason of an employment contract or agreement or
14 an employer policy, plan, or practice and includes rights and benefits under a
15 pension plan, a health plan, an employee stock ownership plan, insurance
16 coverage and awards, bonuses, severance pay, supplemental unemployment
17 benefits, vacations, and the opportunity to select work hours or location of
18 employment.

19 38 U.S.C. 4303(2).

20 20. In its Fiscal Year 2010 report to Congress (published in July 2011), the
21 Department of Labor clarified its interpretation that a “benefit of employment” included a
22 freedom from workplace harassment and/or a hostile work environment:

23 “The Department of Labor considers it a violation of USERRA for an employer to
24 cause or permit workplace harassment, the creation of a hostile working environment,
25 or to fail to take prompt and effective action to correct harassing conduct because of an
26 individual’s membership in the uniformed service or uniformed service obligations.”

27 Department of Labor (USERRA) Fiscal Year 2010 Report to Congress.

28 21. 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

1 such membership, application for membership, service, application for service,
2 or obligation for service.

3 38 U.S.C. 4311(c).

4 22. Section 4312(f)(1) of USERRA provides:

5 A person who submits an application for reemployment in accordance with
6 subparagraph (C) [military leave more than 30 days but less than 181 days] or (D)
7 [military leave for more than 180 days] of subsection (e)(1) shall provide to the
8 person's employer (upon the request of such employer) documentation [of the military
9 leave] to establish that -- (A) the person's application is timely; (B) the person has not
10 exceeded the service limitations set forth in subsection (a)(2) (except as permitted
11 under subsection (c)); and (C) the person's entitlement to the benefits under this
12 chapter has not been terminated pursuant to section 4304.

13 38 U.S.C. 4312(f)(1).

14 23. Section 4316(a) of USERRA provides:

15 A person who is reemployed under this chapter is entitled to the seniority and other
16 rights and benefits determined by seniority that the person had on the date of the
17 commencement of service in the uniformed services plus the additional seniority and
18 rights and benefits that such person would have attained if the person had remained
19 continuously employed.

20 38 U.S.C. 4316(a).

21 24. Section 4316(d) of USERRA provides:

22 Any person whose employment with an employer is interrupted by a period of service
23 in the uniformed services shall be permitted, upon request of that person, to use during
24 such period of service any vacation, annual, or similar leave with pay accrued by the
25 person before the commencement of such service. No employer may require any such
26 person to use vacation, annual, or similar leave during such period of service.

27 38 U.S.C. 4316(d) (emphasis added).

28 25. Appellants and the Class they represent have been subject to Appellees'
continuous pattern of harassment in which Appellees have repeatedly chided and derided
Appellants and the Class for their military service through the use of discriminatory conduct
and derogatory comments regarding their military service and military leave obligations.

26 26. This wide-ranging pattern of harassment not only violates USERRA but shows
27 agency-wide policies of discrimination that are not limited to the acts of a few employees
28 acting on their own and shows that Appellees' numerous USERRA violations are intentional.

1 27. This harassment establishes that Appellants’ and the Class’ membership in the
2 Reserves or Guard is a motivating factor in denying employment benefits to Appellants and
3 the Class.

4 28. Appellants are informed, believe and thereon allege that Hans Crail (hereinafter
5 “Crail”) is a Supervisory Air Interdiction Agent (“SAIA”) in Appellees’ San Diego,
6 California Office and has and/or had supervisory and managerial control over members of the
7 Class.

8 29. Appellants are informed, believe and thereon allege that Scott Aktison
9 (hereinafter “Aktison”) was an AIA in Appellees’ San Diego, California Office and is now
10 the Acting Branch Chief, Air and Marine Basic Training Academy at the Federal Law
11 Enforcement Training Center (“FLETC”) in Glynco, Georgia, and has and/or had supervisory
12 and managerial control over members of the Class.

13 30. Appellants are informed, believe and thereon allege that Marty Miles
14 (hereinafter “Miles”) was at all times relevant the Deputy Director of Air Operations
15 (“DDAO”) in Appellees’ San Diego, California Office and has and/or had supervisory and
16 managerial control over members of the Class.

17 31. Appellants are informed, believe and thereon allege that Mike Howard
18 (hereinafter “Howard”) was at all times relevant an SAIA in Appellees’ San Diego, California
19 Office and has and/or had supervisory and managerial control over members of the Class.

20 32. Appellants are informed, believe and thereon allege that Kirk Gray (hereinafter
21 “Gray”) was at all times relevant an AIA in Appellees’ San Diego, California Office and had
22 supervisory and managerial control over members of the Class.

23 33. Appellants are informed, believe and thereon allege that Chris Riccardi
24 (hereinafter “Riccardi”) was at all times relevant an SAIA in Appellees’ San Diego,
25 California Office and has and/or had supervisory and managerial control over members of the
26 Class.

1 34. Appellants are informed, believe and thereon allege that John Micallef
2 (hereinafter “Micallef”) was at all times relevant an SAIA in Appellees’ San Diego,
3 California Office and has and/or had supervisory and managerial control over members of the
4 Class.

5 35. Appellants are informed, believe and thereon allege that Mark Marshman
6 (hereinafter “Marshman”) was at all times relevant a Supervisory Customs and Border
7 Protection Officer (SCBPO) in Appellees’ Buffalo, New York office and has and/or had
8 supervisory and managerial control over members of the Class.

9 36. Appellants are informed, believe and thereon allege that Sanjeev Shinde
10 (hereinafter “Shinde”) was at all times relevant an SAIA in Appellees’ Miami, Florida office
11 and has and/or had supervisory and managerial control over members of the Class.

12 37. Appellants are informed, believe and thereon allege that Erik Soykan
13 (hereinafter “Soykan”) was at all times relevant an SAIA in Appellees’ National Air Security
14 Operations Center, Sierra Vista, Arizona office and has and/or had supervisory and
15 managerial control over members of the Class.

16 38. Appellants are informed, believe and thereon allege that Rogelio “Roger”
17 Martinez (hereinafter “Martinez”) was at all times relevant first an SAIA then the DDAO in
18 Appellees’ McAllen, Texas office and has and/or had supervisory and managerial control
19 over members of the Class.

20 39. Appellants are informed, believe and thereon allege that Gustavo “Gus”
21 Gonzalez (hereinafter “Gonzalez”) was at all times relevant the DAO in Appellees’ McAllen,
22 Texas office and has and/or had supervisory and managerial control over members of the
23 Class.

24 40. Appellants are informed, believe and thereon allege that Randy Heberholtz
25 (hereinafter “Heberholtz”) was at all times relevant Appellees’ Acting Director for Southwest
26 Region and has and/or had supervisory and managerial control over members of the Class.
27
28

1 41. Harassing comments by Appellees and their management have been directed at
2 Appellants and numerous Class members¹ and include:

- 3 a. Comments by Appellees management, training and hiring personnel that the
4 company should not hire military applicants due to the inconvenience placed
5 on the Appellees' ability to schedule;
- 6 b. Comments by Crail to members of the Class including, but not limited to:
- 7 i. "We want to put you in this airplane, but with all this military leave
8 you are taking, we are probably not going to be able to do that.
9 However, if you would guarantee to us that you will not take
10 military leave, or only take leave during certain timeframes, or only
11 take a very limited number of military leave days then maybe we
12 could put you in that airplane."
- 13 ii. "You cannot just call in and tell us you are going on military leave
14 for thirty days starting yesterday without any notice."
- 15 c. Comments by Atkison regarding members of the Class including, but not
16 limited to:
- 17 i. "[Probation] should be [something longer than a year], because of all
18 the military guys who are always gone."
- 19 ii. "You're taking too much mil[itary] leave."
- 20 d. Comments by Miles regarding members of the Class including, but not
21 limited to:
- 22 i. "So are you still interested in a rotor transition or are your
23 commander duties keeping you too busy?"
- 24 e. Comments by Howard regarding members of the Class including, but not
25 limited to:
- 26 i. "You need to understand that that's [member's Reserve unit] not your
27 job, this is your job. Can you turn down the [Commanding Officer]
28 job?"

¹ Many Class members authorized the use of the comments made to them but will not reveal their identities for fear of reprisal and retaliation by Appellees and their supervisory employees.

- 1 f. Comments by Gray regarding members of the Class including, but not
2 limited to:
- 3 i. "I don't think I can send you [to a CBP training school] because of
4 your mil stuff, [I] can't risk you being gone too much."
- 5 g. Comments by Riccardi² regarding members of the Class including, but not
6 limited to:
- 7 i. "AIA [] has availability issues due to ML obligations." (denying said
8 Class member a quota at a firearms training school).
- 9 ii. "The schedule stands as posted and your days off are as printed."
10 (forcing said member to perform military on scheduled days off and
11 denying requested military leave days.)
- 12 iii. "Now, [] I want you to admit that I am not making you perform
13 military [leave] on your days off."
- 14 iv. Words to the effect of "This isn't a part-time job and we can't have
15 reservists here only three days per week."
- 16 v. Words to the effect of "What are we supposed to do with you for
17 only five to six hours per day if you take a few hours of mil[itary]
18 leave?"
- 19 vi. Words to the effect of "When I was in the National Guard, I
20 performed my military duties on a not-to-interfere basis with CBP."
- 21 vii. "You won't make it through the probationary period if you take too
22 much military leave."
- 23 h. Comments by Micallef regarding members of the Class including, but not
24 limited to:
- 25 i. Words to the effect of "This isn't a part-time job and we can't have
26 reservists here only three days per week."
- 27 ii. Words to the effect of "What are we supposed to do with you for
28 only five to six hours per day if you take a few hours of mil[itary]

² A Class member's comment: "Chris Riccardi has been the most anti-reservist supervisor at Brown Field and most likely in the entire Branch."

1 leave?”

2 iii. “I wouldn’t have hired all you military guys.”

3 iv. Words to the effect of “You military guys are more trouble than
4 you’re worth and I would fire you if I could.”

5 v. Telling a Class member that he would have to retire from the
6 National Guard before a transfer to another CBP branch would be
7 approved.

8 i. Comments by Marshman regarding members of the Class including, but not
9 limited to:

10 i. Asking a Class member if he “volunteered” for his upcoming military
11 obligations or if they were “making him go.”

12 j. Comments by Shinde regarding members of the Class including, but not
13 limited to:

14 i. Directing a Class member that he “would not go to ESGR with this
15 complaint” in reference to the Class member’s complaint about being
16 charged annual leave when performing military service.

17 ii. Telling the same Class member that using his annual leave [when on
18 military orders] would be beneficial to him.

19 iii. Words to the effect that the Class member “would be screwing every
20 other Reservist in the office by demanding a change to the COSS
21 [military leave input system].”

22 k. Comments by Soykan regarding members of the Class including, but not
23 limited to:

24 i. Asking a Class member if he would consider joining the Individual
25 Ready Reserve so he would not have to go on military leave any
26 longer.

27 l. Comments by Martinez regarding members of the Class including, but not
28 limited to:

i. Asking a Class member if it was “mandatory” that he attend drill or if

1 he was “just volunteering.”

2 ii. In an email dated May 28, 2008, “I know you and I have spoken
3 about your military leave and in fact it’s on the schedule, but I don’t
4 think we have a choice about the pending Spanish Class. I’ll check
5 into it, but the ‘needs of the service’ [CBP] will take priority.”

6 iii. In an email dated June 1, 2008, “As I mentioned to you earlier, needs
7 of the service takes (sic) priority over anything else. Unless the
8 D.A.O. Tells (sic) me different (sic) plan on attending Spanish Class
9 as scheduled.”

10 iv. In an email dated February 27, 2008, “This is not the military folks,
11 you are supposed to be professionals...”

12 m. Comments by Heberholtz regarding members of the Class including, but not
13 limited to:

14 i. “Look, the General [Asst. Commissioner Michael Kostelnik] gets
15 briefed on this every week, this [BSTP] needs to get done, he knows
16 all about how USERRA works, and the military is not going to keep
17 you out of this, you’re going, this fiscal year.”

18 n. One of Appellees’ supervisors asking another supervisor: “Do I have to give
19 him days off for Reserve duty?”

20 o. “You get weekends off; your Reserve duty.”

21 p. “When are you coming back to do your real job?”

22 q. Discussing a proposed night scheduling period with a Class member who
23 was responsible for approving any Risk Assessments relating to scheduling,
24 “[you] will just drop mil[itary] leave if you see [night rotation] in your
25 schedule.”

26 42. Harassing and discriminatory acts by Appellees management toward the Class
27 and thereby denying them benefits of employment have included:

28 a. Denying members of the Class certain formal school and/or training courses
when they would otherwise be qualified to attend because military service

1 obligations kept them from attending previous schools and/or training
2 courses;

- 3 b. Removing qualifications from Class members (or “de-designating” them)
4 for failing to complete certain “mandatory” training when military service
5 obligations conflicted with the training and/or when the member was on
6 military leave, and when non-military affiliated agents who failed to
7 complete the same training were allowed to keep their qualifications and/or
8 designations;
- 9 c. Pressuring and/or forcing Class members to cancel military leave to
10 complete certain “mandatory” training at a specific time chosen by
11 Appellees;
- 12 i. One Class member who wishes to remain anonymous for fear of reprisal
13 said: “I informed our FLETC class advisor that I was ready to go [to
14 training] but had a two week military obligation that I committed to prior
15 to attending FLETC. As a new hire on first year probation I certainly felt
16 pressured into cancelling my military leave and going to [training]. I did
17 cancel my military orders and went to [training] to avoid any
18 repercussions while on probation.”
- 19 d. Requiring Class members to turn in their weapons and badges when on
20 military leave for periods in excess of 30 days, but not requiring non-
21 military-affiliated employees who are on similar forms of leave in excess of
22 30 days (annual leave, sick leave, etc.) to turn in their weapons and badges;
- 23 e. Acts by Crail regarding members of the Class including, but not limited to;
- 24 i. Attempting to order a Class member who was on military leave to leave
25 his military duty station and report to work for Appellees on the same
26 day. (The Class member refused this illegal order.)
27
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28
- f. Acts by Riccardi regarding members of the Class including, but not limited to:
 - i. Threats to call a Class member’s Reserve commanding officer and have him pulled from a military leave obligation.
 - ii. Repeatedly denying a Class member’s requested days off in the schedule “wish list” and initialing the denial “CR.”
 - iii. Demanding the phone number to a Class member’s commanding officer so he could “validate” a military leave request of five days.
 - g. Acts by Soykan regarding members of the Class including, but not limited to:
 - i. Calling and emailing a Class member’s Reserve commanding officer without his knowledge to question the member’s military service obligations and attempting to schedule the Class member’s military leave periods without the member’s input.
 - h. Acts by Martinez regarding members of the Class including, but not limited to:
 - i. Calling a Class member’s Reserve command to question the member’s military service obligations and questioning the member’s loyalty to CBP and whether the member “had” to attend military duty.
 - i. Charging Class members annual leave rather than a military leave without pay (“LWOP”) day despite the member’s military service on that day;
 - j. Appellees’ condescending attitude towards and comments about Class members taking military leave;
 - k. Appellees scheduling of an “off day” on a Class member’s schedule rather than a military leave day (LWOP) despite the member’s military service on that day;
 - l. Pressure to perform military service on days off;

- 1 m. Orders to perform military service on days off;
- 2 n. Refusal to approve military leave until the member's submission of orders
- 3 for military leave periods of less than 30 days;
- 4 o. Refusal to properly charge a member's military leave as LWOP and instead
- 5 charging the Class member annual leave until the member's submission of
- 6 orders for military leave periods of less than 30 days;
- 7 p. A Deputy Director of Air Operations ("DDAO") forcing a Class member to
- 8 cancel military leave that had been scheduled weeks in advance in order for
- 9 that member to attend a CBP training course. The member showed up for
- 10 the training course to find out that he was ineligible for the course and had
- 11 cancelled his military leave for no reason;
- 12 q. In 2005, a Tucson Air Operations Branch ("TAOB") Supervisor demanding
- 13 on no fewer than three occasions that a Class member change his military
- 14 leave schedule to accommodate TAOB. The same Class member was told to
- 15 submit "leave requests" to attend his military obligations.

16 43. Appellees ratified each and every act of harassment performed by their

17 employees and/or by refusing to act on or investigate complaints made by members of the

18 Class.

19 44. This anti-military environment caused and allows discriminatory practices

20 against Class members with military service obligations.

21 45. The specific acts perpetrated by Appellees by and through its managerial

22 employees including but not limited to Crail, Atkison, Miles, Howard, Gray, Riccardi,

23 Micallef, Marshman, Shinde, Soykan, Rodriguez, Gonzalez, Heberholtz and others,

24 constituted a pattern and practice of intentional harassment related to the Class' service

25 obligations and military affiliation.

26

27

28

1 46. CBP Directive Chapter 7.1.6 reads, in relevant part: “An employee must turn in
2 the assigned badge and/or credential when...Recalled/mobilized for active military duty for
3 30 days or more...”

4 47. On August 26, 2010 on its website, CBP defined its “Extended Military Duty-
5 Responsibilities Outlined.” In this definition under “Supervisors” it reads: “Will ensure that
6 employees, activated into military service for more than 30 days, turn in all government
7 property, such as their identification badge, credentials, keys, weapons, etc., and that any
8 property handed over is documented (cosign a receipt for all items turned in).”

9 48. When directly asked about one, Appellees could not identify any CBP policy
10 that requires non-military-affiliated employees to turn in their government property when
11 they take other forms of leave (e.g., annual leave, sick leave) for periods of more than 30
12 days.

13 49. When Class members who were subject to this discriminatory policy
14 nonetheless complied with it and asked for documentation regarding the property
15 (specifically weapons) they had turned in, Appellees failed to provide such documentation
16 and in doing so violated their own policies and procedures.

17 50. On November 9, 2012, Appellees instituted a retroactive policy that read:
18 “Effective November 9, 2012, any OAM employee who does not complete **any phase** of their
19 mandatory basic training within the timelines established by policy will not be eligible for
20 **any designation** until they have complied with policy.”(emphasis in original)

21 51. When Appellant Ferguson was hired in 2007, there was no “mandatory basic
22 training” other than completing FLETC of which he or any other Class member was aware,
23 nor was he or any other Class member aware that attending a Basic Spanish Training
24 Program (“BSTP”) was a “hiring requirement.”

25 52. In 2009 Ferguson and other Class members in the San Diego office were told
26 that BSTP had always been a “hiring requirement” or “condition of employment” and that
27 they were required to attend.
28

1 53. Class members in the San Diego office questioned in writing that BSTP was a
2 “hiring requirement” or “condition of employment” after which the CBP Assistant
3 Commissioner of Air and Marine, Michael Kostelnik and CBP Executive Director, Test,
4 Training, Safety, and Standards, Steve Pitotti, issued a memo in February 2009 changing
5 BSTP to a “basic training requirement.”

6 54. This “basic training requirement” was not mandated for every AIA, just those
7 hired between certain dates, many of whom are or were Class members.

8 55. Appellees’ Primary Aviation Survival School (“PASS”) is a CBP “mandatory
9 basic training” requirement for which waivers can be granted for agents who have
10 successfully completed a course that accomplishes most, if not all, of the PASS objectives.

11 56. Naval Aviators, including many Class members, complete a quadrennial
12 requalification in United States Navy sponsored Water Survival and Physiology course that is
13 more comprehensive than CBP’s PASS.

14 57. Class members who submitted waivers for PASS based on completion of their
15 service’s water survival training were denied.

16 58. Class members were routinely scheduled for PASS during periods when their
17 military leave obligations would not allow them to attend PASS.

18 59. Class members who were unable to complete the “mandatory basic training”
19 due to military service commitments were “de-designated” and removed from their primary,
20 operational billets, denying them a benefit of employment.

21 60. In Appellees’ San Diego office, this “de-designation” policy only applied to
22 five individuals, all of whom were Class members.

23 61. On information and belief, numerous Appellees’ non-military affiliated
24 employees did not complete the various, mandatory “basic training requirements” but were
25 never “de-designated” and are still performing their duties as they were when originally hired,
26 and without completing the BSTP.
27
28

1 62. Section 4312 of USERRA (as explained in 5 CFR §1001.121) does not require
2 an employee to provide written documentation of military leave periods less than 30 days in
3 duration.

4 63. Appellees’ most current “ENTITLEMENT TO AND COMPENSATION
5 DURING MILITARY LEAVE” Directive (“Military Leave Directive”) contains several
6 provisions that are direct and unambiguous violations of USERRA.

7 64. Paragraph 4.5 of the Military Leave Directive reads, in relevant part,
8 “Employees are responsible for providing proper documentation (i.e., written orders) prior to
9 or upon their return from military leave.”

10 65. On March 19, 2012, one of Appellees’ Supervisors at the San Diego Air and
11 Marine Branch wrote in an email: “All Military Reservists... Management and Payroll
12 request that you all provide orders, drill letters or memos for periods of military service
13 of **less than 30 days**, preferably in advance and if that’s not feasible, shortly thereafter. This
14 will assist us with documenting periods of absence for our record-keeping and periodic T &
15 A audits.” (bold in original)

16 66. On March 20, 2012 that same Supervisor wrote in another email: “I do know
17 that its (sic) not a written policy for you to provide us [30 days or less] with documentation,
18 but we can certainly encourage it.... :) thus making it easier on us in some many
19 administrative ways.”

20 67. On May 7, 2012, one of Appellees’ employees, the Director of the Miami Air
21 and Marine Branch, wrote in an email: “Read below, this message was sent out March 20 to
22 everyone. Written orders for military duty are required prior to or upon return from military
23 duty. Below are the pertinent paragraphs taken from the CBP Directive on Military Leave,
24 which is attached. The *verbal* term may have misled some to believe they only had to
25 verbally inform their Supervisor of a pending military assignment / drill. This should be
26 interpreted as: The employee will verbally confirm there does exist written confirmation of
27 military service, and he/she will produce those orders upon return to work. ... Attach a copy
28

1 of the military orders to the Leave Slip and turn in with the time card. The timekeeper will
2 need these documents to facilitate the audit.” (Emphasis in original)

3 68. Appellants’ and the Class’ service obligations were a motivating factor in
4 Appellees’ decision to require Class members to provide written documentation of military
5 leave periods less than 30 days in duration.

6 69. Sections 4313 and 4314 of USERRA define the terms under which Appellees
7 must re-employ Class members upon their return from military leave.

8 70. Class members are General Service (“GS”) employees. The GS pay scale is
9 separated into fifteen grades and ten steps within each grade. The progression between steps
10 (or “step increase”) is based on serving a prescribed period in each step in a satisfactory
11 manner, and is “seniority-based.”

12 71. Sections 4313 and 4314 of USERRA (as explained in 5 CFR §1001.191)
13 provide that an employee reemployed after a period of military service is reemployed based
14 on the “escalator principle” which requires that the employee be reemployed in a position that
15 reflects with reasonable certainty the pay, benefits, seniority and other job perquisites, that he
16 or she would have attained if not for the period of service.

17 72. In an email to members of the Class regarding “step-increases,” one of
18 Appellees’ supervisors wrote, “To get credit back for the time you do on military duty you
19 are allowed to *buy that time back.*”(emphasis added)

20 73. In another, separate email to members of the Class regarding “step-increases,”
21 one of Appellees supervisors wrote, “When you have LWOP time during the year, LWOP
22 time affects the date of your step increase and your date is moved forward.”

23 74. Appellants’ and the Class’ service obligations were a motivating factor in
24 Appellees’ failure to accurately calculate and timely provide Class members “step increases”
25 to which they were entitled.
26
27
28

1 75. Section 4316(d) of USERRA provides that no employer may require an
2 employee who takes military leave to use vacation, annual, or similar leave during such
3 period of service.

4 76. On his May 7, 2012 email, the Director of the Miami Air and Marine Branch
5 wrote: “There are several instances pending in the current Pay Period (PP 09) for Military
6 Leave. These dates will be changed to Annual Leave. When documentation is presented that
7 the employee was on military orders, the Annual Leave will be corrected to Military Leave
8 through a timecard amendment.”

9 77. Section 4311(a) of USERRA provides that a person who is a member of a
10 uniformed service shall not be denied initial employment on the basis of that membership.

11 78. On information and belief, Appellant Dutcher and members of the Applicant
12 Subclass were denied initial employment based on their membership in the United States
13 Armed Services or National Guard.

14 79. On information and belief, and thereon alleged, polygraph examinations are or
15 were administered to applicants with military service obligations at an unreasonably higher
16 and inexplicably rate than to those applicants without military service obligations.

17 80. On information and belief, and thereon alleged, applicants with military service
18 obligations fail the polygraph examinations at an unreasonably and inexplicably higher rate
19 than do those applicants without military service obligations.

20 81. The Class’ obligations and membership in the uniformed services was and is a
21 motivating factor in all discriminatory, harassing and hostile actions Appellees have taken
22 against the Appellants.

23 **Appellant Brian Ferguson’s Experiences with Appellees**

24 82. Throughout the entirety of his employment with CBP, Appellant Ferguson has
25 been a Lieutenant Commander then Commander in the United States Naval Reserve. From
26 April 2010 through December 2012, Ferguson was the Executive Officer (“XO”) of his
27
28

1 Reserve Unit and since December 2012 he has been the Commanding Officer (“CO”) of his
2 Reserve Unit.

3 83. Ferguson’s Reserve Unit, VFC-13, is based at Naval Air Station Fallon, Nevada
4 and provides adversary support and tactical training for Navy, Marine Corps and Air Force
5 fighter squadrons for five to six days per week.

6 84. Ferguson’s Reserve Unit requires him to perform varying service obligations
7 each month. Since April 2010, those obligations have continued to increase in frequency and
8 importance to the mission success of his unit and the United States Armed Services.

9 85. Each month Ferguson provides reasonable notice regarding his military leave
10 schedule when possible.

11 86. From the start of his employment with CBP, Ferguson has received numerous
12 commendations, accolades and other awards, including incentive pay bonuses, as a result of
13 his exceptional performance as an Air Interdiction Agent.

14 87. From the start of his employment, Appellees, by and through Ferguson’s
15 supervisors, harassed and criticized him for his military service. Harassing acts included:

- 16 a. During his initial interview process, Ferguson was asked several times if he was
17 a Reservist, and if he intended to continue participating in the Reserves if he
18 was hired;
- 19 b. Repeatedly demanding that Ferguson provide military orders prior to
20 performing his service obligations to justify his military leave for periods of
21 less than 30 days;
- 22 c. SAIA Riccardi told Ferguson via email that if he did not provide written orders
23 evidencing his upcoming military commitments that he would be unilaterally
24 scheduled for BSTP regardless of any military service obligations;
- 25 d. Ferguson was asked on multiple occasions to provide a formal written letter
26 from the squadron Commanding Officer (CO) verifying the fact that he was
27
28

1 “essential personnel,” and that his absence for 10 weeks (for BSTP) would
2 place undue burden on the unit;

- 3 e. In October 2011, after presenting the requested letter from his CO, Ferguson
4 was asked to provide a personal letter to the agency outlining his availability,
5 and reasons for his lack thereof;
- 6 f. In mid-2012, after assuming command of VFC-13, Ferguson was again asked
7 for his availability periods;
- 8 g. Attempting to force Ferguson to attend training courses during periods when
9 Ferguson would be on military leave;
- 10 h. Pressuring Ferguson to cancel military leave periods.

11 88. From the start of his employment, Appellees, by and through Ferguson’s
12 supervisors denied him benefits of employment including, but not limited to:

- 13 a. De-designating Ferguson of all his designations on November 9, 2012 “due to
14 non-compliance with the **Required Completion of Mandatory Basic**
15 **Training SOP.**” (emphasis in original)
- 16 b. Miscalculating and unreasonably delaying Ferguson’s “step-increase” in pay,
17 thereby denying him the reasonable rate of return on his earnings from the date
18 he was entitled to them.
- 19 c. Failing to categorize Ferguson as a veteran for government service start date
20 purposes despite Ferguson having submitted his DD-214 (Certificate of Release
21 or Discharge from Active Duty) to Appellees on several occasions.

22 **Appellant Andreas Hau’s Experiences with Appellees**

23 89. Throughout the entirety of his employment with CBP, Appellant Hau has been
24 a Lieutenant Colonel United States Air Force Reserve.

25 90. Hau’s Reserve Unit requires him to perform varying service obligations each
26 month.

1 91. Each month Hau provides reasonable notice regarding his military leave
2 schedule when possible.

3 92. From the start of his employment, Appellees, by and through Hau’s supervisors,
4 harassed and criticized him for his military service. Harassing acts included:

- 5 a. Repeatedly demanding that Hau provide military orders prior to performing his
6 service obligations to justify his military leave for periods of less than 30 days;
- 7 b. Repeatedly calling and/or demanding contact from Hau’s Reserve command to
8 verify the timing and purpose of his military leave absences;
- 9 c. Attempting to force Hau to attend training courses during periods when Hau
10 would be on military leave;
- 11 d. Pressuring Hau to cancel military leave periods.

12 93. From the start of his employment, Appellees, by and through Hau’s supervisors
13 denied him benefits of employment including, but not limited to:

- 14 a. De-designating Hau of all his designations on November 9, 2012 “due to non-
15 compliance with the **Required Completion of Mandatory Basic Training**
16 **SOP.**” (emphasis in original);
- 17 b. Miscalculating and unreasonably delaying Hau’s “step-increase” in pay,
18 thereby denying him the reasonable rate of return on his earnings from the date
19 he was entitled to them;
- 20 c. Forcing Hau to turn in his badge, credentials and weapon when on military
21 leave in excess of 30 days.

22 **Appellant Rob Bryant’s Experiences with Appellees**

23 94. Throughout the entirety of his employment with CBP, Appellant Bryant has
24 been a Captain in the United States Air Force Reserve. Bryant has been selected for Major
25 and will be promoted in May 2013.

26 95. Bryant’s Reserve Unit requires him to perform varying service obligations each
27 month.
28

1 All past and present employees of DHS, CBP and/or OAM who are or were members
2 of the United States Armed Services or National Guard

3 100. Appellants Ferguson, Hau and Bryant seek to represent the following subclass
4 (hereinafter the “Employee Subclass”):

5 All past and present employees of DHS, CBP and/or OAM who are or were members
6 of the United States Armed Services or National Guard and who have taken military
7 leave between January 1, 1994 and the present while employed by DHS, CBP and/or
8 OAM

9 101. Appellant Dutcher seeks to represent the following subclass (hereinafter the
10 “Applicant Subclass”):

11 All those individuals who applied for employment at DHS, CBP and/or OAM between
12 January 1, 1994 and the present who were not hired due to their military service
13 obligations

14 102. Numerosity (Fed R. Civ. P. 23(a)(1)): The Class is so numerous that joinder of
15 all individual members in one action is impracticable and unfeasible. The disposition of their
16 claims through this action will benefit both the parties and this Court

17 103. Appellants are informed and believe and thereon allege that the Class and
18 Subclasses consist of, at a minimum, 100 individual members.

19 104. The exact sizes of the Class and Subclasses are ascertainable through
20 Appellees’ records, including, but not limited to, Appellees’ employment and human
21 resources records.

22 105. Members of the Class and Subclasses may be notified of the pendency of this
23 action by techniques and forms commonly used in class actions, such as by first class mail,
24 email notice, website notice, or combinations thereof, or by other methods suitable to this
25 class and deemed necessary and/or appropriate by the Court.

26 106. Typicality (Fed. R. Civ. P. 23(a)(3)): Appellants’ Ferguson’s, Hau’s and
27 Bryant’s claims are typical of the claims of the Class and Employee Subclass. Appellant
28

1 Dutcher's claims are typical of the claims of the Class and Applicant Subclass. The claims of
2 Appellants and members of the Class and the respective Subclasses are based on the same
3 legal theories and arise from the same unlawful conduct.

4 107. Appellants and members of the Class and Subclasses are or were employees or
5 employee applicants of Appellees and are or have served in the United States Armed Services
6 or National Guard.

7 108. Common Questions of Fact and Law (Fed. R. Civ. P. 23(a)(2) and b(3)): There
8 is a well-defined community of interest and common questions of fact and law affecting the
9 members of the Class and the respective Subclasses.

10 109. The questions of law and fact common to the Class the respective Subclasses
11 predominate over questions affecting only individual members of the Class and the respective
12 Subclasses and include the following, without limitation:

- 13 a. Whether Appellees maintained a culture of discrimination against the Class due
14 to their service and/or affiliation with the United States Armed Services or
15 National Guard, by including, but not limited to, denying military leave,
16 discouraging military leave, ordering members of the Class to perform civilian
17 duties when military leave had been properly requested, requiring written
18 documentation of military leave for periods of less than thirty days, charging
19 annual leave when members of the Class were on military leave, and making
20 derogatory comments to and about the Class for their United States Armed
21 Services or National Guard affiliation and/or service obligations;
- 22 b. Whether Appellees' hiring policies and procedures, including, but not limited
23 to, the administration of polygraphs during the application process, discriminate
24 against the Applicant Subclass on the basis of their United States Armed
25 Services or National Guard affiliation and/or service obligations;
- 26 c. Whether Appellees' acts, practices, policies and procedures have violated
27 USERRA by denying benefits of employment of the Class and Subclasses;
28

- 1 d. Whether Appellees' acts, practices, policies and procedures have violated
2 USERRA by denying employment to members of the Applicant Subclass;
3 e. Whether Appellees' conduct, as set forth herein, injured members of the Class
4 and Subclasses;
5 f. Whether injunctive and other equitable remedies for the Class and Subclasses
6 are warranted, and;
7 g. Whether members of the Class and Subclasses are entitled to damages,
8 including recovery of costs and/or reasonable attorneys' fees based on
9 Appellees' conduct as alleged herein.

10 110. Adequacy of Representation (Fed. R. Civ. P. 23(a)(4)): Appellants are adequate
11 representatives of the Class and respective Subclasses because their interests do not conflict
12 with the interests of the Class or Subclasses which Appellants seek to represent. Appellants
13 will fairly, adequately, and vigorously represent and protect the interests of the Class and
14 Subclasses through their attorneys and have no interests antagonistic to the Class or
15 Subclasses. Appellants have retained adequate counsel who have substantial experience and
16 success in the prosecution of class actions and complex business litigation matters.

17 111. Superiority (Fed. R. Civ. P. 23(a) and 23(b)(3)): The nature of this action and
18 the nature of the laws available to the Class and Subclasses make use of the class action
19 format a particularly efficient and appropriate procedure to afford relief to the Class and
20 Subclasses for the wrongs alleged. Further, this case involves large Federal agency employers
21 and a large number of individual employees and employee applicants with many relatively
22 small claims with common issues of law and fact. If each employee or employee applicant
23 was required to file an individual lawsuit, Appellees would necessarily gain an
24 unconscionable advantage since they would be able to exploit and overwhelm the limited
25 resources of each individual Appellant with their vastly superior financial and legal resources.
26 As a result, the expense and burden of individual litigation makes it economically infeasible
27 and procedurally impracticable for each member of the Class and/or Subclasses to
28

1 individually seek redress for the wrongs done to them. Requiring each member of the Class
2 and/or Subclasses to pursue an individual remedy would also discourage the assertion of
3 lawful claims by employees who would be disinclined to pursue an action against their
4 present and/or former employer for an appreciable and justifiable fear of retaliation and
5 permanent damage to their careers at their present and/or subsequent employment. Proof of
6 common business practices or factual patterns, which the named Appellants experienced, is
7 representative of the Class and Subclasses and will establish the right of each Class and/or
8 Subclass Member to recovery on the causes of action alleged.

9
10 112. The likelihood of individual Class and/or Subclass members prosecuting
11 separate claims is remote. The prosecution of separate actions by the individual Class and/or
12 Subclass Members, even if possible, would create a substantial risk of inconsistent,
13 contradictory or varying verdicts or adjudications with respect to the individual Class and/or
14 Subclass Members against Appellees, and would establish potentially incompatible standards
15 of conduct for Appellees and/or legal determinations with respect to individual Class and/or
16 Subclass Members which would, as a practical matter, be dispositive of the interest of other
17 Class and/or Subclass Members not parties to the adjudications or which would substantially
18 impair or impede the ability of the class members to protect their interests. Individualized
19 litigation would also increase the delay and expense to all parties and the court system
20 resulting from multiple trials of the same factual issues. In contrast, the conduct of this matter
21 as a class action presents fewer management difficulties, conserves resources of the parties
22 and the court system, and would protect the rights of each member of the Class and respective
23 Subclasses. Further, the claims of the individual Class and/or Subclass Members are not
24 sufficiently large to warrant vigorous prosecution considering all of the concomitant costs and
25 expenses attending thereto. Appellants know of no difficulty to be encountered in the
26 management of this action that would preclude its maintenance as a class action.

27 113. Class certification is also appropriate pursuant to Fed. R. Civ. Proc. Rule
28 23(b)(2) because DHS, CBP and/or OAM have acted on grounds generally applicable to the

1 Class, making appropriate compensatory, declaratory and injunctive relief to Appellants and
2 the Class as a whole. The Class and Subclass Members are entitled to compensatory,
3 declaratory and injunctive relief to end Appellees’ acts and practices that have denied
4 members of the Class and Employee Subclass certain benefits of their employment and have
5 denied members of the Applicant Subclass employment.

6
7 **VI.**
8 **FIRST CAUSE OF ACTION FOR VIOLATIONS OF**
9 **THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT**
10 **RIGHTS ACT OF 1994, 38 U.S.C. §§4301 et seq.**

11 (On Behalf of Appellants Ferguson, Hau, Bryant and the Employee Subclass
12 as Against All Appellees)

13 114. Appellants re-allege and incorporate herein by reference each and every
14 allegation within paragraphs 1-113 inclusive, as though set forth at length herein and made a
15 part hereof.

16 115. Appellants and the Employee Subclass they represents are persons protected
17 under USERRA, 38 U.S.C. §§4301-4333.

18 116. Appellees, and each of them, knowingly and willfully violated Section 4311 of
19 USERRA by denying Appellants and members of the Employee Subclass benefits of
20 employment through discriminatory practices including, but not limited to, subjecting the
21 Employee Subclass to a hostile work environment, discrimination and harassment.

22 117. Appellees, and each of them, knowingly and willfully violated Section 4312 of
23 USERRA by forcing Appellants and members of the Employee Subclass to provide written
24 documentation of military leave periods of 30 days or less in duration.

25 118. Appellees, and each of them, knowingly and willfully violated Sections 4313
26 and 4314 of USERRA by failing to accurately calculate and timely provide Appellants and
27 members of the Employee Subclass seniority-based benefits of employment, or “step
28 increases,” to which they were entitled.

1 126. Appellants re-allege and incorporate herein by reference each and every
2 allegation within paragraphs 1-125 inclusive, as though set forth at length herein and made a
3 part hereof.

4 127. Appellant Dutcher and the Applicant Subclass he represents are persons
5 protected under USERRA, 38 U.S.C. §§4301-4333.

6 128. Appellees have violated USERRA by denying initial employment to the
7 Applicant Subclass based on their military service.

8 129. Upon information and belief, Appellees have repeatedly made comments to
9 members of the Applicant Subclass during the application process indicating that the
10 applicant's affiliation with the military made it difficult for Appellees to hire the applicant
11 because the individual may have future military commitments.

12 130. Upon information and belief, Appellees have repeatedly refused to hire
13 members of the Applicant Subclass because they may have future military obligations.

14 131. Upon information and belief, Appellees administer polygraph tests during the
15 application process randomly, arbitrarily and at an unreasonably higher rate to members of
16 the Applicant Subclass than to applicants with no military service affiliation.

17 132. Upon information and belief, an unreasonably and inexplicably higher
18 percentage of applicants with military service affiliations fail the polygraph tests than do
19 applicants with no military service affiliation.

20 133. USERRA requires employers to treat all applicants for employment similarly
21 regardless of their military service affiliation and obligations.

22 134. By repeatedly discriminating against Appellant Dutcher and the Applicant
23 Subclass through their refusal to hire members of the Applicant Subclass, Appellees have
24 violated §4311 of USERRA.

25 135. Appellant' Dutcher's and the Applicant Subclass' service obligations were a
26 motivating factor in the discriminatory actions Appellees have taken against Appellant and
27 the Applicant Subclass.
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

VII.

PRAYER FOR RELIEF

WHEREFORE, based on the foregoing, Appellants pray for relief against Appellees, and each of them, as follows:

1. Declare that the acts and practices complained of herein are unlawful and are in violation of USERRA, 38 U.S.C. § 4301, et.seq.;

2. Determine that this action may proceed and be maintained as a class action, designating Appellants as Lead Appellants, and certifying Appellants as class representatives under Rule 23 of the Federal Rules of Civil Procedure and their counsel as lead counsel, and designating Appellant as representative of the Class and his counsel of record as Class Counsel;

3. Require that DHS, CBP and OAM fully comply with the provisions of USERRA by providing Appellants and Class Members all employment benefits denied them as a result of the unlawful acts and practices under USERRA described herein, including, but not limited to, the freedom from a hostile work environment, discrimination and harassment;

4. Enjoin DHS, CBP and OAM from taking any action against Appellants that fails to comply with the provisions of USERRA;

5. Require that DHS, CBP and OAM reinstate all members of the Applicant Subclass Members who desire to be reinstated after being wrongly denied initial employment;

6. Award Appellants fees and expenses, including attorneys' fees pursuant to 38 U.S.C. §4323(h);

7. Award Appellants prejudgment interest on the amount of lost wages or employment benefits found due.

8. Order that Appellees pay liquidated damages in an amount equal to the amount of lost compensation and other benefits suffered by reason of DHS's, CBP's and OAM's willful violations of USERRA;

9. For costs of suit incurred:

