No. _____

In The Supreme Court of the United States

DEREK CARDER, MARK BOLLETER, DREW DAUGHERTY, and ANDREW KISSINGER, on behalf of themselves and others similarly situated,

Petitioners,

v.

CONTINENTAL AIRLINES, INC., a Delaware Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Uniformed Services Employment and Reemployment Rights Act ("USERRA") provide servicemembers a cause of action when their civilian workplace is so poisoned with harassment based upon military status that it is "sufficiently severe or pervasive to alter conditions of [their] employment?" *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

PARTIES TO THE PROCEEDING

Petitioners are Derek Carder, Mark Bolleter, Drew Daugherty, and Andrew Kissinger, on behalf of themselves and others similarly situated.

Respondent is Continental Airlines, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Derek Carder, et al., respectfully request this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit, entered in this case on March 22, 2011.

OPINIONS BELOW

The November 30, 2009 opinion of the United States District Court, Southern District of Texas, Houston Division is reported at *Carder v. Continental Airlines, Inc*., Civil Action No: 4:09-cv-03173, 2009 WL 4342477 (S.D. Texas, Nov. 30, 2009). App. at 28. The District Court's January 6, 2010 order certifying the hostile work environment claim for appeal pursuant to 28 U.S.C. §1292(b) is set forth at App. at 26. The United States Court of Appeals for the Fifth Circuit's February 18, 2010 per curiam order granting the interlocutory appeal is set forth at App. at 25. The March 22, 2011 opinion of the United States Court of Appeals for the Fifth Circuit is published at *Carder v. Continental Airlines, Inc.*, 636 F.3d 172 (5th Cir. 2011) and set forth at App. at 1.

STATEMENT OF JURISDICTION

The Fifth Circuit Court of Appeals entered its final judgment on March 22, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Uniformed Services Employment and Reemployment Rights Act ("USERRA") specifically sets forth its stated purpose in 38 U.S.C. § 4301(a)(3), which provides that:

> (a) The purposes of this chapter are . . .
>
> (3) to prohibit discrimination against persons because of their service in the uniformed services.

USERRA also prohibits an employer from denying a servicemember any benefit of employment because of his or her service to the military. Section 4311(a) provides in pertinent part that:

> (a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service 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.

USERRA's defines "benefit," "benefit of employment," or "rights and benefits" as:

> [A]ny advantage, profit, privilege, gain, status, account, or interest (including 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 . . .

38 U.S.C. § 4303(2).

STATEMENT OF THE CASE

I. Overview

This case concerns the scope of protections afforded by USERRA to United States servicemembers and, particularly, whether Derek Carder and others may assert a claim under USERRA for freedom from harassment on the basis of their military service. USERRA's purpose, which is to prohibit discrimination toward servicemembers on the basis of their military service, prohibits, in part, an employer from denying a servicemember a "benefit of employment" due to his or her military affiliation.

Derek Carder and the other petitioners, employees of Respondent as well as members of the United

States Armed Forces Reserves and Air National Guard, filed suit against Respondent under USERRA alleging, *inter alia*, harassment based on their military service.[1] At the time Lieutenant Commander Carder and others initiated this lawsuit, virtually every district court previously confronted with the issue of whether freedom from harassment is cognizable under USERRA held that it is and permitted employees to proceed on hostile work environment claims.

When Continental Airlines challenged the viability of the hostile work environment claims, the United States District Court for the Southern District of Texas erroneously limited its interpretation solely to the text of the statute and concluded that the term "benefit of employment" does not include a freedom from a hostile work environment claim. The district court thereafter dismissed the hostile work environment claim from the underlying lawsuit.[2] Upon appeal before the Fifth Circuit, the appellate court reached a similar conclusion, holding that the absence of the phrase "terms, conditions, and privileges", the language used in Title VII of the Civil Rights

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[1] At the time of filing the lawsuit in this matter, Petitioner Derek Carder was a Lieutenant Commander of the United States Naval Reserve, Petitioner Mark Bolleter had retired as a Major from the Louisiana Air National Guard, Petitioner Drew Daugherty was a Lieutenant Colonel in the Texas Air National Guard and Petitioner Andrew Kissinger was a Lieutenant Colonel in the United States Air Force Reserves.

[2] Two other causes of action were not dismissed by the district court.

Act of 1964, signaled Congress's intent to exclude harassment claims from the scope of USERRA's protections.

Under the Fifth Circuit's analysis, a harassed servicemember will only be protected under USERRA if the harassment results in the denial of a contractual benefit or forces the employee to quit his or her job, such that the servicemember could assert a claim for constructive discharge.

II. Facts

Petitioners Derek Carder, Mark Bolleter, Drew Daugherty, and the putative Plaintiff Class are, or were, employed by Respondent Continental Airlines. The majority of Petitioners, if not all, are, or were, employed by the international air carrier as pilots.[3] Petitioners are also members of the Armed Forces Reserves or Air National Guard or previously served in the United States military at all relevant times mentioned in Petitioners' original complaint in this matter.

As part of their service in the Armed Forces Reserves or Air National Guard, Petitioners are typically required to drill, at a minimum, one weekend per month and attend annual training for two

[3] Petitioner Andrew Kissinger was never employed by Respondent and represents the subclass of individuals who were never hired by Respondent due to their service in the military. This issue is not before the Court on appeal.

weeks a year. Petitioners also receive orders for lengthier periods of duty and other sporadic duty orders depending on the needs of their military command. Because of their military obligations, Petitioners may be, and have to varying degrees been, called away from their civilian jobs with Continental Airlines more often than their non-reservist counterparts.

As a direct result of their military service and corresponding absence at work, Petitioners have been subjected to Respondent's continuous pattern of harassment directed at and based upon Petitioners' military service. As alleged in Petitioners' complaint, Respondent's harassing conduct and comments towards Petitioners have included the following:

1. Placing onerous restrictions on taking military leave and arbitrarily attempting to cancel military leave.
2. Respondent's disapproval and denial of military leave notices.
3. Phone calls to pilots' homes while off duty in order to question pilots about their military leave.
4. Comments by Respondent's managerial employees, such as:
    - "If you guys take more than three or four days a month of military leave, you're just taking advantage of the system."

- "We don't hire part-time pilots. Their first commitment is to CAL [Continental Airlines]."
- "I'm trying to run a business here, and if you're only available to me half the time, then I have to hire another half an employee to make up for you."
- "I used to be a Guard guy, so I know the scams you guys are running."
- "Continental is your big boss, the Guard is your little boss."
- "You don't do anything but protect the state of Michigan against the Canadians" in response to a Michigan Air National Guardsman's request for military leave.
- "You take too much military leave."
- "Continental is not happy with many military reservists right now. Short notice orders and short notice requests screw up their staffing formula and any short notice issues (in some cases 50 days notice) will throw a monkey wrench in PBS [preferential bidding system]."
- "You need to choose between CAL and the Navy"[4]

[4] These comments merely serve as examples of the comments directed towards Petitioners in this case. Since the district court dismissed Petitioners' claim for freedom from a

(Continued on following page)

Lieutenant Commander Carder, in particular, was wrongfully accused of submitting a fraudulent leave notification. After reviewing the allegation, however, the Chief of Naval Air Training at the Department of the Navy later stated, "Once again, our investigation found no inappropriate use or abuse of military leave in LCDR Carder's case."

III. Proceedings Below

As a result of the foregoing conduct, Petitioners filed a class action complaint on July 2, 2009 in the United States District Court for the Southern District of California alleging four separate USERRA violations, including: (1) Discriminatory scheduling practices; (2) Deficient retirement contribution payments; (3) Hostile work environment; and (4) Failure to hire. On September 28, 2009, pursuant to Respondent's Motion to Transfer, the Honorable Dana M. Sabraw transferred the case to the Southern District of Texas before the Honorable Kenneth M. Hoyt.

On October 12, 2009, Respondent filed a motion to dismiss seeking, in part, an order dismissing Petitioners' third cause of action for freedom from a hostile

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hostile work environment, Petitioners have not yet had the opportunity to detail each and every harassing comment giving rise to their freedom from harassment claim. Taken in the proper context and tone, and coupled with Respondent's other improper actions aimed at servicemembers, this conduct, in Petitioners' view, created an extremely hostile work environment for those with military obligations.

work environment. On November 30, 2009, the district court granted in part and denied in part Respondent's motion to dismiss, and held that USERRA does not provide for a hostile work environment cause of action. Relying solely on the plain language of the statute, the district court concluded that freedom from harassment does not constitute a "benefit of employment" as defined by USERRA.

On January 6, 2010, the district court granted Petitioners' Motion for Certification of Appealability as to its November 30, 2009 order regarding its dismissal of Petitioners' cause of action concerning freedom from a hostile work environment. On February 18, 2010, pursuant to Section 1292(b) of Title 28 of the United States Code, the Fifth Circuit Court of Appeals granted Petitioners' Petition for Permission to Appeal the District Court's November 30, 2009 order.

The Fifth Circuit rendered its decision regarding Petitioners' appeal on March 22, 2011. In its opinion, in which it affirmed the district court's decision, the Fifth Circuit held that the term "benefit of employment" only covers contractual benefits. The court further held that "[t]he term 'benefits of employment' does not reflect the same broad-based Congressional intent to 'strike at the heart' of all forms of harassment against employees protected under USERRA as those protected by Title VII or the ADA." (App. at 16). Petitioners did not seek a rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN ISSUE OF FUNDAMENTAL IMPORTANCE FOR THOSE SERVING IN THE UNITED STATES ARMED SERVICES AND NATIONAL GUARD

A. Whether USERRA Prohibits Harassment on the Basis of Military Service Is a Matter of Paramount Importance That Warrants Immediate Review by This Court

This case potentially impacts millions of Americans. Approximately 23 million men and women over the age of 18 in the civilian non-institutionalized population are veterans.[5] Of these, approximately 2.2 million have served since the September 11, 2001 terror attacks. Estimating conservatively, more than 500,000 Reservists and National Guardsmen have been deployed to Iraq and Afghanistan since late 2001.[6] As of June 8, 2011, there are approximately 96,000 mobilized Reservists and National Guardsmen serving our country.[7] As of April 2011, there are roughly 100,000 active and reserve U.S. troops in

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[5] The statistics provided are based upon recent data released by the United States Bureau of Labor Statistics. The data is available at: http://www.bls.gov/news.release/vet.nr0.htm.

[6] Reserve Officer Association (ROA) monthly mobilization statistics *available at* http://www.roa.org.

[7] U.S. Department of Defense weekly news releases *available at* http://www.defense.gov/releases/release.aspx?releaseid=14554 (June 8, 2011).

Afghanistan[8]. At some point, all of these individuals will rotate back to civilian life.

These men and women will be returning home after they have put their lives on the line to serve this country. They deserve to work in an environment free from hostility based upon their military service and are entitled to know whether USERRA protects them from such harassment. 38 U.S.C. § 4301 *et seq*.

This country has long recognized that employment stability for servicemembers is of utmost importance and that employers should not treat servicemembers differently because of their military service.[9] Indeed, Congress has, on multiple occasions, amended statutes or enacted new laws in order to broaden employment protections afforded to military servicemembers.[10] USERRA is in keeping with this

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[8] Ian S. Livingston, Heather L. Messera, & Michael O'Hanlon, *Afghanistan Index: Tracking Variables of Reconstruction & Security in Post-9/11 Afghanistan*. Brookings Tracks Reconstruction and Security in Afghanistan, Iraq, and Pakistan. *Available at* http://www.brookings.edu/afghanistanindex (April 30, 2011).

[9] The Court has acknowledged Congress's intent to provide broad protections for military servicemembers for over 50 years. *See*, *e.g*., *Fishgold v. Sullivan Drydock & Repair Corp*., 328 U.S. 275 (1946). The Selective Training and Service Act "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Id.* at 285. *See* discussion *infra* Part I.b.

[10] Konrad S. Lee, *"When Johnny Comes Marching Home Again" Will He Be Welcome at Work?,* 35 PEPP. L. REV. 247,

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longstanding tradition and its purpose is concise and clear: to ensure that servicemembers are not subject to discrimination "because of their service in uniform services." 38 U.S.C. § 4301(a)(3).

The Fifth Circuit improperly restricted USERRA's coverage, finding that it does not protect against harassment based upon military status – an interpretation that will directly impact many thousands of returning servicemembers in the very near future.

Veterans returning home from war are already facing high unemployment rates – an unemployment rate that is two percentage points higher than the national non-veteran average.[11] Those that do find employment, or are able to return to previous employment, should be afforded what USERRA promises: no discrimination based upon military status, including freedom from harassment based upon their military service.

It is necessary for the Court to clarify the extent of USERRA's protections now while our country is

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253-54 (2008). (Providing of discussion of the historical development of the laws protecting veterans in the workplace.).

[11] On May 31, 2011, the United States Joint Economic Committee released a Joint Economic Committee Report. This report shows that the unemployment rate is higher among post-9/11 veterans than the civilian population. The report is available at: http://jec.senate.gov/public//index.cfm?a=Files.Serve&File_id=c1d47e4b-128b-41a4-afe1-2f3ac509ecbc&SK=D6745FB5F69B4F41540BB9A2D1A33DF9.

still at war. It would provide little solace and no benefit to those who currently serve for this Court to wait to decide this issue until after the war is over. Any delay in deciding this issue may result in needlessly subjecting our servicemembers to improper harassment and hostility. Importantly, "[i]f we are asking our servicemen and women to risk their lives for our country, we must ensure that their employment rights are easily understood and consistently observed." 139 Cong. H2210 (statement of Rep. Hutchinson). Our Country continues to utilize and rely on our servicemembers to protect its citizens; these men and women continue to rely on USERRA's protection from employment discrimination.[12]

The importance of this issue is also highlighted by the fact that the district court certified this issue for appeal under 28 U.S.C. § 1292(b), and that the United States Court of Appeals for the Fifth Circuit permitted the interlocutory appeal to proceed. (App. at 25, 26.) For a case to be certified under § 1292(b), both the district and the appellate courts must determine that the issue "involves a controlling issue of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the termination of the litigation. . . ." 28 U.S.C. § 1292(b). Obviously, this

[12] The Department of Labor has reported an increase in the number of USERRA complaints since 2001. Konrad S. Lee, *"When Johnny Comes Marching Home Again" Will He Be Welcome at Work?,* 35 PEPP. L. REV. 247, 251 (2008).

certification alone does not demonstrate that the issue is appropriate for review by this Court. However, this Court should not ignore the fact that the district and appellate courts in this case determined that an immediate appeal was necessary.

The criteria that Congress has directed the lower federal courts to use in making their certification determinations include similar considerations used by the Court when determining whether it should grant certiorari. For example, S. Ct. Rule 10(c) explains that one consideration dictating whether the Court should grant certiorari is whether "a United States court of appeals has decided an important question of federal law that has not been, but should be settled by this Court."[13]

Congress has set a very high standard for an appeal involving a "controlling question of law": it must include an issue that has "substantial ground for difference of opinion" and that "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Interlocutory appeals by permission under § 1292(b) are truly the exception and not the rule.[14] However when lower courts reach the

[13] Prior to the enactment of the Interlocutory Appeals Act of 1958, the Court could not review matters that had not reached final judgment by a lower court. However, the Interlocutory Appeals Act of 1958 changed the law and permitted immediate appeals from non-final matters.

[14] The limited data available confirms that these appeals are rare "district courts grant § 1292(b) certificates in about 100

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conclusion that an issue warrants immediate review, as in this case, the Court should factor the lower court's decision into its own determination of whether a petition for certiorari should be granted.

B. This Country Has Long Recognized the Importance of Protecting Servicemembers; It Is Critical That USERRA Protect Them Practically And Not Just In Theory.

Congress has enacted statutes to provide servicemembers employment stability for over 50 years. Indeed, Congress has, on multiple occasions, amended these statutes to increase the level of protection afforded to those who serve our country.[15] USERRA's legislative history exemplifies Congress's intent to provide broad protections in the workplace. For example, the record indicates that "[USERRA's] rights are to be broadly defined to include all attributes of the

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cases a year and that the courts of appeal allow the appeal in about half of those 100." Byer and J.N. Ranjan, *May I Appeal? Basics of Appellate Jurisdiction and Writ Relief*, Third Circuit Appellate Practice Manual 5-3.2 (2d ed. 2010), *citing* Charles Allen Wright, Arthur R. Miller, and Edward H. Cooper, 16 Federal Practice and Procedure, § 3951, n.20 (3d ed. 1999), *citing* the *Annual Report of the Director of the Administrative Office of the United States Courts*, 1992, Table B-1.

[15] Lee, 35 PEPP. L. REV. at 251-60. *See also* Matt Crotty, *The Uniformed Services Employment and Reemployment Rights Act and Washington State's Veteran's Affairs Statute: Still Short on Protecting Reservists from Hiring Discrimination,* 43 GONZ. L. REV. 170, 173-75 (2008).

employment relationship [that are affected by a servicemember's absence.]" It also explains that "*the list of benefits is illustrative and not intended to be all inclusive.*" House Report No. 103-65, pt. 1 at 21 (1993) (emphasis added).

In addition to the legislative record, the Court has routinely emphasized that statutes affording employment protections to servicemembers are to be broadly construed. In 1946, for example, the Court emphasized that the Selective Training and Service Act, a predecessor to USERRA, was "to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275 (1946). In 1980, the Court unanimously reaffirmed this notion and explained that the Vietnam Era Veterans' Readjustment Assistance Act was to be "liberally construed for the benefit of the returning veteran." *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980). Because these statutes are similar to and are indeed precursors to USERRA, these cases provide great precedential value and should guide this Court in broadly construing USERRA as intended by Congress.[16]

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[16] In a final rule, the Department of Labor explained that USERRA is to supplement rather than replace these previous statutes. Therefore, this Court's interpretations of the previous statutes are applicable to its interpretation of USERRA. 70 Fed. Reg. 75246 (2005).

The legislative history coupled with 50 years of valuable precedent from this Court creates an inference that statutes that are enacted to protect servicemembers cover a wide scope in the employment context. A finding that USERRA, a statute intended to protect servicemembers from discrimination based on their military service, permits harassment in the workplace would completely undermine its purpose and fly in the face of this Court's hostile work environment jurisprudence. A servicemember's employment benefits are diminished when the workplace is riddled with harassing comments based upon that person's military status. As the Court has explained in discussing sexual harassment "[a] discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Harris v. Forklift Sys.,* 510 U.S. 17, 21 (1993) Thus, any meaningful construction of USERRA's language would include a hostile work environment cause of action.[17]

[17] The issue presented does not address what the legal standard for a hostile work environment based upon military status should be but rather whether there is a right to work in an environment free of harassment based upon military status. However, as discussed *infra* Part III, the Court has provided a standard for Title VII hostile work environment claims and thus this petition uses this well-developed line of cases for guidance.

The Fifth Circuit's interpretation of USERRA is anything but broad. It narrowly construed the statute's language, ignored the Court's precedent, and belittled a hostile work environment's effect on servicemembers. A brief review of some of the comments in this case show that the harassing statements are directly related to Petitioners' military status and that these statements have and do affect Petitioners' employment environment. Some examples of these comments, as noted in Petitioners' original complaint, include: "If you guys take more than three or four days a month in military leave, you're just taking advantage of the system."; "I used to be a guard guy, so I know the scams you guys are running."; "Your commander can wait. You work full time for me. Part-time for him."; "Continental is your big boss, the Guard is your little boss."; "It's getting really difficult to hire you military guys because you're taking so much military leave."; "You need to choose between [Continental] and the Navy." (App. at 3.)

Under the Fifth Circuit's ill-reasoned interpretation of USERRA, employees can be forced to endure a workplace poisoned with harassment based upon military status despite USERRA's stated anti-discrimination purpose. In accordance with the Fifth Circuit's opinion, a person who is subject to such harassment will have limited options: endure the hostility, quit the Reserves or Guard, or quit their job. This restrictive paradigm undermines USERRA's

purpose and goes against 50 years of the Court's precedent.

II. LOWER COURTS HAVE SUFFICIENTLY DEFINED THE ISSUE, THUS WARRANTING THIS COURT'S IMMEDIATE REVIEW.

A. The Lower Federal Courts' Interpretations of the Issue Have Produced Inconsistent Conclusions.

Despite no definitive guidance from the Court, the lower federal courts have, with limited exceptions, determined that USERRA provides for claims of harassment based upon military status. The Fifth Circuit's *Carder* decision broke from this practical uniformity. Without guidance from the Supreme Court, the courts will continue to struggle to articulate the proper legal framework for analyzing hostile environment claims under USERRA. Some circuits have avoided deciding the issue altogether, instead favoring an inconclusive assumption that harassment or hostile work environment claims are actionable under USERRA. *See Vega-Colon v. Wyeth Pharmaceuticals*, 625 F.3d 22, 32 (1st Cir. 2010) (states without making any affirmative decision, its *assumption* that harassment claims are cognizable under USERRA); *see also Miller v. City of Indianapolis*, 281 F.3d 648, 652-53 (7th Cir. 2002) (impliedly *assumes* that harassment claims are actionable under USERRA and then discusses why the plaintiffs' allegations are not sufficient to support such a claim); *see also Dees v.*

Hyundai Motor Mfg. Alabama, LLC, 368 Fed. Appx. 49, 53 (11th Cir. 2010) (states, without making a definitive conclusion, its *assumption* that hostile work environment claims are cognizable under USERRA).[18] In its *Carder* decision, the Fifth Circuit became the first federal appellate court to expressly rule on the issue, but, surprisingly, chose to disregard other circuits' inclination toward recognizing harassment claims under USERRA. (App. at 1.)

The district courts, however, have not avoided the issue and most have found that USERRA prohibits harassment based on military status. *See Steenken v. Campbell County*, No. 04-224-DLB, 2007 WL 837173, at *3 (E.D. Ky. Mar. 15, 2007) (recognizing that a hostile work environment claim is cognizable under USERRA after broadly construing the term "benefit of employment" to include the right to be free from harassment in the workplace); *see also Maher v. City of Chicago*, 406 F. Supp. 2d 1006, 1023 (N.D. Ill. 2006) (holding that harassment can be considered a violation of USERRA); *see also Vickers v. City of Memphis*, 368 F. Supp. 2d 842, 845 (W.D. Tenn. 2005) (acknowledging that the text of USERRA does not explicitly protect an employee from harassment based on military status, yet ultimately holding that

[18] The Ninth Circuit, while also refusing to ultimately rule on the issue, noted that "USERRA does not specifically include a hostile work environment in its definition of 'benefit of employment.'" *Church v. City of Reno*, No. 97-17097, 1999 WL 65205, at *1 (9th Cir. Feb. 9, 1999).

harassment claims under USERRA can proceed if the claimant can establish the existence of an employment policy prohibiting harassment).

On the other hand, the District of Puerto Rico held that hostile work environment claims are not actionable under USERRA. *See Baerga-Castro v. Wyeth Pharmaceuticals*, No. 08-1014 (GAG/JA), 2009 WL 2871148, at *8 (D.P.R. Sept. 3, 2009). However, apart from the Fifth Circuit's recent ruling in *Carder*, the District of Puerto Rico stands alone in this conclusion.

Most of the lower courts that explicitly recognize a claim under USERRA for harassment based upon military status, or that have assumed a claim exists, have adopted the reasoning of the Merit Services Protection Board, a federal administrative body that held that claims of harassment based on military status are covered under USERRA. *See Petersen v. Dept. of the Interior*, 71 M.S.P.R. 227, 237-39 (M.S.P.B. 1996). Curiously, and without explanation, the Fifth Circuit decided to ignore this precedent and hold that harassment claims are not cognizable under USERRA. (App. at 1.)

This Court's guidance is needed in order to establish the proper interpretation of the scope of USERRA and whether the term "benefit of employment" encompasses a workplace free of harassment based upon military status. Allowing additional time for this issue to percolate among the lower courts will provide little useful guidance in resolving the proper

scope of USERRA's protections. As our servicemen and women return from duty, they should not have to face uncertainty regarding the scope of their protected status or whether they are entitled to work in an environment free from harassment based upon their military service.

B. This Court Should Clarify the Scope of the Statute to Prevent Further Discord Among the Lower Courts.

Through its 1996 decision in *Petersen*, the Merit Systems Protection Board (the "Board") provided district courts with a template for examining harassment claims under USERRA. When determining whether a veteran's hostile work environment allegations were cognizable under USERRA, the Board scrutinized the statute's language and the Congressional intent surrounding its passage. *See Petersen*, 71 M.S.P.R. at 237. In concluding that Congress anticipated an "expansive interpretation" of the terms "benefit of employment," the Board held that the statute's wording included hostile work environment claims. *Id.* The Board reinforced its interpretation by noting that "courts have consistently construed anti-discrimination statutes as proscribing harassment in the workplace." *Id.* Of course, the Board recognized the language discrepancies between Title VII's anti-discrimination provision and that contained within USERRA (i.e., "terms, conditions, or privileges of employment" vs. "benefit of employment," respectively). However, the Board observed that "[s]imilar differences

in language have not prevented the courts from using Title VII as the model" in their interpretation of other anti-discrimination statutes[19] when examining cases involving harassment.[20] *Id.* at 238.

All of the district courts that have acknowledged the viability of harassment claims under USERRA have referenced the *Petersen* decision and its reasoning for guidance. Accordingly, it follows that all of these district court decisions use similar arguments. In *Steenken v. Campbell County*, for example, the Eastern District of Kentucky explained the inclusivity of the terms "benefit of employment" and held that such a concept involved the "right to be free from a hostile work environment." *Steenken,* 2007 WL 837173 at *3. Both the Northern District of Illinois and the Western District of Tennessee, in *Maher v. City of Chicago* and *Vickers v. City of Memphis*, respectively, also cited the *Petersen* decision in support of their conclusion that harassment on the basis

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[19] For example, the Board noted that the Second Circuit had used Title VII as a model when it interpreted Title VI. *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243 (2d Cir. 1995). Similarly, the Eastern District of Virginia used Title VII as a model when interpreting the Americans with Disabilities Act. *Mannell v. American Tobacco Co.,* 871 F. Supp. 854 (E.D. Va. 1994).

[20] Academic literature examining this issue also agrees with this interpretation of the language of USERRA, and has expressed views supporting the viability of USERRA harassment claims. *See* Konrad S. Lee, *"When Johnny Comes Marching Home Again" Will He Be Welcome at Work?,* 35 PEPP. L. REV. 247, 264-77 (2008).

of military status constitutes a violation of USERRA. *See Maher*, 406 F. Supp. 2d at 1023; *see also Vickers*, 368 F. Supp. 2d 842 at 845.

The two lower courts that have decided that USERRA provides no protection against harassment based upon military status, including the Fifth Circuit in its *Carder* decision, have based their rulings on a strict interpretation of the statute's language.[21] In its *Carder* decision, the Fifth Circuit based its reasoning on its analysis of Congressional intent, insisting that if Congress had meant for USERRA to maintain coverage comparable to that of Title VII or the ADA, it would have used similar language – i.e. the phrase "terms, conditions, or privileges of employment" that this Court has previously interpreted to encompass harassment. *Id. See Meritor Savings Bank*, *FSB v. Vinson*, 477 U.S. 57, 63-66 (1986).

The issue of whether USERRA permits claims of harassment based upon military status is, at its core, an exercise of statutory interpretation – one that should further the purposes of the law. This Court should resolve this issue and definitively conclude

[21] The Ninth Circuit, while declining to ultimately decide the issue, stated that the statute's definition of the term "benefit of employment" does not "specifically include a hostile environment." *Church v. City of Reno*, No. 97-17097, 1999 WL 65205, at *1 (9th Cir. Feb. 9, 1999). The Ninth Circuit also references the *Petersen* decision in a footnote to its ruling in *Church*, but explained that the Merit Systems Protection Board's "interpretation of the USERRA is not . . . binding on the City [of Reno]." *Church*, 1999 WL 65205 at *1 n.3.

whether freedom from a hostile work environment is cognizable under USERRA.

III. THE *CARDER* DECISION IS INCONSISTENT WITH THE COURT'S HOSTILE WORK ENVIRONMENT JURISPRUDENCE.

A. The Court Has a Well-Developed Jurisprudence For Addressing Workplace Harassment.

Over the last several decades, the Court has developed and refined a legal framework for determining whether harassment in the workplace constitutes a hostile environment claim under various statutes and whether and when an employer can be held liable for the harassment or hostile work environment. The Supreme Court has noted that a working environment is deemed to be hostile if it "is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Harris v. Forklift Sys.,* 510 U.S. at 17, (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-67 (1986)).

The Court differentiated harassment that establishes a hostile environment claim from isolated comments that may be harassing in nature but that do not rise to the level of a hostile environment. Initially, the Court explained that a hostile environment is one that is "so heavily polluted with discrimination as to destroy completely the emotional and

psychological stability of minority group workers[.]" *Meritor*, 477 U.S. at 66 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957, 32 L. Ed. 2d 343, 92 S. Ct. 2058 (1972)). As this area of the law became more nuanced, the Court further defined the legal standard for proving a claim. In *Harris*, the Court noted that *Meritor Savings* "present[ed] some especially egregious examples of harassment . . . but that it did not mark the boundary of what is actionable" because "Title VII comes into play before the harassing conduct leads to a nervous breakdown." *Harris*, 510 U.S. at 22.

Providing more refinement in subsequent cases, the Court went further and formulated an affirmative defense for employers: If a company has an effective policy addressing workplace harassment and the employee unreasonably fails to take advantage of that policy, the company can escape liability. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998). This affirmative defense is available only for claims of hostile work environment thus providing employers with an incentive to develop policies aimed at preventing harassment on the job and to encourage employees to use these policies.

Most recently in addressing an issue closely related to the issues presented here, the Court discussed the concept of constructive discharge and explained that the evidence needed to establish a constructive discharge claim differentiated from the evidence required for a hostile environment claim.

Penn State Police v. Suders, 542 U.S. 129 (2004). While a hostile environment claim requires a showing of harassment that was so "severe or pervasive" that it altered the conditions of employment, a constructive discharge claim requires a plaintiff to make "a further showing: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response." *Suders*, 542 U.S. at 133. The Fifth Circuit neglected this important distinction in concluding in *Carder* that harassed servicemembers would still be protected under USERRA's constructive discharge protections even if a hostile work environment claim did not exist.

The *Carder* opinion reveals a startling disconnect between the Fifth Circuit's interpretation of USERRA and this Court's valuable and well-developed hostile environment jurisprudence. Instead of relying on anti-discrimination and anti-harassment precedent, the Fifth Circuit concluded that workplace harassment does not exist as a stand-alone claim under USERRA. As discussed below, the Fifth Circuit's straying from the Court jurisprudence is problematic and warrants the Court's attention.

B. By Finding There Is No Right to Work In an Environment Free From Harassment Based Upon Military Status, The *Carder* Decision Ignores This Court's Hostile Work Environment Jurisprudence.

The Court has long recognized hostile work environment claims under other statutes that aim to eliminate discrimination in the workplace. In holding that Title VII provided a hostile work environment claim, as noted previously, the Court reasoned that "[a] discriminatorily abusive work environment . . . can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Harris v. Forklift Sys.*, 510 U.S. at 22. These problems that the Court has associated with workplace harassment occur regardless of whether the harassment is based upon race, sex or military status.

Curiously, the Fifth Circuit has recognized the importance of a hostile environment claim, dating all the way back to 1971. *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971). In attempting to answer whether racial harassment was prohibited under the laws prohibiting racial discrimination, the court explained that Congress chose not to specifically list employer actions that would violate Title VII nor did it set precise parameters of the statute's protection. *Id.* at 238. Instead, Congress intended for the statute to evolve with evolving employment practices. "[Today's] employment discrimination is a far more complex and

pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues." *Id.*

This rationale also applies to harassment based upon military status – an important consideration overlooked by the *Carder* panel. Specifically, the rationale articulated by the *Rogers* court in the employment setting directly applies to the ever-increasing military responsibilities of the Reserves and National Guard that have continually evolved since Congress enacted USERRA in 1994. Prior to USERRA being enacted, the Reserves and National Guard had just been subjected to one massive military call-up in response to the first Gulf War in 1990-1991. Many, if not most, of those personnel who were called to duty then returned to their civilian jobs and were not called to long-term active duty again. This situation has changed drastically since the September 11, 2001 terror attacks, however, as Reservists and Guardsmen are now prone to more frequent and longer-lasting periods of activation and absence from their civilian jobs.

It is obvious that an employer cannot "disfavor members of the armed services in their hiring decisions. . . ." *Staub v. Proctor Hospital*, 131 S. Ct. 1186, 1194 (2011).[22] It is axiomatic that a law that precludes employers from doing something directly, refusing to

[22] Associate Justice Scalia explained that such a policy "would violate USERRA. . . ." *Staub*, 131 S.Ct. at 1193-94.

hire or firing employees based upon their military service, would similarly prohibit the employer from accomplishing the same thing indirectly, harassing employees to the point that they simply quit, for example. This is not a new or controversial observation.

One of the first cases to find that a prohibition of discrimination based upon sex includes a ban on workplace harassment was *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).[23] In that case, the D.C. Circuit eloquently summarized the choices confronting an employee facing a hostile work environment. "The [employee] . . . faces a 'cruel trilemma.' [He or she] can endure the harassment. [He or she] can attempt to oppose it, with little hope of success, either legal or practical, but with every prospect of making the job even less tolerable for [them]. Or [he or she] can leave her job, with little hope of legal relief and the likely prospect of another job where [he or she] will face harassment anew." *Id.* at 946. Employees facing harassment based upon military status face the same untenable choices with one additional choice – they can give up their service to this Country. This is hardly the result Congress could have intended when it enacted USERRA to "prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4303(a)(3).

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[23] The Court relied on *Bundy* in *Meritor Savings*, 477 U.S. at 62, 67, 76.

The *Carder* decision also ignores the Court's jurisprudence that is aimed at encouraging employers to adopt workplace harassment policies and to encourage employees to use these policies rather than waiting to address the issue after significant damage has occurred – damage that most likely would result in a constructive discharge claim. *Burlington Industries* 524 U.S. at 764-65; *Faragher*, 524 U.S. at 806-09. Indeed, the Fifth Circuit ignored the Court's high standard for establishing a constructive discharge claim and used the existence of a constructive discharge claim to support its holding that USERRA does not provide a cause of action for a hostile work environment. According to the *Carder* court, "[i]f an employer makes servicemembers' employment so intolerable that they feel forced to quit, these servicemembers could likely make a claim under USERRA for constructive discharge. Such claims are routinely brought under Title VII and other anti-discrimination statutes." (App. at 21-22.) This analysis eliminates any incentive for employers to adopt policies or for employees to use them. Instead, under the Fifth Circuit's analysis, USERRA's protections would only arise after an employee quits as a result of workplace harassment. This holding directly challenges this Court's hostile work environment jurisprudence holding that anti-discrimination protections apply well before a person feels compelled to quit.

In practical terms, if the *Carder* decision does stand, even for a short period of time, employers may adopt policies intended to dissuade employees from

serving their country to avoid the additional costs caused by an employee's absence to perform military service. This is evidenced by Continental's managerial comments described above, "if you're only available to me half the time, then I have to hire another half an employee to make up for you." This result is completely counter to the stated purpose of USERRA and, without any other remedy, will frequently result in an employee being forced to resign from his or her military affiliation in order to put a stop to the harassing conduct.

The *Carder* decision sends a dangerous message and one that will no doubt confuse lower courts and civilian employers alike. The Court should grant certiorari to clarify the intent and scope of USERRA's protections and whether lower courts should ignore decades of hostile environment jurisprudence when interpreting USERRA's provisions.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Fifth Circuit. Alternatively, this Court should invite the Solicitor General to file a brief in this matter expressing the position of the United States.

Respectfully submitted this 17th day of June, 2011.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-20105

DEREK CARDER, an Individual, on behalf of himself and all others similarly situated; MARK BOLLETER, an Individual, on behalf of himself and all others similarly situated; DREW DAUGHERTY, an Individual, on behalf of himself and all others similarly situated; ANDREW KISSINGER, an Individual, on behalf of himself and all others similarly situated,

Plaintiffs-Appellants

v.

CONTINENTAL AIRLINES, INC., a Delaware Corporation,

Defendant-Appellee

Appeal from the United States District Court
for the District of Texas, Houston

(Filed Mar. 22, 2011)

Before DAVIS, WIENER, and BENAVIDES, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge.

Appellants, members of the United States Armed Forces Reserves and Air National Guard, are currently

employed as pilots by Appellee Continental Airlines, Inc. ("Continental"). Appellants filed a class-action complaint in the district court purportedly on behalf of all similarly situated employees at Continental. The complaint raises a number of claims against Continental under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), a statute adopted to prohibit civilian employers from discriminating against their employees because of their military service. Appellants filed this interlocutory appeal from the district court's partial grant of Continental's motion to dismiss under Federal Rule of Procedure 12(b)(6). The district court held that Appellants failed to state a claim for a hostile work environment because USERRA does not provide for such a claim. We granted permission to appeal and for the following reasons, we affirm.

I.

Appellants' class complaint asserts several claims against Continental under USERRA. The complaint which is the focus of this appeal alleges that Continental has created a hostile work environment through "harassing, discriminatory, and degrading comments and conduct relating to and arising out of" Appellants' military service and service obligations. This count of the complaint cites a "continuous pattern of harassment in which Continental has repeatedly chided and derided plaintiffs for their military service through the use of discriminatory conduct and derogatory comments regarding their military service

and military leave obligations." The factual content of this count is based primarily on Appellants' allegations that Continental management has (1) placed onerous restrictions on taking military leave and arbitrarily attempting to cancel military leave; (2) made derisive and derogatory comments to pilots about their military service. Examples of these alleged derisive comments include comments by Continental managers such as the following: "If you guys take more than three or four days a month in military leave, you're just taking advantage of the system."; "I used to be a guard guy, so I know the scams you guys are running."; "Your commander can wait. You work full time for me. Part-time for him. I need to speak with you, in person, to discuss your responsibilities here at Continental Airlines."; "Continental is your big boss, the Guard is your little boss."; "It's getting really difficult to hire you military guys because you're taking so much military leave."; "You need to choose between CAL and the Navy."

Continental moved for dismissal of this hostile work environment claim under Federal Rule of Civil Procedure 12(b)(6). Continental argued that USERRA does not prohibit harassment of military members nor otherwise contemplate a hostile work environment action. The district court agreed. The district court held that the plain meaning of the phrase prohibiting the denial of any "benefit of employment" to a member of the uniformed services based on such membership or the performance of service, 38 U.S.C.

§ 4311(a), does not include a cause of action based on a hostile work environment.

Some of Appellants' other claims were not dismissed.[1] The district court granted certification and this court granted Appellants permission to pursue this interlocutory appeal of the district court's order dismissing the hostile work environment claim pursuant to 28 U.S.C. § 1292.

II.

"We review the district court's dismissal for failure to state a claim *de novo*." *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 742 (5th Cir. 2008). "The court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Id*. Questions of statutory interpretation are, of course, reviewed *de novo*. *United States v. Clayton*, 613 F.3d 592, 595 (5th Cir. 2010).

III.

The issue in this case is whether USERRA, which was adopted to prohibit discrimination against members of the armed forces because of that service,

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[1] These claims include (1) the claim that Continental violated USERRA by depriving class members employment benefits through discriminatory practices in the underpayment of retirement contributions, and (2) the claim that Continental denied employment to Plaintiff Andrew Kissinger and subclass members based on their military service.

provides a service member with a cause of action against his employer for a hostile work environment. This dispute narrows to an interpretation of USERRA's prohibition against denial of a "benefit of employment" on the basis of military service, as stated in § 4311(a) and further defined in § 4303(2).

We have little direct authority to guide us. "Neither the Supreme Court nor any court of appeals has decided whether a hostile work environment claim is cognizable under USERRA." *Vega-Colon v. Wyeth Pharms*., 625 F.3d 22, 32 (1st Cir. 2010). Several circuit courts have assumed without deciding that USERRA does provide for such a claim while disposing of the claim on other grounds. *Id.* at n.9 (citing *Dees v. Hyundai Motor Mfg. Alabama, LLC*, 368 F. App'x 49, 53 (11th Cir. 2010); *Church v. City of Reno*, 168 F.3d 498 (9th Cir. Feb. 9, 1999)); *Miller v. City of Indianapolis*, 281 F.3d 648 (7th Cir. 2002). A number of district courts have reached differing conclusions on the merits.[2] Thus, we are the first circuit court to consider whether the statute creates a cause of action for hostile work environment.

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[2] *See, e.g., Dees v. Hyundai Motor Mfg. Alabama, LLC*, 605 F. Supp. 2d 1220, 1228 (M.D. Ala. 2009) (holding that a USERRA harassment claim is cognizable under USERRA); *Vickers v. City of Memphis*, 368 F. Supp. 2d 842, 845 (W.D. Tenn. 2005) (holding that a USERRA harassment is cognizable if based on a company employment policy); *contra Baerga-Castro v. Wyeth Pharm.*, No. 08-1014, 2009 WL 2871148, at *12 (D.P.R. Sept. 3 2009) (holding that a USERRA harassment claim is not cognizable).

A.

Statutory interpretation begins with the statute's plain language. *Waggoner v. Gonzales*, 488 F.3d 632, 636 (5th Cir. 2007). The plain language of USERRA is as follows.

Section 4311(a) of the statute (entitled "Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited") states the following:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service 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.

(emphasis added).

In a separate definitions section, the statute defines "benefit of employment":

> The term "benefit", "benefit of employment", or "rights and benefits" means any advantage, profit, privilege, gain, status, account, or interest (including 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).

A different section of the statute states the purposes of USERRA:

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

Id. § 4301(a)(1)-(3)

From the plain language of § 4301(3), it is clear that one of the purposes of USERRA is to prohibit discrimination and acts of reprisal against service members because of their service. Section 4311(a) defines this discrimination to include the denial of any "benefit of employment." The language of § 4303(2) defining the word "benefit" and the phrase "benefit of

employment" includes the long list of terms "advantage, profit, privilege, gain, status, account, or interest." But § 4303(2) does not refer to harassment, hostility, insults, derision, derogatory comments, or any other similar words. Thus, the express language of the statute does not provide for a hostile work environment claim.

Given the statute's express prohibition of discrimination against service members, however, we must also consider the statute's legislative history and its underlying policy objectives in an attempt to gain insight into whether Congress intended to create a cause of action under USERRA for harassment of service members. *See Rogers v. City of San Antonio*, 392 F.3d 758, 762 (5th Cir. 2004). We will also compare the language of USERRA to language from other federal anti-discrimination statutes from which courts have inferred a cause of action for hostile work environment.

B.

Appellants have pointed to segments of USERRA's legislative history stating that the statute was intended to be "broadly construed" and given an "expansive interpretation" in favor of service members. The Appellants couple this "broadly construed" language with USERRA's third express purpose – to "prohibit discrimination against persons because of their service in the uniformed services" – to argue that USERRA must be broadly construed as

encompassing a hostile work environment claim in order to carry out the purpose of prohibiting discrimination against service members.

An administrative decision of the Merit Systems Protection Board ("MSPB"), *Petersen v. Department of Interior*, 71 M.S.P.R. 227 (1996), put heavy emphasis on Congress's intent that the statute should be broadly construed in reaching the conclusion that USERRA allows a hostile work environment claim.[3] Some district courts have followed *Petersen* and its reliance on this legislative history to conclude that workplace harassment is actionable under USERRA. *See, e.g., Dees*, 605 F. Supp. 2d at 1227; *Vickers*, 368 F. Supp. 2d at 845.

Continental argues that even considering this legislative history, the conclusion does not necessarily follow that the term "benefits" of employment can be interpreted to include a hostile work environment claim. Continental contends that the term "benefits"

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[3] The MSPB has jurisdiction to hear appeals of various federal agency personnel decisions. *See* 5 U.S.C. §§ 1204, 7701. Appellants have argued that the MSPB's interpretation of USERRA is not binding on this court, but merely persuasive. Because Appellants have not argued for a higher level of deference or directed us to any authority suggesting that Congress delegated authority to the MSPB to interpret USERRA through decisions having "the force of law," especially with regard to private employment, we defer to *Petersen* based only on that decision's "power to persuade." *See United States v. Mead Corp.*, 533 U.S. 218, 231-32, 121 S. Ct. 2164, 2173-74 (2001).

cannot be construed beyond all reasonable textual meaning.

We agree with Appellants that we cannot ignore the Congressional mandate that the statute be broadly construed to prevent discrimination of service members. But we are not satisfied that this carries the day for them. We believe the analysis most likely to provide a more accurate assessment of Congress's intent on the narrow question presented to us lies in examination of the case law interpreting other anti-discrimination statutes.

C.

1.

Hostile work environment claims were first recognized in discrimination cases decided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. ("Title VII"). In originally permitting a plaintiff to assert a hostile work environment claim in a Title VII case, the Supreme Court relied heavily on Title VII's language prohibiting discrimination with respect to the "terms, conditions, or privileges of employment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-66, 106 S. Ct. 2399, 2404-05 (1986). The Court stated that "'[t]he phrase terms, conditions, or privileges of employment in Title VII is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.'" *Id*. at 66 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th

Cir. 1971)).[4] The Court further held that this broad phrase "evinces a congressional intent to strike at the entire spectrum of men and women in employment." *Id*. at 64, 106 S. Ct. at 2404 (internal quotes and citation omitted).

The *Meritor* opinion makes clear it is the word "conditions," in particular, that the Court relied on in inferring a claim for hostile work environment under Title VII. For instance, the opinion states that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive to *alter the conditions* of the victim's employment and create an abusive working environment." *Id*. at 67, 106 S. Ct. at 2405 (internal quotes and citation omitted) (emphasis added). The Court added: "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect the *conditions* of employment to sufficiently significant degree to violate Title VII." *Id*. (internal quotes and citation omitted) (emphasis added).

The Supreme Court has consistently applied this standard: "'When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter *the conditions*

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[4] The *Meritor* opinion cited extensively this court's opinion in *Rogers*, which was one of the first circuit court opinions to recognize a hostile work environment claim under Title VII and which relied on the statute's use of the phrase 'terms, conditions, or privileges" of employment. *See Meritor*, 477 U.S. at 65-66, 106 S. Ct. at 2405.

of the victim's employment and create an abusive working environment, Title VII is violated.'" *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 368 (1993) (quoting *Meritor*, 477 U.S. at 67, 106 S. Ct. at 2405) (emphasis added); *see also Penn. State Police v. Suders*, 542 U.S. 129, 133, 124 S. Ct. 2342, 2347 (2004) ("To establish hostile work environment, plaintiffs like Suder must show harassing behavior 'sufficiently severe or pervasive to alter *the conditions* of their employment.'") (internal citations omitted) (emphasis added); *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81, 118 S. Ct. 998, 1003 (1998) (Title VII's prohibition of harassment "forbids only behavior so objectively offensive as to alter *the 'conditions'* of the victim's employment.") (internal citation omitted) (emphasis added).

We have relied on the same phrase "terms, conditions, or privileges of employment" in other anti-discrimination statutes such as the American with Disabilities Act ("ADA") to infer a cause of action for hostile work environment. For example, in a statutory question of first impression like this one, this court interpreted the phrase "terms, conditions, or privileges of employment" used in the ADA as encompassing a claim for hostile work environment, or "disability-based harassment." *Flowers v. S. Reg'l Physician Servs*., 247 F.3d 229, 233-35 (5th Cir. 2001). *Flowers* drew heavily from the *Meritor* opinion and the fact that the ADA used the same language as Title VII. *Flowers* concluded that "the language of Title VII and the ADA dictates a consistent reading

of the two statutes" and that "[t]herefore, following the Supreme Court's interpretation of the language contained in Title VII, we interpret the phrase 'terms, conditions, or privileges of employment' as it is used in the ADA to 'strike at' harassment in the workplace." *Id*. at 233 (quoting *Meritor*, 477 U.S. at 64, 106 S. Ct. at 2404).

Notably, Congress passed the ADA after *Meritor*. Thus, Congress's choice to include the same phrase in the ADA that the Court relied on in *Meritor* supports the view that Congress intended to make harassment actionable under the ADA to the same extent as Title VII. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85-86, 126 S. Ct. 1503, 1513 (2006) ("[W]hen 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general mater, the intent to incorporate its judicial interpretations as well.' ") (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645, 118 S. Ct. 2196, 2208 (1998)). Other anti-harassment statutes passed by Congress after *Meritor* have included the same or similar language from Title VII. *See, e.g.*, 18 U.S.C. § 1514A(a) (regarding civil actions to protect against retaliation in fraud cases) ("[N]o 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. . . .”). (emphasis added).[5]

Congress initially passed USERRA in 1994, years after *Meritor* was announced. Accordingly, Congress's choice to not include the phrase “terms, conditions, or privileges of employment” or similar wording in USERRA weighs in favor of the conclusion that USERRA was not intended to provide for a hostile work environment claim to the same extent as Title VII and other antidiscrimination statutes containing that phrase. The significance that the Supreme Court has placed on this phrase – and particularly on the specific word “conditions” – cannot be ignored. If Congress had intended to create an actionable right to challenge harassment on the basis of military service under USERRA, Congress could easily have expressed that intent by using the phrase “terms, conditions, or privileges of employment” interpreted previously by the Supreme Court. *See Merrill Lynch*, 547 U.S. at 85-86, 126 S. Ct. at 1513. The fact that Congress did not do so, even though USERRA was passed after the *Meritor* opinion, but instead chose to use the narrower phrase “benefits of employment,” indicates that Congress intended to create a

[5] The Age Discrimination in Employment Act of 1967 (“ADEA”) includes the phrase “terms, conditions, or benefits.” However, “[w]e have never held that the ADEA contemplates hostile work environment claims.” *Mitchell v. Snow*, 326 F. App'x 852, 854 n.2 (5th Cir. 2009). We have only assumed without deciding that it does. *Id*.

somewhat more circumscribed set of actionable rights under USERRA.

We are not persuaded that use of the word "privilege" as one of many words defining "benefits of employment" in §4303(2), a separate definitions section of USERRA, is sufficient to infer a cause of action for hostile work environment. Cases interpreting Title VII have relied on that statute's use of the full phrase "terms, conditions, and privileges" or on the sole word "conditions," not on the word "privilege" alone. Neither are we persuaded by the title of § 4311(a), which specifies that the section prohibits "acts of reprisal," because acts of reprisal are primarily relevant to a claim for retaliation. *See, e.g., Randel v. United States Dep't of Navy*, 157 F.3d 392, 395 (5th Cir. 1998) (repeatedly describing a Title VII retaliation claim as a "reprisal claim."); *see also, e.g., Dominguez v. Miami-Dade County*, 669 F. Supp. 2d 1340, 1345 (S.D. Fla. 2009) (plaintiff's USERRA retaliation claim described as being based on employer's alleged "acts of reprisal."). Department of Labor ("DOL") regulations implementing §4311(a) of USERRA frequently refer to retaliation in such a way as to suggest the statute's prohibition on acts of reprisal relates to a retaliation cause of action. *See* 20 C.F.R. §§ 1002.18-1002.23.[6]

[6] DOL regulations implementing USERRA with regard to private employment are further discussed below in Section C.3.

The term "benefits of employment" does not reflect the same broad-based Congressional intent to "strike at the heart" of all forms of harassment against employees protected under USERRA as those protected by Title VII or the ADA. This conclusion is further supported by consideration of the policies and purposes underlying USERRA. As the Seventh Circuit has noted, the primary purpose of USERRA is to "encourage people to join the reserves." *Velasquez v. Frapwell*, 160 F.3d 389, 392 (7th Cir. 1998) (Posner, J.), *vacated in part*, 165 F.3d 593 (7th Cir. 2009). Unlike other anti-discrimination statutes which are designed in part to prevent "invidious and irrational" discrimination and harassment of "historically disadvantaged" minorities considered in need of special protections, we find nothing to indicate that Congress passed USERRA to combat this type of discrimination against military members. *Id*. There is simply "little evidence that employers harbor a negative stereotype about military service or that Congress believes they do." *Id*. Appellants have not directed this court to anything in the legislative history of USERRA that would suggest Congress believed invidious and irrational harassment of members of the military in the workplace comparable to harassment addressed by Title VII is a widespread social problem in need of a remedy.[7] Thus, based on the distinct text of USERRA,

[7] At oral argument, counsel for Appellants stated his belief that Continental is the only airline engaging in the complained-of, alleged harassment of military reservist pilots. This statement provides further support for our conclusion that workplace

(Continued on following page)

its legislative history, and its policies and purposes, we decline to infer a cause of action for hostile work environment under USERRA.

2

We are not persuaded by the Appellants' reliance on the reasoning of the *Petersen* administrative opinion and similar district court opinions, which as noted above construed USERRA broadly to provide for hostile work environment claims. *Petersen* drew comparisons to Title IX of the Education Amendments of 1972 and the Rehabilitation Act of 1974. These are the only two federal statutes identified by the parties on appeal that lack the phrase "terms, conditions, or privileges of employment" but have been interpreted to provide for hostile work environment causes of action.[8] Both of these statutes use the word "benefits," as in USERRA. Title IX states that no person "shall, on the basis of sex, be excluded from participation in, be denied *the benefits of*, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (emphasis added). The Rehabilitation Act states that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely

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harassment of military members is not a widespread problem that Congress intended to address with USERRA.

[8] Congress passed both statutes before the Supreme Court issued the *Meritor* opinion.

by reason of her or his disability, be excluded from the participation in, or be denied *the benefits of*, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." 29 U.S.C. § 794(a) (emphasis added).

Although courts have permitted plaintiffs to assert hostile work environment claims under these two statutes, these statutes are distinguishable from USERRA. An examination of the intent and purposes of Title IX and the Rehabilitation Act reveals that Congress intended these statutes to combat harassment of women and the disabled, respectively. The courts have interpreted each statute so as to harmonize it with a companion statute that does contain the phrase "terms, conditions, or privileges." Based on its legislative history, this court has interpreted Title IX as being intended to prohibit a wide spectrum of discrimination against women in the same manner as Title VII. *See, e.g., Lakoski v. James*, 66 F.3d 751, 757 (5th Cir. 1995) ("Title IX's proscription of sex discrimination, when applied in the employment context, does not differ from Title VII's."); *see also, e.g., Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 540 (1st Cir. 1995) ("Title VII, and thus Title IX, 'strike at the entire spectrum of disparate treatment of men and women,' including conduct having the purpose or effect of unreasonably interfering with an individual's performance or creating an intimidating, hostile or offensive environment.") (quoting *Meritor*, 477 U.S. at 57, 106 S. Ct. at 2404), *superseded on other grounds*, *County of Sacramento v. Lewis*, 523 U.S. 833, 118

S. Ct. 1708 (1998). Of course, as discussed extensively above, the Supreme Court inferred Title VII's proscription of harassment against women from the words "terms, conditions, or privileges of employment."

Similarly, we have read the Rehabilitation Act together with the ADA in allowing a harassment claim under the Rehabilitation Act. *See Soledad v. United States Dep't of Treasury*, 304 F.3d 500, 506-07 (5th Cir. 2002). In *Soledad*, we recognized that Congress amended the Rehabilitation Act in 1992 to include "a provision that explicitly incorporates the ADA's standards governing complaints alleging employment discrimination." *Id*. at 503. As explained, the ADA includes the words "terms, conditions, or privileges of employment."

These cases construing Title IX and the Rehabilitation Act are not inconsistent with the substantial authority discussed above that premise the inference of Congress's intent to create a harassment or hostile work environment cause of action from use of the broad phrase "terms, conditions, or privileges of employment." We are also influenced by the fact that the beneficiaries of Title IX and the Rehabilitation Act, like the beneficiaries of Title VII, are members of historically disadvantaged minorities. Members of the military do not fall within such a group. This supports our conclusion that Congress's decision not to extend the broad protection to military service members against discrimination in the "terms, conditions,

or privileges of employment" was not an oversight and should be given effect.

3.

As noted above, the DOL has issued regulations implementing USERRA with regard to private employers and employees. *See* 20 C.F.R. § 1002 *et seq*. USERRA provides the DOL with this authority. 38 U.S.C. § 4331(a). The DOL issued these regulations after a notice and comment period. *See* www.dol.gov/vets/regs/fedreg/final/2005023961.htm (last visited March 16, 2011). "Subpart B [of the regulations] describes USERRA's anti-discrimination and anti-retaliation provisions." 20 C.F.R. § 1002.1. The regulations in Subpart B explain in detail the DOL's informed opinion about the elements of USERRA discrimination and retaliation claims. *Id*. §§1002.18-1002.23. These DOL regulations make no mention whatsoever of employer harassment on the basis of military service, creation of a hostile work environment, or any other type of comparable claim.

This stands in sharp contrast to the guidelines issued by the Equal Employment Opportunity Commission expressly defining sexual harassment as a form of discrimination prohibited by Title VII to which the Supreme Court looked for guidance in *Meritor*. *See Meritor*, 477 U.S. at 65, 106 S. Ct. at 2404. The complete lack of similar DOL regulations referring to harassment or a hostile work environment as an actionable form of discrimination under

USERRA serves as additional support for our conclusion that USERRA should not be interpreted to provide for such a cause of action.[9]

D.

Appellants also argue that the express purposes and prohibitions of USERRA may be circumvented by employers if we do not interpret the statute as providing for a harassment cause of action. Appellants generally contend that because USERRA expressly prohibits firing and other employment decisions on the basis of military service, it would be patently inconsistent with the purpose of the statute to permit employers to accomplish indirectly via harassment what an employer cannot accomplish directly. As one district court put it, "[a]n assurance that employees cannot be fired on account of their military service is meaningless without assurance that the work environment will not be so intolerable that they will feel forced to quit." *Dees*, 605 F. Supp. 2d at 1227-28.

We are not persuaded by this argument. If an employer makes service members' employment so

[9] The lack of DOL regulations regarding harassment of private employees on the basis of military service also supports our determination that we need not defer to the opinion of the MSPB, which has authority only over federal employment. *See supra* n. 3. In fact, the MSPB has authority to issue regulations under USERRA that grant "greater or additional rights" to federal employees than DOL regulations governing private employees. 38 U.S.C. § 4331(a)-(b).

intolerable that they feel forced to quit, these service members could likely make a claim under USERRA for constructive discharge. Such claims are routinely brought under Title VII and other anti-discrimination statutes. *See, e.g., Hinojosa v. CCA Props. of Am., LLC*, No. 10-40342, 2010 U.S. App. LEXIS 22947, *5 (5th Cir. Nov. 4, 2010) (Under Title VII, "[t]o make out a claim of constructive discharge, [a plaintiff] must show that his working conditions became 'so intolerable that a reasonable person would have felt compelled to resign.'") (quoting *Penn. State. Police*, 542 U.S. at 147, 124 S. Ct. at 2354). Claims for constructive discharge have, in fact, been recognized under USERRA by other courts. *See, e.g., Wallace v. City of San Diego*, 479 F.3d 616, 624 (9th Cir. 2007). This type of claim would be based on USERRA's clear prohibition against firing service members based on their military service. The availability of such relief would prevent an employer from circumventing the express purposes of USERRA by engaging in some intolerable form of harassment, but would not make actionable those lesser levels of harassment that usually form the basis for hostile work environment claims such as Continental's allegedly derisive comments toward Appellants.

We also note that circumvention of USERRA is difficult given the express definition of "benefits of employment" in the statute covering a wide range of employment practices and policies. To repeat, a "benefit of employment" is defined as "any advantage, profit, privilege, gain, status, account, or interest

(including wages or salary for work performed) that accrues by reason of an employment contract or agreement or employer, policy, plan, or practice. . . ." 38 U.S.C. § 4303(2). As the Sixth Circuit held of USERRA's predecessor statute, this definition is "derivative" and "[i]t is intentionally framed in general terms to encompass the potentially limitless variations in benefits of employment that are conferred by an untold number and variety of business concerns." *Monroe v. Standard Oil Co.*, 613 F.2d 641, 645 (6th Cir. 1980). Thus, this definition of "benefits of employment" covers all of the contractual benefits of Appellants' employment with Continental.

These contractual benefits may bar or limit at least some of the actions by Continental that Appellants attempt to characterize as harassment. For example, Appellants complain that Continental has allegedly placed "onerous restrictions" on military leave. If these allegedly "onerous restrictions" have materially affected contractual benefits of Appellants' employment, such as Appellants' opportunity to log flight hours toward participation in a retirement fund, these restrictions could constitute independent, actionable benefit denials under USERRA. Indeed, the claims that are still pending in this suit involve these sorts of arguments by the Appellants. The complaint includes a separate count that the district court did not dismiss for denial of retirement benefits. This separate count is seemingly based in part on Continental's alleged denial of flight time to the Appellants and other class members because of their

service obligations. Thus, there is no reason for an additional, non-textual harassment cause of action to remedy this purported benefit denial.

To be clear, nothing in this opinion alters the ability of service members to sue under USERRA for the denial of contractual benefits of their employment on the basis of military service as defined in the statute. All that we hold is that service members may not bring a freestanding cause of action for hostile work environment against their employers.

For all of the reasons stated above, we AFFIRM the district court's order dismissing the USERRA hostile work environment claim as a matter of law and REMAND this case for further proceedings consistent with this opinion.

AFFIRMED and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-3

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

Plaintiffs-Petitioners,

v.

CONTINENTAL AIRLINES, INC., a Delaware Corporation,

Defendant-Respondent.

Motion for Leave to Appeal from an Interlocutory Order

(Filed Feb. 18, 2010)

Before JOLLY, WIENER, and ELROD, Circuit Judges..

PER CURIAM:

IT IS ORDERED that leave to appeal from the interlocutory order of the United States District Court of the Southern District of Texas, Houston, entered on January 6, 2010, is GRANTED.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEREK CARDER, an individual, MARK BOLLETER, an individual, DREW DAUGHERTY, an individual, and ANDREW KISSINGER, an individual, on behalf of themselves and all others similarly situated, Plaintiffs, v. CONTINENTAL AIRLINES, INC. a Delaware Corporation; and DOES 1 through 100, inclusive, Defendants.	§	Civil Action No.: 4:09-cv-03173

ORDER

(Filed Jan. 6, 2010)

Before this Court is Plaintiffs' Motion for Certification Pursuant to 28 U.S.C. §1292(b) of the Court's November 30, 2009 Order [Document Number 43] dismissing Plaintiffs' Third Cause of Action alleging freedom from hostile work environment under USERRA. The Court has considered the Motion and finds good cause to certify the Court's November 30, 2009 Order regarding Plaintiffs' Third Cause of Action for appeal. The Court concludes that Plaintiffs'

Third Cause of Action, as set forth in their original Complaint concerning freedom from a hostile work environment under USERRA, involves a controlling question of law, offers substantial ground for difference of opinion and, if appealed immediately, will materially advance the ultimate termination of the litigation.

The Motion is GRANTED. It is therefore ORDERED that the Court's November 30, 2009 Order with respect to Plaintiffs' allegations concerning freedom from a hostile work environment under USERRA is certified for appeal pursuant to 28 U.S.C. §1292(b).

ORDERED this 6th day of January, 2010.

/s/ [Illegible]
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEREK CARDER, *et al*,	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-09-3173
CONTINENTAL AIRLINES, INC., *et al*,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Nov. 30, 2009)

I. Introduction

Pending before the Court is the defendant, Continental Airlines, Inc.'s ("Continental") motion to dismiss pursuant Federal Rule of Civil Procedure 12(b)(1), (6) and (7) (Docket Entry No. 34). The plaintiffs, Derek Carder, Mark Bolleter, Drew Daugherty and Andrew Kissinger (collectively the "plaintiffs"), submitted a response to this motion (Docket Entry No. 41). Having carefully reviewed the parties' submissions, the record and the applicable law, the Court hereby grants Continental's motion to dismiss in-part and denies the motion in-part.

II. Factual Background

Continental is an air carrier. Carder, Bolleter and Daugherty are currently employed by Continental as

pilots. Kissinger is a pilot who Continental declined to hire. Each of the plaintiffs is, or was, a member of the armed forces. As described below, the plaintiffs assert that Continental has violated the Uniformed Services Employment and Reemployment Rights Act ("USERRA") through various acts of malfeasance against pilots who are current or former members of the armed forces.

Continental's pilots are employed subject to a collective bargaining agreement (the "CBA") between Continental and the Airline Pilots Association. Pursuant to the CBA, a seniority-based preferential bidding system (the "PBS") was implemented to facilitate pilot scheduling. Under this system, greater seniority equates to greater benefits of employment. The PBS is utilized to incorporate military leave into the system by blocking off a pilot's availability and granting them a credit of time in the construction of their schedule.

Pursuant to the CBA, Continental established a pilot-only money purchase, defined contribution pension plan (the "B-Plan"). Under this plan, pilots with military obligations are eligible for B-Plan contributions from Continental that are calculated on the amount they would have worked if they had not gone on military leave.

The plaintiffs assert that they have been subjected to a continuous pattern of harassment by Continental during their employment as pilots. Specifically, the

plaintiffs maintain that they were the subject of harassment premised upon their military service.

The present complaint alleges that Continental has violated USERRA in multiple ways. First, the plaintiffs state that they have been denied certain seniority benefits because of their military service. Second, they complain that Continental has engaged in discrimination against members of the armed forces with regard to B-Plan contributions. The plaintiffs' last allegation against Continental is that it has subjected them to a hostile work environment.

III. Contentions

A. The Defendant's Contentions

Continental asserts that each of the plaintiffs' claims against it should be dismissed. Initially, it argues that several of the causes of action should be dismissed because the Railway Labor Act (the "RLA") requires mandatory arbitration of these claims, and therefore, this Court has no jurisdiction. Second, Continental maintains that the plaintiffs' Employee Retirement Income Security Act ("ERISA") based claims must be dismissed because the B-Plan was not named as a party and/or the plaintiffs failed to exhaust the administrative remedies available to them under the B-Plan. Lastly, Continental states that the hostile work environment claim must be dismissed because no such cause of action exists under USERRA, or in the alternative, the plaintiffs have not sufficiently alleged a violation.

B. The Plaintiffs' Contentions

The plaintiffs contend that their claims should not be dismissed. They assert that the RLA does not preclude any of their claims because none of the claims require construction of the CBA. Further, the plaintiffs maintain that, to the extent that ERISA might require exhaustion of administrative remedies in the present case, this requirement is precluded by USERRA. They also argue that the B-Plan is not a required party to any of the claims. Lastly, the plaintiffs state that they have sufficiently pleaded a viable hostile work environment claim under USERRA.

IV. Standard of Review

A. Legal Standard for Rule 12(b)(1)

A motion to dismiss filed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction must be considered by the court "before any other challenge because the court must find jurisdiction before determining the validity of a claim." *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994) (internal citation omitted). Since federal courts are considered courts of limited jurisdiction, absent jurisdiction conferred by statute, federal courts lack the power to adjudicate claims. *See, e.g., Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998) (citing *Veldhoen v. U.S. Coast Guard*, 35 F.3d 222, 225 (5th Cir. 1994). Therefore, the party seeking to invoke the jurisdiction of a federal court carries the burden of proving its existence. *Stockman*, 138 F.3d at 151;

Cross Timbers Concerned Citizens v. Saginaw, 991 F. Supp. 563, 566 (N.D. Tex. 1997).

In ruling on a motion to dismiss for lack of subject matter jurisdiction, "a district court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *MDPhysicians & Assoc., Inc. v. State Bd. of Ins.*, 957 F.2d 178, 181 (5th Cir. 1992) (citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)). In making its ruling, the district court may rely on any of the following: "(1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *MDPhysicians*, 957 F.2d at 181 n.2 (citing *Williamson*, 645 F.2d at 413).

The standard of reviewing a motion to dismiss pursuant to 12(b)(1) depends on whether the defendant has made a "facial" or "factual" jurisdictional attack on the plaintiff's complaint. *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). A defendant makes a "facial" jurisdictional attack on a plaintiff's complaint by merely filing a motion under Rule 12(b)(1). *Id.* In this instance, the court is merely required to assess the sufficiency of the allegations contained in the plaintiff's complaint, which are presumed to be true. *Id.* A "factual" attack, however, is made by providing affidavits, testimony and other evidentiary materials challenging the court's jurisdiction. *Id.* When a "factual" jurisdictional attack has been made by a defendant, the plaintiff is required to

submit facts in support of the court's jurisdiction and bears the burden of proving by a preponderance of the evidence that the court, in fact, has subject matter jurisdiction. *Id.*

B. Legal Standard for Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) authorizes a defendant to move to dismiss for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). Under the demanding strictures of a Rule 12(b)(6) motion, "the plaintiff's complaint is to be construed in a light most favorable to the plaintiff, and the allegations contained therein are to be taken as true." *Oppenheimer v. Prudential Sec., Inc.*, 94 F.3d 189, 194 (5th Cir. 1996). In essence, "the district court must examine the complaint to determine whether the allegations provide relief on any possible theory." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001.) Under Rule 12(b)(6), a court will dismiss a complaint only if the "[f]actual allegations [are not] enough to raise a right to relief above the speculative level, [even with] the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations, footnote and emphasis omitted). To survive a Rule 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

C. Legal Standard for Rule 12(b)(7)

"The Court may dismiss a claim pursuant to [Federal Rule of Civil Procedure] 12(b)(7) for 'failure to join a party under Rule 19.'" *J & J Sports Prods., Inc. v. Tawil*, No. SA-09-CV327, 2009 WL 3761766, at *2 (W.D. Tex. Nov. 9, 2009) (quoting Fed. R. Civ. P. 12(b)(7)). "Rule 19 provides for the joinder of all parties whose presence in a lawsuit is required for the fair and complete resolution of the dispute at issue. It further provides for the dismissal of litigation that should not proceed in the absence of parties that cannot be joined." *HS Res., Inc. v. Wingate*, 327 F.3d 432, 438 (5th Cir. 2003) (internal citations omitted). If a party can be added without destroying jurisdiction, then the court should undergo a two part analysis:

> A court must first determine whether a party should be added under the requirements of Rule 19. Next, it must determine whether litigation can be properly pursued without the absent party under Rule 19. If a required party cannot be joined, a court must consider whether the action should proceed among the existing parties or be dismissed as a matter of equity.

Ash Grove Tex., L.P. v. City of Dallas, No. 3:08-CV-2114-O, 2009 WL 3270821, at *7 (N.D. Tex. Oct. 9, 2009) (internal citations and quotation marks omitted). The U.S. Supreme Court has recognized four factors that must be considered when determining if

a court should proceed without an indispensable party:

> (1) the plaintiff's interest in securing a forum for his lawsuit; (2) the defendant's interest in avoiding "multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another;" (3) the interest of the "outsider whom it would have been desirable to join;" and (4) the interest of the courts and the public in "complete, consistent, and efficient settlement of controversies."

Kelly v. Commercial Union Ins. Co., 709 F.2d 973, 977 (5th Cir. 1983) (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 109-11 (1968)). With regard to the burdens established under Rule 19, District Judge Lee H. Rosenthal (United States District Court, S.D. Texas) has stated:

> In ruling on a motion to dismiss for failure to join a necessary and indispensable party, a court must accept the complaint allegations as true. *Davis Cos. v. Emerald Casino, Inc.*, 268 F.3d 477, 479 n.2 (7th Cir. 2001). The moving defendant has the burden of showing that a party must be joined for just adjudication. *Ploog v. HomeSide Lending, Inc.*, 209 F. Supp. 2d 863, 873 (N.D. Ill. 2002) ("The proponent of a Rule 12(b)(7) motion to dismiss has the burden of producing evidence which shows the nature of the absent party's interest and that the protection of that interest will be impaired or impeded by the absence."). The analysis under Rule

> 19 is fact-specific. *See Rhone-Poulenc Inc. v. Int'l Ins. Co.*, 71 F.3d 1299, 1301 (7th Cir. 1995) (stating that a Rule 19 determination depends on the circumstances of the case). Determinations as to whether a party is required under Rule 19(a) and indispensable under Rule 19(b) are not mechanical and "the court must consider the practical potential for prejudice in the context of the particular factual setting presented by the case at bar." *Schlumberger Indus. Inc. v. Nat'l Sur. Corp.*, 36 F.3d 1274, 1286 (4th Cir. 1994) (citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968)).

United States v. Rutherford Oil Corp., No. G-08-0231, 2009 WL 1351794, at *2 (S.D. Tex. May 13, 2009).

V. Analysis & Discussion

The plaintiffs allege that Continental has violated multiple sections of USERRA. This federal statute "protects employees from being discriminated against by their employers because of their military service." *McIntosh v. Partridge*, 540 F.3d 315, 320 (5th Cir. 2008 (citing 38 U.S.C. § 4311). Specifically, "USERRA's purpose is, inter alia, to 'eliminat[e] or minimiz[e] the disadvantages to civilian careers and employment which can result' from non-career military service." *Day v. Lockheed Martin Space Sys. Co.*, 304 Fed. Appx. 296, 287 (5th Cir. 2008) (quoting

38 U.S.C. § 4301(a)(1)) (unreported opinion). To this end, the statute provides that:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service 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.
>
> * * *
>
> An employer shall be considered to have engaged in [prohibited] actions prohibited if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service. . . .

The plaintiffs' specific allegations under USERRA, and Continental's rebuttals thereto, are addressed below.

A. Alleged Denial of Seniority Benefits and the RLA

In their first cause of action, the plaintiffs allege that "Continental has violated USERRA by depriving

[the plaintiffs] employment benefits through discriminatory scheduling practices." Specifically, they maintain that Continental "utilizes PBS to construct trip assignments around each pilot's military leave . . . that are far inferior, lower in quality and/or contain fewer hours and thus less pay than their seniority allows them to hold." Continental rebuts that this cause of action "must be dismissed under Rule 12(b)(1) because [it] . . . must be arbitrated under the RLA." This assertion is premised upon the rule that, for claims falling under "the RLA, minor disputes must be resolved through a compulsory, binding arbitration procedure. . . ." *Mitchell v. Cont'l Airlines, Inc.*, 481 F.3d 225, 231 (5th Cir. 2007). Under the RLA, "[m]inor disputes are those disputes which concern the application or interpretation of existing collective bargaining contracts. . . ." *Hendley v. Cent. of Ga. R.R. Co.*, 609 F.2d 1146, 1150 (5th Cir. 1980).

The Court takes guidance on this issue from Senior District Judge Paul A. Magnuson's (United States District Court, Minnesota District) discussion in *Roslyn v. Northwest Airlines, Inc.*, which stated:

> The majority of cases addressing RLA preemption involve underlying state law claims.[1] See *id*. However, the instant case

[1] Courts addressing the issue of whether the RLA preempts underlying state law claims have divided claims into two categories. "Major" disputes involve the formation of collective bargaining agreements. *See Hawaiian Airlines, Inc.*, 512 U.S. at 252. "Minor" disputes involve "controversies over the meaning of

(Continued on following page)

> involves two federal laws, the RLA and the USERRA. Thus, the issue is not necessarily one of *per se* preemption, but rather whether the RLA precludes a claim brought under the USERRA. Nevertheless, the preclusion inquiry, like the preemption inquiry, focuses on congressional intent and whether the two federal statutes are compatible. *See Schlitz v. Burlington N. R.R.*, 115 F.3d 1407, 1415 (8th Cir.1997) (relying on preemption standards to determine that the RLA precluded claim under Age Discrimination in Employment Act ("ADEA")).

No. 05-0441, 2005 WL 1529937, at *2 (D. Minn. June 29, 2005) (unreported opinion) (footnote in original). Accordingly, in determining whether this cause of action ought to be dismissed, the Court will look to state law preemption cases to determine "congressional intent and whether the two federal statutes are compatible."

"Under the [RLA], minor disputes involving the interpretation of terms in an existing collective

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an existing collective bargaining agreement in a particular fact situation." See id. (quoting *Bhd. of R.R. Trainmen v. Chicago River & Ind. R.R. Co.*, 353 U.S. 30, 33, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957)). Generally, "minor" disputes are preempted by the RLA. *See Hawaiian Airlines, Inc.*, 512 U.S. at 252-53. However, "where there is a statutory basis for the claim, the 'major/minor dispute' analysis becomes irrelevant." *Carpenter v. Northwest Airlines, Inc.*, File No. 00-2490, 2001 WL 1631445, at *3 (D. Minn. June 7, 2001) (Montgomery, J.) (quotations omitted), aff'd 47 Fed. Appx. 424, 2002 WL 31102569 (8th Cir. Sept. 23, 2002).

bargaining agreement . . . must be resolved through binding arbitration. . . ." *BNSF Ry. Co. v. Bhd. of Maint. of Way Employees*, 550 F.3d 418, 423 (5th Cir. 2008). A minor dispute grows "out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53 (1994). On this issue, the Fifth Circuit has held "that 'a claim is preempted by the RLA only if it relies on the interpretation of a provision of the CBA; if the claim is brought under state law without any reference to the CBA, then it is not preempted.'" *Kollar v. United Transp. Union*, 83 F.3d 124, 126 (5th Cir. 1996) (quoting *Norris*, 512 U.S. at 282). Further, "when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Norris*, 512 U.S. at 261 n.8 (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994)).[2] The Court finds that, in the case at bar, the meaning of the CBA's terms are the subject of dispute, and as such, this cause of action must be dismissed.

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[2] It is of note that this standard arose with regards to the Labor Management Relations Act (the "LMRA"). However, the U.S. Supreme Court has noted that "[g]iven th[e] convergence in the pre-emption standards under the two statutes, we conclude that [the LMRA] provides an appropriate framework for addressing pre-emption under the RLA, and we adopt the [LMRA] standard to resolve claims of RLA pre-emption." *Norris*, 512 U.S. 246, 263. Accordingly, application of the LMRA framework to the RLA is appropriate.

In their first cause of action, the plaintiffs allege that Continental's scheduling practices violate USERRA. The complaint does not explicitly allege that the CBA is inconsistent with USERRA. However, the plaintiffs do maintain that certain seniority benefits guaranteed under the CBA are being denied to them by the application of the PBS. Specifically, they state that:

> Pilots with more seniority are afforded more benefits of employment as set forth in [the CBA,] which provides: "seniority, in accordance with a pilot's position on the current Continental Pilot System Seniority List, will govern all pilots in case of promotion or demotion . . . , retention in case of reduction in force, assignment or reassignment due to expansion or reduction in flying time, recall after furlough due to reduction in force, monthly Line award, and choice of vacancies."
>
> * * *
>
> Continental denies the Class a benefit of their employment through PBS by building schedules around their military leave and not in accordance with each pilot's seniority.

Accordingly, the outcome determinative inquiries are what rights are guaranteed under the CBA and whether such rights are being denied to the plaintiffs. Resolution of these questions necessarily entails "the interpretation of a provision of the CBA." *See Kollar*, 83 F.3d at 126. As the parties differ with regard to whether the plaintiffs are not being granted all

privileges of their seniority, they necessarily disagree about what seniority rights are provide for under the CBA (an issue of interpretation). *See Norris*, 512 U.S. at 261 n.8. Pursuant these findings, this cause of action falls under the RLA and must be dismissed.

B. The B-Plan, USERRA and ERISA

In their second cause of action, the plaintiffs assert that "Continental violated USERRA by depriving Plaintiffs . . . employment benefits through the discriminatory practices in the underpayment of B-Plan retirement contributions." Further, they state that Continental breached USERRA by failing to "treat the period of military leave as service with the employer for purposes of vesting and the accrual of pension benefits[, despite the rule that p]ension benefits should accrue as though the employees were available but for the military service."

The parties agree that the B-Plan is a pension plan that falls under ERISA. Continental argues that if a plan beneficiary "seek[s] to recover benefits from a plan covered by ERISA, their exclusive remedy is provided by ERISA. . . ." Further, it points out the rule that "claimants seeking benefits from an ERISA plan must first exhaust available administrative remedies under the plan before bringing suit to recover benefits." *Bourgeois v. Pension Plan for Employees of Santa Fe Intern. Corps.*, 215 F.3d 475, 479 (5th Cir. 2000). Premised upon these grounds, Continental asserts that the second cause of action must be

dismissed because the plaintiffs did not exhaust the remedies available under the B-Plan.

The plaintiffs attempt to rebut this position through a two part argument. First, they posit that ERISA plans are subject to USERRA, and therefore, any rights granted under USERRA are not precluded by ERISA. Second, they argue that USERRA pre-empts any contractual preconditions to suit (such as administrative remedies in the B-Plan). The Court agrees with the plaintiffs.

With regard to the plaintiffs' argument that "ERISA plans are covered under USERRA," the Court looks to the Code of Federal Regulations, which states:

> The Employee Retirement Income Security Act of 1974 (ERISA) defines an employee pension benefit plan as a plan that provides retirement income to employees, or defers employee income to a period extending to or beyond the termination of employment. *Any such plan maintained by the employer or employers is covered under USERRA*.

20 CFR § 1002.260 (emphasis added). This clause expressly holds that ERISA plans are subject to USERRA. From this, the plaintiffs argue that USERRA precludes application of the ERISA rule that administrative procedures must be exhausted prior to filing suit. The Court agrees. This conclusion

is supported by 38 U.S.C. § 4302, which provides, with regards to USERRA, that:

> (a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
>
> (b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

Subsection (a) establishes that USERRA does not preempt/preclude any law that provides benefits beyond those established by USERRA. In contrast, under subsection (b), USERRA does preempt/preclude laws or policies that diminish rights thereunder. To the extent that ERISA requires exhaustion of administrative remedies, it is *reducing* benefits provided by USERRA. This is inconsistent with § 4302(b) and § 1002.260. Thus, to the extent that USERRA applies to ERISA plans, exhaustion of administrative remedies is not required.

Moreover, with regard to the requirements under the B-Plan that administrative remedies be exhausted, § 4302(b) expressly provides that USERRA supersedes, among other things, any contract that would "establish[ ] additional prerequisites to the exercise of any [right granted under USERRA.]" The B-Plan falls under subsection (b). It establishes administrative procedures that must be followed prior to exercising rights granted by USERRA. This is inconsistent with subsection (b). Therefore, to the extent that a party is exercising rights under USERRA, that party need not adhere to the administrative requirements in the B-Plan. Accordingly, as the plaintiffs' second cause of action is brought under USERRA, they are under no obligation to exhaust the remedies provided by the B-Plan. Thus, this claim need not be dismissed for failing to exhaust administrative remedies.[3]

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[3] The Court notes that Continental points out that if a plan beneficiary "seek[s] to recover benefits from a plan covered by ERISA, their exclusive remedy is provided by ERISA. . . ." This rule is supported by case law. *See Hansen v. Cont'l Ins. Co.*, 940 F.2d 971, 979 (5th Cir. 1991). However, this rule is not applicable to the present case. As the plaintiffs point out, they "are not requesting payments *from* the B-Plan. . . ." Rather, they are "protesting Defendant's calculation of contributions made outside of the management of the B-Plan which are then deposited by Defendant to the B-Plan."

C. The B-Plan and Rule 19

Continental asserts that the B-Plan is a required party under Rule 19. Accordingly, it argues that the plaintiffs' failure to name the B-Plan as a party necessitates dismissal of their second cause of action under Rule 12(b)(7). Rule 19, in pertinent part, provides that:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

The Court will not grant Continental's requested relief on this issue. Outside of the assertion that "[t]he ERISA plan is a required party in any case seeking benefits from the plan," Continental has

failed to explain why dismissal is warranted under Rule 19. Further, as the plaintiffs have alleged "underpayment of B-Plan retirement contributions" *by Continental* – as opposed to malfeasance in the operation *of the actual B-Plan* – the Court does not immediately see why the B-Plan is a required party. Accordingly, Continental's requested relief is denied on this issue.

D. Alleged Denial of Retirement Benefits and the RLA

Similar to the plaintiffs' first cause of action, Continental asserts that the "second cause[ ] of action must be dismissed under Rule 12(b)(1) because [it is a] minor disputes that must be arbitrated under the RLA." The Court agrees.

"[T]he special boards of adjustment provided for in the Railway Labor Act have 'exclusive jurisdiction' over minor disputes." *Ruby v. TACA Intern. Airlines, S.A.*, 439 F.2d 1359, 1362 (5th Cir. 1971). As such, in order for this Court to maintain jurisdiction, it must be established that the present cause of action is not a minor dispute. As discussed above, "[t]he party asserting jurisdiction bears the burden of proof for a Federal Rule of Civil Procedure 12(b)(1) motion to dismiss." *Castro v. United States*, 560 F.3d 381, 386 (5th Cir. 2009) (citing *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001)). Accordingly, for this Court to maintain jurisdiction, the plaintiffs must

establish that their second cause of action is not a minor dispute.

In making this jurisdictional determination, the Court will "view all the facts in a light most favorable to the plaintiff." *Ambraco, Inc. v. Bossclip B. V.*, 570 F.3d 233, 237-38 (5th Cir. 2009) (citing *Ginter ex rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 448 (5th Cir. 2008) (Dennis J., dissenting)). Further, "under Rule 12(b)(1), the court may consider any of the following: '(1) the complaint alone; (2) the complaint supplemented by the undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'" *Walch v. Adjutant Gen.'s Dept. of Tex.*, 533 F.3d 289, 293 (5th Cir. 2008) (quoting *Robinson v. TCI/US W. Commc'ns Inc.*, 117 F.3d 900, 904 (5th Cir. 1997)). Even under this forgiving standard, plaintiffs are unable to establish jurisdiction over their second cause of action.

As discussed with regard to the plaintiffs' first cause of action, the Fifth Circuit has held "that 'a claim is preempted by the RLA only if it relies on the interpretation of a provision of the CBA; if the claim is brought under state law without any reference to the CBA, then it is not preempted.'" *Kollar v. United Transp. Union*, 83 F.3d 124, 126 (5th Cir. 1996) (quoting *Norris*, 512 U.S. at 282). Further, "when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be

extinguished." *Norris*, 512 U.S. at 261 n.8 (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994)). Thus, in order to establish jurisdiction at present, the plaintiffs would solely need to have alleged that the CBA need not be construed to address this issue. Further, the plaintiffs could have introduced into the record a portion of the CBA that evidences that the CBA need not be construed to address the second cause of action. However, the plaintiffs have failed to do this. Accordingly, the cause of action must be dismissed.[4]

E. Hostile Work Environment and USERRA

In their third cause of action, plaintiffs allege that "Continental violated Section 4311 of USERRA by creating a hostile work environment through harassing, discriminatory and degrading comments and conduct related to and arising in and out of Plaintiffs United States Armed Services and National Guard membership and service obligations." In response, Continental states that USERRA "does not provide for a hostile work environment cause of action." Continental further points out that "[n]either the Supreme Court nor any federal court of appeals has ever interpreted USERRA to create liability for a

[4] Should the plaintiffs believe that they can establish that this Court has jurisdiction through an amendment to their complaint or through the introduction of evidence into the record, the Court hereby grants leave to do this within 15 days of the entry of this memorandum opinion.

hostile work environment. Also, no district court in the Fifth Circuit has ever reached such an interpretation. . . .” However, it is also true that no federal appellate court or Fifth Circuit district court has ever interpreted USERRA to not create liability for a hostile work environment. In addressing this issue of first impression in this circuit, the Court looks to other district courts for guidance.

On this topic, Senior District Judge Conway (United States District Court, New Mexico District) has stated:

> The Tenth Circuit has not addressed the question whether USERRA provides a cause of action for hostile work environment or harassment. Other courts who have confronted this question have found that USERRA does provide for a hostile work environment cause of action, and they have applied the same analysis as hostile work environment claims brought pursuant to Title VII. *See, e.g., Dees v. Hyundai Motor Mfg. Alabama, LLC*, 605 F. Supp. 2d 1220, 1228 (M.D. Ala.2009) (holding that “USERRA-harassment claims, like those under Title VII should be analyzed using the principle announced by the Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986): harassment is actionable when it is ‘sufficiently severe or pervasive to alter conditions of [the victim’s]

> employment and create an abusive working environment' ").

Otero v. N.M. Corr. Dept., 640 F. Supp. 2d 1346, 1358 (D.N.M. 2009). In an opinion cited by Judge Conway, District Judge Thompson (United States District Court, M.D. Alabama) stated:

> One case to address [whether USERRA creates a cause of action for hostile work environment] is *Petersen v. Department of Interior*, 71 M.S.P.R. 227 (1996). In *Petersen*, the plaintiff contended that he had been harassed as a result of his prior military service. *Petersen* examined the legislative history of the term "benefit of employment" and found that Congress intended the phrase to be interpreted expansively in order to support veterans, *id*. at 236, and also noted that the Supreme Court has broadly construed predecessor statutes. *Id*. at n.8 (citing *Coffy v. Rep. Steel Corp.*, 447 U.S. 191, 196, 100 S.Ct. 2100, 65 L.Ed.2d 53 (1980) ("The statute is to be liberally construed for the benefit of the returning veteran.")). *Petersen* then stated that, "Although the appellant's hostile environment claim does not clearly fall within the term 'benefit,' we are persuaded that an 'expansive interpretation' of that term, as intended by Congress, leads to the conclusion that it does." *Id.* at 237. *Petersen*'s conclusion was bolstered by courts' consistent holdings that other anti-discrimination statutes lacking anti-harassment language (including Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, the Rehabilitation

> Act of 1973, 29 U.S.C. § 794, and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12112) nevertheless proscribe harassment as a kind of discrimination. *Id*. at 238-39. The Eleventh Circuit Court of Appeals has also acknowledged the prohibition on harassment into other anti-discrimination statutes. *See., e.g., Davis v. DeKalb County Sch. Dist.*, 233 F.3d 1367 (11th Cir.2000) (school district may be liable under Title IX for teacher's sexual harassment of a student).

Dees v. Hyundai Motor Mfg. Ala., LLC, 605 F. Supp. 2d 1220, 1227 (M.D. Ala. 2009). However, to the contrary, District Judge Gelpi (United States District Court, Puerto Rico District) has stated:

> "USERRA prohibits the denial of any benefit of employment by an employer to members of the uniformed service based on their membership and/or performance of service, but does not specifically prohibit an employer from subjecting an employee to harassment or a hostile work environment due to the employee's military status." *Ortiz Molina*, 2006 WL 2639297, *5 (internal citations omitted); *see also Figueroa Reyes*, 389 F. Supp. 2d at 212. Therefore, plaintiff's claim of harassment in the form of a hostile work environment is not cognizable under USERRA. For that reason, the court GRANTS defendant's motion for summary

> judgment as to the USERRA hostile work environment claim.

Baerga-Castro v. Wyeth Pharm., No. 08-1014, 2009 WL 2871148, at *12 (D.P.R. Sept. 3, 2009); *contra Vega Colon v. Wyeth Pharm.*, 611 F. Supp. 2d 110, 116-117 (D.P.R. 2009).

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)).

With this standard for statutory interpretation in mind, Judge Gelpi's analysis of hostile work environment claims seems the better construction of USERRA. *See Baerga-Castro*, 2009 WL 2871148, at *12. The Court recognizes that USERRA expressly prevents

the denial of benefits of employment to members of the uniformed service by their employers. However, under a plain language analysis, the scope of this protection does not include safeguarding from a hostile work environment. The term "benefit" is defined as an "[a]dvantage [or] privilege" or a "[p]rofit or gain." Black's Law Dictionary 178 (9th ed. 2009). The avoidance of a hostile work environment does not fall into either of these definitions. These definitions of "benefit" connote obtaining some gain above the expected status quo. In no way does avoiding a hostile work place grant such a gain. Accordingly, the Court finds that, under a plain language interpretation, USERRA does not provide for a hostile work environment cause of action. As such, it is not necessary to look to extrinsic evidence to construe this statute. Under these considerations, the claim must be dismissed.

VI. Conclusion

Based on the preceding discussion, the Court hereby GRANTS Continental's motion to dismiss in-part and DENIES the motion in-part.

It is so **ORDERED**.

SIGNED at Houston, Texas this 30th day of November, 2009.

/s/ Kenneth M. Hoyt
Kenneth M. Hoyt
United States District Judge