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“When Johnny Comes Marching Home Again”¹ Will He Be Welcome at Work?

Konrad S. Lee*

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1. “When Johnny Comes Marching Home Again” is a popular Civil War-era song that expressed citizens’ longing for the return of their family and friends from the war. Library of Congress, Overview Page: When Johnny Comes Marching Home Again: Patriotic Melodies (Library of Congress), <http://lcweb2.loc.gov/cocon/ihas/loc.natlib.ihas.200000024/default.html> (last visited Oct. 18, 2007).

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I. INTRODUCTION

The 2001 commencement of the “War on Terror”² placed an unprecedented demand on the National Guard and Reserves.³ While Desert Storm involved the deployment of 222,614 ready reservists,⁴ over 590,000 Guard members and Reservists have been mobilized since September 11, 2001,⁵ with nearly fifty percent of the active military comprised of members of the National Guard and Reserve.⁶ This nation’s reliance upon the National Guard and Reserve for essential military readiness is reaching unprecedented levels.⁷ From its original conception as an organized group

2. It appears President George W. Bush’s first use of the phrase “War on Terror” to describe the Administration’s efforts to stamp out terrorism against the United States came in a September 29, 2001 Radio Address of the President to the Nation. George W. Bush, U.S. President, Radio Address of the President of the Nation (Sept. 29, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010929.html>.

3. The Army, Navy, Marines, Air Force, and Coast Guard Reserves are always under the President’s control. Eric Umansky, *Army Reserve vs. National Guard: What’s the Difference Anyway?*, Slate, Jan. 7, 2005, <http://www.slate.com/id/2112001>; see also U.S. Const. art. II, § 2, cl. 1. This is not so with the Air and Army National Guards. Guard units are assigned to, and primarily controlled by, individual states. Umansky, *supra*. This actually gives the Guard units greater authority to enforce civilian laws, as the other branches of the military are prohibited by the Posse Comitatus Act, 18 U.S.C. § 1385 (2000), from doing so. *Id.* Guard units may be federalized and come under Presidential authority should the President declare a national emergency as he did with a partial mobilization following 9/11. Umansky, *supra*; see also U.S. Const. art. II, § 2, cl. 1. Guard units are comprised of part-timers who normally train one weekend per month and an additional two weeks per year and may be called up for two-year stints of duty. Umansky, *supra*. Reserve soldiers who are on inactive duty may also be called up for active duty for the same period of time, and both the Guard and the Reserves may, if Congress declares a national emergency, be compelled “to serve for the length of the emergency plus six months.” *Id.* (internal quotations removed). For an audio description of the differences between the Reserves and the National Guard, see Andy Bowers, *NPR: Slate’s Explainer: National Guard vs. Reserve* (NPR audio broadcast Jan. 11, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4278725>.

4. Stephan A. Duncan, *ROA National Security Report: Gulf War Was a Test of Reserve Components and They Passed*, in THE U.S. NAVAL WAR COLL., OPERATIONS DEPARTMENT, DESERT SHIELD/DESERT STORM EMPLOYMENT OR RESERVE COMPONENT: EXTRACTS OF LESSONS LEARNED 29 (1991).

5. Marcel Quinn, *Uniformed Services Employment and Reemployment Rights Act (USERRA) —Broad in Protections, Inadequate in Scope*, 8 U. PA. J. LAB. & EMP. L. 237, 237 (2005) (citing Bradley Graham, *Reservists May Face Longer Tours of Duty*, WASH. POST, Jan. 7, 2005, at A1).

6. ESGR, *EMPLOYER RESOURCE GUIDE: FOR BUSINESS LEADERS* (2003), available at http://www.esgr.org/contents/download/ESGR_HR_Guide_Final.pdf; see also Press Release, U.S. Dept. of Defense, National Guard and Reserve Mobilized as of May 11, 2005 (May 11, 2005), available at <http://www.defenselink.mil/releases/2005/nr20050511-3044.html> (“Total number currently on active duty in support of the partial mobilization for the Army National Guard and Army Reserve is 149,581; Naval Reserve, 3,653; Air National Guard and Air Force Reserve, 9,361; Marine Corps Reserve, 11,299; and the Coast Guard Reserve, 581. This brings the total National Guard and Reserve personnel, who have been mobilized, to 174,475, including both units and individual augmentees.”).

7. ESGR, *FAQ for Employers*, <http://esgr.org/resources.asp?p=employersfaq> (last visited Oct. 8, 2007).

of local militias,⁸ the National Guard has evolved into an integral player in military personnel strategy.⁹

The significant increase in deployment, both in numbers and in length, has taken a toll on both the reservist and the employer.¹⁰ The War on Terror has required many of those deployed to leave family, friends, and employment for over a year. One news article reported:

[The] resulting burden has been as much financial as emotional for many families, as onetime weekend warriors see their incomes shrink and businesses dry up.

. . . [W]hen employers pick up the financial slack, the burden has been relatively minor. But many other families feel squeezed and some feel pushed to the economic breaking point

. . . The self-employed have been hit especially hard, often having no one to run their businesses for months at a time.¹¹

In a continued effort to insulate reservist employees from loss of employment and to entice citizens who were concerned that enlisting in a part-time military organization would jeopardize their full-time employment, the Uniformed Services Employment and Reemployment Rights Act¹²

8. The National Guard is the oldest division of the United States armed forces, established in 1637. Army National Guard, *History of the Guard*, available at <http://www.armg.army.mil/guardhistory.aspx> (last visited October 18, 2007).

9. Employer Support of the Guard and Reserve (ESGR), a Department of Defense organization founded to safeguard and develop the relationship between employers and their Guard and Reserve employees, states, "The current National Defense Strategy indicates that the National Guard and Reserve, will be full partners in the fully integrated Total Force. Our Reserve forces will spend more time away from the workplace defending the nation, supporting a demanding operations tempo and training to maintain their mission readiness." ESGR, About ESGR, <http://www.esgr.org/about.asp> (last visited Oct. 18, 2007).

10. Sumana Chatterjee, *Business Urges Limits on Military Service of Workers, Employees Active in National Guard and Reserve Units Cause Headaches for Businesses, Employers Told Lawmakers*, PHILA. INQUIRER, June 26, 2004, at A02. ("Increased reliance in Iraq on the part-time warriors of the National Guard and military reserves is straining U.S. businesses and could cause big problems over time, business leaders and military experts told lawmakers yesterday. Employers must hold jobs open for those called up for duty, but the short notice, long deployments and unpredictability are stressing small and mid-sized companies, said Jeffrey Crowe, who sits on the board of the U.S. Chamber of Commerce.")

11. Steven Greenhouse, *After the War: The Reservists; Balancing Their Duty to Family and Nation*, N.Y. TIMES, June 22, 2003, at N14.

12. Uniformed Services Employment and Reemployment Rights Act (USERRA), Pub. L. No. 103-353, § 2(a), 108 Stat. 3150 (1994) (codified at 38 U.S.C. §§ 4301-33 (2000)), amended by

(USERRA) was enacted in 1994.¹³ It requires an employer to permit military absences by reservist employees and to reemploy the reservists upon their return.¹⁴ Although USERRA guarantees employment, many reservists continue to fear the loss of their jobs upon their deployment.¹⁵ The combination of this fear, along with the drastic decrease in wages upon deployment, causes many reservists to look for new employment upon their return home.¹⁶

Employers also face significant burdens, especially small businesses. Bobby Hollingsworth¹⁷ stated that although the Pentagon does not track economic effect on businesses:

It recognizes that using reservists “inextricably links the defense of this nation to employers” Some Army reservists are expected to spend 12 months with “boots on the ground,” plus varying time for pre-deployment training. That means businesses lose their employees for up to 18 months at a time, Crowe said. Some reservists are called up for duty repeatedly, making it hard for some employers to plan budgets and strategies.¹⁸

Temporarily replacing low- to mid-level employees may be cumbersome.¹⁹ Companies can draw upon temporary agencies and the unemployed with minimal training and upstart time.²⁰ However, war no longer is limited to the traditional “guns-and-ground troop affair” but relies on sophisticated “high-tech mastery and intelligence-gathering,” resulting in a change in the reservist deployment characterization.²¹ The twenty-first-century fighters

Veterans Program Enhancement Act of 1998, Pub. L. No. 105-368, § 212(b)(2), 112 Stat. 3331 (1998).

13. See *infra* Part II for the history of USERRA.

14. See USERRA § 2(a).

15. See Greenhouse, *supra* note 11.

16. *Id.* See also Robert A. Hamilton, *While They're Protecting Us, Who's Protecting Them?*, N.Y. TIMES, Oct. 21, 2001, at 14CN (“I had health insurance, but it came out of my check, and if I don't work I don't get paid, so I don't know what's going to happen with that,” Mr. Walsh, a member of the 143rd Military Police Company of the Connecticut National Guard and employee of New England Building Products,] said. And while one of his supervisors has told him the company will hold his job for him, he also knows that his co-workers will not be able to keep up if someone is not brought in to replace him. “If they hire someone else, I'm not going to fight to get a job back where someone doesn't want me,” Mr. Walsh said. “I like my job, and the money is great, but I guess I'd have to go someplace else.”).

17. Hollingsworth is the director of the Pentagon's ESGR. Sumana Chatterjee, *War Drains Some Firms Jobs Held for Reservists and Guard in Iraq*, ST. PAUL PIONEER PRESS, June 25, 2004, at C1.

18. *Id.*

19. Jennifer Merritt, *Sorry, the Boss Is in Baghdad*, BUS. WK., Feb. 17, 2003, at 74.

20. *Id.*

21. *Id.*

are “increasingly white-collar,”²² with more skills and bigger duties, leaving a bigger void when absent.²³

With the armed forces increased dependency on “weekend warriors” and the significant toll on employers, the resulting tension in the workplace is inevitable, with more reservists facing hostility when notifying employers of deployment orders or upon return from deployment.²⁴ After reporting a decrease in the number of USERRA complaints for several years in a row, the Department of Labor is now reporting an increase in complaints since 2001 and the initiation of the “Global War on Terrorism.”²⁵

While one of USERRA’s purposes is to protect individuals who are potentially sacrificing their lives in the interest of national security, it is not apparent that this purpose is succeeding; while USERRA clearly prohibits adverse discriminatory and retaliatory action based on military status, it is unclear whether it precludes employers from exhibiting or allowing employees to exhibit hostility toward their reservist workforce.²⁶ Without a clarification on this issue, the protections of USERRA may be undermined as corporations look to create such a difficult work environment that reservists are forced to either resign from the Reserves or their jobs.²⁷

Although the hostile workplace provision is a well-established cause of action under Title VII and has recently been applied under the ADA, the question remains whether it is cognizable under USERRA.²⁸ Because USERRA includes anti-discriminatory language, courts may be susceptible to automatically reliance upon Title VII’s severe or pervasive test.²⁹ Title VII was enacted for the purpose of remedying past wrongs and removing barriers experienced by historically disadvantaged groups, whereas USERRA was intended to provide protections for the purpose of

22. *Id.* (“More than 60% of reservists surveyed in 2000 by the Defense Dept. say they work in the corporate world, and a growing number come from the managerial ranks. While the Defense Dept. doesn’t collect specifics, reservist associations and human resource consultants say the number of management types called up in the past year outpaces those activated in the Persian Gulf War by an estimated 20%. And a higher percentage of the 111,600 reservists now on active duty are officers, says John O’Shea of the reserve Officers Assn. Senior military rank typically translates into a senior role in the civilian world.”).

23. *Id.*

24. *Hearing on the Fiscal 2006 Defense Budget Before S. Comm. on Armed Servs. Subcomm. On Personnel*, 110th Cong. (2005).

25. *Id.* (noting that complaints were decreasing from 1995 to 2001, but over the last three years the duty days performed by reservists has tripled in relation to the complaints received).

26. The Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4311 (2000).

27. *See id.*

28. 42 U.S.C. § 2000e-2(a) (2006); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986).

29. *See Meritor Sav. Bank*, 477 U.S. at 67.

encouraging military recruitment.³⁰ This difference is likely to become even more crucial in the current political environment.³¹

This article will address the underlying issues that are critical to any legal analysis of hostile environment claims. Part II outlines the history of USERRA and provides a basic framework for the protections it affords to veterans. Part III traces the evolution of the hostile work environment claim through its development under Title VII of the Civil Rights Act. Part IV examines the unsettled landscape of hostile work environment claims brought under USERRA and the various approaches taken by different federal courts. Part V argues that these causes of action should be unequivocally recognized by courts because the availability of these claims is entirely consistent, not only with other anti-discrimination statutes, but also with the explicit intent and underlying rationales of Congress. Finally, Part VI concludes the discussion.

II. HISTORICAL FRAMEWORK OF VETERAN REEMPLOYMENT RIGHTS AND THE GENESIS OF USERRA

A. *History of Veterans' Reemployment Rights*

Reemployment protections first appeared in 1940 in anticipation of America's entry into World War II and the corollary need for a large prepared military. Congress enacted the Selective Training and Service Act (STSA) to protect civilians who forsook employment for military training prior to the United States' entry into the war.³² In the event war did not ensue, Congress wanted the reentry into regular life for these civilians to be as smooth as possible, including the ability to return to former employment.³³ Senator Elbert Thomas of Utah reflected this sentiment in his statement before Congress:

30. Jennifer Merrigan Fay, *Employment Law—Presumption Against Extraterritoriality Prevents Application of 1964 Civil Rights Act Beyond United States Borders*—EEOC v. Arabian American Oil Co., 111 S. Ct. 1227 (1991), 26 SUFFOLK U. L. REV. 302, 302 n.3 (citing CIVIL RIGHTS IN AMERICAN HISTORY xi (Kermit Hall ed. 1987)).

31. Robert Burns, *Army Likely to Miss Year's Recruiting Goal: It Would Be the First Time Since 1999*, PHILA. INQUIRER, June 9, 2005, at A17.

32. Pub. L. No. 783, § 8, 54 Stat. 885, 890-92 (1940) (codified at 50 U.S.C. app. § 308 (1942)), repealed by Pub. L. No. 759, § 17, 62 Stat. 625 (1948).

33. H. Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F. L. REV. 55 (1999); Anthony H. Green, Note, *Reemployment Rights Under the Uniform Services Employment and Reemployment Act (USERRA): Who's Bearing the Cost?*, 37 IND. L. REV. 213 (2003); Andy P. Fernandez, *The Need for the Expansion of Military Reservists' Rights in Furtherance of the Total Force Policy: A Comparison of the USERRA and ADA*, 14 ST. THOMAS L. REV. 859 (2002).

If it is constitutional to require a man to serve in the Armed Forces, [sic] it is not unreasonable to require the employers of such men to rehire them upon the completion of their service, since the lives and property of the employers as well as everyone else in the United States are defended by such service.³⁴

Interest in protecting the ordinary lives of those called to serve in the military continued for the next fifty years. In 1948, Congress reenacted the protections of STSA within the Military Selective Service Act (MSSA) so as to support “conscription-based force management policies that existed for the first twenty-five years of the Cold War.”³⁵ Minor amendments were made thereafter.³⁶

In 1974, in light of the ensuing cessation of the Vietnam War, the repeal of the draft, and the move in military strategy to a “peacetime” volunteer force, MSSA was repealed and re-codified as the Vietnam Era Veterans’ Readjustment Assistance Act (VRRRA).³⁷ This amendment reflected the change in military defense strategy known as the “Total Force Policy” that was initiated in 1973.³⁸ The military replaced a conscription-based force with an increased reliance on volunteer soldiers, resulting in the Reserves and National Guard becoming a more integral part of the military.³⁹ This trend continued through the end of the Cold War in the 1980s, as old security threats were replaced with new threats located in different geographical regions.⁴⁰ The 1991 Persian Gulf War was the first real test of this new defense policy.⁴¹

34. See Green, *supra* note 33, at 217-18 (quoting remarks of Sen. Thomas, 123 CONG. REC. 10, 573 (1940)).

35. See Manson, *supra* note 33, at 56-57 (asserting that the disfavor of the draft, where the typical length of service for a draftee was two to three years, was postponed to some degree by these reemployment protections).

36. Renamed the Military Selective Service Act of 1967 (MSSA) without major revisions to reemployment protections. See Green, *supra* note 33, at 218. Its purpose once again was to “give protection to reservists and National Guardsmen against discrimination after their reemployment because of their military” duty. *Id.*

37. *Id.*

38. See Fernandez, *supra* note 33, at 861.

39. *Id.* (stating that references to reservists incorporate members of all seven separate units of the reserve and National Guard including the Army National Guard, Army Reserve, Naval Reserve, Air National Guard, Air Force Reserve, Marine Corps Reserve, and the Coast Guard Reserve).

40. See Green, *supra* note 33, at 219.

41. See Manson, *supra* note 33, at 58 (estimating that the number of reservists who actually served during Desert Storm and Desert Shield vary from 200,000 to over 280,000); see also 139 CONG. REC. H2211 (daily ed. May 4, 1993) (statement of Rep. Clyburn indicating “more than 200,000 members of the National Guard and Reserve answered the call to duty”).

B. USERRA'S Goals

Although VRRRA's protections were designed to assure retained employment for reservists during military leave, both employers and veterans were unsure of their obligations and rights under VRRRA.⁴² The veterans' reemployment statute had become complex and unruly with its unclear distinctions among those who could qualify for its protections.⁴³

Troubled with the complexities produced by the various amendments made to VRRRA over the years and problems faced by the returning Gulf War veterans, Congress enacted the Uniformed Services Employment and Re-Employment Rights Act in 1994.⁴⁴ The purpose of VRRRA had been to promote and encourage volunteerism in a large part-time military force which could be activated in times of need—forces that could quickly be trained and sent to war.⁴⁵ Nevertheless, after serving in the Gulf War, many reservists lost jobs, even with VRRRA's protections.⁴⁶ As a result, Congress was concerned that such results would lead to fewer enrollees and create distractions for those fighting.⁴⁷ While the majority of the reservists were well-treated by employers, Congress wanted USERRA to “undergird the original language with a restatement of congressional intent that a person may fulfill military commitments without fear of discrimination or retaliation in their normal employment.”⁴⁸ In addition, the provision would no longer focus on whether or not the military member was on active duty, but rather would provide blanket protection for all those serving in the various military components.⁴⁹

42. See 139 CONG. REC. H2211 (statement of Rep. Brown).

43. Penni P. Bradshaw & Richard E. Fay, *When Johnny comes Marching Home Again: the Veteran's Reemployment Rights Act and Employer Obligations to Military Reservists*, 15 AM. J. TRIAL ADVOC. 79, 81 (1991).

44. 38 U.S.C. § 4301 (2006); Pub L. 103-353, § 2(a), Oct. 13, 1994.

45. 38 U.S.C. § 4301.

46. See John F. Beasley Jr., *Protecting America's Reservists: Application of State and Federal Law to Reservists' Claims of Unfair Labor Practices*, GA. B.J., Feb. 2002, at 12, available at <http://www.gabar.org/public/pdf/GBJ/feb02.pdf> (last visited Oct. 10, 2007).

47. See 139 CONG. REC. H2212 (statement of Congressman Clement) (commenting that without this “protect[ion] from discrimination or reprisal on the job as a result of their service, it will be increasingly difficult to recruit Americans to serve. This would seriously jeopardize the All-Volunteer Force concept. Many of my fellow guard members served proudly in the gulf war. Upon their return, some of these individuals experienced additional hardships and inconveniences in the workplace as a direct result of their deployment overseas. These experiences have caused a great deal of skepticism among the troops and a reluctance on the part of others to join the Guard and Reserves.”); see also 139 CONG. REC. H2210 (statement of Rep. Hutchinson) (“This bill will help our forces to concentrate totally on the purpose of their mission. If we are asking our service men and women to risk their lives for our country, we must ensure that their employment rights are easily understood and consistently observed.”).

48. CONG. REC. H2210 (statement of Rep. Penny).

49. *Id.* (statement of Rep. Stump) (“It would effectively clarify and strengthen existing laws, on veterans' reemployment rights. It would cover the active duty forces, reserves and National Guard alike.”).

Congress reduced its original findings into three purposes:

(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.⁵⁰

Substantial fines and punishments were to be assessed against those companies refusing to abide by the dictates of the statute.⁵¹ In summary, the goal of USERRA was to encourage participation in the reserves, minimize the disruption in the lives of those that served, foster anti-discriminatory policies, and promote prompt reemployment upon return from military leave.⁵²

C. The "Benefits of Employment" Provisions of USERRA

USERRA prohibits discriminatory actions by an employer against the reservist employee, provides reemployment rights upon return from military duty, and preserves benefits of employment for those on leave.⁵³ This article places particular emphasis on whether or not discrimination in "benefits of employment" includes the right of the reemployed reservist to be free from an intolerable or hostile work environment. This type of environment can be caused by harassing supervisors or employees disgruntled with a reservist's extended and recurring absences.

Additionally, USERRA prohibits an employer from denying "initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership,

50. The Uniformed Services Employment and Re-Employment Rights Act of 1994, 38 U.S.C. § 4301 (2004).

51. § 4323.

52. §§ 4301, 4311(a).

53. § 4301 et seq.

application for membership, performance of service, application for service, or obligation.”⁵⁴ The employer may neither retaliate nor take any adverse employment action against a person for asserting rights under USERRA.⁵⁵ In order to prove discrimination under USERRA, a plaintiff must show the plaintiff’s military status was a motivating factor in the employer’s negative action.⁵⁶ Once a plaintiff has shown a prima facie case of discrimination, the employer may assert an affirmative defense if it “can prove that the action would have been taken in the absence of such membership”⁵⁷

As noted, USERRA incorporated many of VRRRA’s protections. Some of these carryover provisions include: (1) returning reservists to the same, or a comparable, position they were in before they were deployed, with the same level of job seniority, status, and pay; (2) transferring disabled employees to another position with similar seniority, status, and pay for those employees disabled during their service if the employees can no longer perform the duties of the previous position; (3) extending the opportunity for the employees to continue health insurance through the employer without any waiting or exclusion period for returning reservists and their family; and (4) excusing the employer from reemploying the returning reservists if the employer’s circumstances are such that rehiring is impossible or unreasonable.⁵⁸ As to this last provision, mere inconvenience, loss of efficiency, or economy of operation due to the extended leave is not deemed to be unreasonable.⁵⁹

Previously the protections provided under VRRRA depended upon whether the reservist served in active duty voluntarily or involuntarily.⁶⁰ For instance, the length of time to which the reinstatement of employment provisions could be extended depended upon whether the reservists volunteered for Operation Desert Shield or Desert Storm or whether the reservists were involuntarily called to active duty.⁶¹ Application

54. § 4311(a) (2000). USERRA also requires that any military member absent due to his military service be reemployed, provided that notice is provided to the company within the articulated deadlines. See, e.g., Ryan Wedlund, *Citizen Soldiers Fighting Terrorism: Reservists’ Reemployment Rights*, 30 WM. MITCHELL L. REV. 797 (2004).

55. § 4311(b) (“An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.”).

56. § 4311(c)(1).

57. *Id.*

58. See generally Bradshaw & Fay, *supra* note 43, at 84-86, 91.

59. *Id.* at 85.

60. *Id.* at 94.

61. *Id.* at 94-95 (“[T]he rules differ for reservists who may have volunteered for active duty and those who were involuntarily called up. A reservist who volunteered for active duty to support

requirements for reemployment also varied based on whether the reservist was mobilized under the Presidential Selected Reserve Call-up or 10 U.S.C. §§ 672(d) and 673.⁶² “[M]ere inquiry into the possibility of reemployment” did not qualify as application under the statute.⁶³ The time during which the employee was protected from termination or discharge for anything but cause also depended upon which authority mobilized the reservist.⁶⁴ USERRA removed these distinctions.

Since *Fishgold v. Sullivan Drydock & Repair Corp.*, reemployment statutes have been broadly interpreted in favor of the military employee.⁶⁵ This broad statutory construction was preserved throughout the various versions of veteran reemployment rights acts.⁶⁶ USERRA’s legislative history elaborates that “[t]o deny such rights to employees who serve in the military undermines the fundamental principle that the employee should not be disadvantaged by military service.”⁶⁷

In establishing a prima facie case of discrimination, the plaintiff has the burden of proof to “show by a preponderance of the evidence that his or her protected status was a substantial or motivating factor in the adverse employment action.”⁶⁸ After the amendments of 1994, military status need

Operation Desert Shield or Desert Storm may extend an initial period of active duty of less than four years up to the four year service limitation of subsection 2024(b)(1) and, upon discharge, still be eligible for reinstatement of other employment benefits under the VRRRA. However, reservists who are called involuntarily to active duty may voluntarily extend their active duty only for a period equal to the maximum allowed under the statutory call-up authority.”)

62. *Id.* at 84 (citing 38 U.S.C. § 2024(c) (1988)).

63. *Id.* at 96.

64. *Id.* at 85, 99 (citing 38 U.S.C. § 2021(b)(1) (1988)).

65. 328 U.S. 275, 285 (1946) (citing *Boone v. Lightner*, 319 U.S. 561, 575 (1943)). For discussion of the “escalator principle” introduced in *Fishgold*, 328 U.S. at 284-85, refer to *Wedlund*, *supra* note 54, at 817.

66. 140 CONG. REC. H9133 (daily ed. Sept. 13, 1994) (statement of Rep. Montgomery) (“Incidents or advantages of employment . . . [are] intentionally framed in general terms to encompass the potential[ly] limitless variation in benefits of employment that are conferred by an untold number and variety of business concerns.”).

67. 140 CONG. REC. 24423 (1994) (statement of Rep. Montgomery).

68. *Gillie-Harp v. Cardinal Health, Inc.*, 249 F. Supp. 2d 1113, 1119 (W.D. Wis. 2003). After the 1994 changes made in USERRA, a plaintiff was no longer required to show that termination was solely a result of plaintiff’s military obligations, but rather that the “defendant was motivated in part by an impermissible factor.” *Id.* at 1118. Interestingly, the court looked to Title VII case law, where the court found that the employer’s reliance upon or taking of a “protected characteristic” into account violates Title VII. *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989), *superseded by statute*, Civil Rights Act of 1991, *as recognized in Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302, 1305 (N.D. Cal. 1992)). The Federal Circuit, in an unpublished opinion, *Fahrenbacher v. Department of Veterans Affairs*, adopted a variation of this test by requiring the plaintiff, in establishing a prima facie case, to show: “(1) [h]e was a member of a protected group; (2) he was similarly situated to an individual who was not a member of his protected group; and (3) he was treated more harshly or disparately than the individual who was not a member of his

only be a “motivating factor” and not the sole cause of the action, meaning that the military status was one of the factors that “a truthful employer would list if asked for the reasons for its decision.”⁶⁹ It is a motivating factor if an employer relies, considers, or conditions a decision based on reservist status.⁷⁰

Direct or circumstantial evidence may be used to prove discriminatory motive.⁷¹ Factors that may be used to infer discriminatory motive include:

[P]roximity in time between the employee’s military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer’s expressed hostility towards members protected by the statute together with knowledge of the employee’s military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses.⁷²

Once the plaintiff establishes a prima facie case, the burden of persuasion then shifts to the employer to show the same decision would have been made regardless of the plaintiff’s protected status.⁷³ Simply articulating a legitimate, nondiscriminatory reason is insufficient. Rather, an employer must show its legitimate reasons that would have induced it to make the same decision.⁷⁴ The relevant question then becomes whether the employer honestly believed the employee’s behavior warranted the termination.⁷⁵ Remedial measures that can be asserted against

protected group.” 243 F.3d 567 (Fed. Cir. 2000) (quoting *Duncan v. U.S. Postal Serv.*, 73 M.S.R.P. 86, 93-94 (1997), *overruled by* *Fox v. U.S. Postal Serv.*, 88 M.S.R.P. 381 (2001)); *see also* *Sheehan v. Dep’t of Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001).

69. *Sanguinetti v. U.P.S.*, 114 F. Supp. 2d 1313, 1318 (S.D. Fla. 2000) (quoting *Brandsasse v. City of Suffolk*, 72 F. Supp. 2d 608, 617 (E.D. Va. 1999); *see also* *Akhary v. City of Chattanooga*, No. 1:01-CV-106, 2002 WL 32060140, at *8 (E.D. Tenn. May 22, 2002) (citing *Robinson v. Morris Moore Chevrolet-Buick, Inc.*, 974 F. Supp. 571, 576 (E.D. Tex. 1997)).

70. *Robinson*, 974 F. Supp. at 576.

71. *Sheehan*, 240 F.3d at 1014.

72. *Akhary*, 2002 WL 32060140, at *9.

73. *Gillie-Harp*, 249 F. Supp. 2d at 1119. The courts adopted the two-part analysis set forth in *N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393 (1983), and have rejected the use of the *McDonnell Douglas* three-part analysis usually applied in federal antidiscrimination cases. *McDonnell Douglas v. Green*, 411 U.S. 792, 802, 804 (1973). *McDonnell Douglas* was deemed inconsistent with the *Transportation Management* “because in *McDonnell Douglas* only the burden of production shifts to the defendant while the burden of persuasion always remains with the plaintiff.” *Gillie-Harp*, 249 F. Supp. at 1119; *see also* *Sheehan*, 240 F.3d at 1013-14.

74. *Robinson*, 974 F. Supp. at 576 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989)).

75. *Chance v. Dallas County Hosp. Dist.*, No. 3-96-CV-2842-BD, 1998 WL 177963, at *5 (N.D. Tex. 1998) (citing *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir. 1995)); *see also* *Essex v. U.P.S.*, 111 F.3d 1304, 1310 (7th Cir. 1997).

discriminating employers include equitable relief, lost compensation, liquidated damages, and attorneys' fees.⁷⁶

In summary, USERRA attempted to clarify (1) employers' obligations toward reservist employees, and (2) which individuals could assert rights under its provisions. One significant issue not addressed by Congress, which has yet to be fully addressed in the courts, is whether the "benefits of employment" language of USERRA includes freedom from a hostile work environment.⁷⁷ If a supervisor inflicts abuse upon a reservist which does not result in a discrete employment action such as termination, can the employer be held equally responsible as it would be in harassment claims based on race, gender, age, national origin, and disability? Courts should be willing to recognize a hostile work environment claim under USERRA because doing so would undermine a significant form of discrimination. To suggest this position, it is necessary to examine the origins and purpose of the claim for a hostile work environment under Title VII of the Civil Rights Act of 1964.⁷⁸

III. TITLE VII AND THE CREATION OF THE HOSTILE WORK ENVIRONMENT CLAIM

Clearly Congress' actions over the last fifty years suggest a national agenda to create a discrimination-free work environment,⁷⁹ an effort "to strike at the entire spectrum of disparate treatment" between individuals, whether it be based on gender, race, disability, or national origin.⁸⁰ Tangible employment actions that are based on certain specified protected classifications are expressly prohibited, but much discussion has evolved over harassment claims.⁸¹ Since 1971, beginning with *Rogers v. EEOC*,⁸² the courts have recognized an implied discriminatory action of harassment or hostile work environment based on a policy that employees should be free from discriminatory intimidation, ridicule, and abuse in the workplace.⁸³ The U.S. Supreme Court in *Meritor*, and then later in *Harris*, officially

76. 38 U.S.C. § 4323(d), (e), (h) (2004).

77. See *infra* Part III.

78. 42 U.S.C. 2000e-2(a) (2000).

79. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

80. *Id.* at 64; see also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) ("The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment . . ." (quoting *Meritor*, 477 U.S. at 64)).

81. *Meritor*, 477 U.S. at 64.

82. *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971).

83. *Meritor*, 477 U.S. at 65.

recognized the sexual harassment claim, stating that “when the workplace 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, Title VII is violated.’”⁸⁴

Over the last thirty years, the hostile work environment claim has been recognized under Title VII, Title IX, Americans with Disabilities Act (“ADA”), and the Age Discrimination in Employment Act (“ADEA”).⁸⁵ However, only recently has a federal court officially recognized that the hostile work environment claim might exist under USERRA or its predecessor statutes.⁸⁶ As the number of reservists being deployed increases, we will likely see an increase in the number of USERRA hostile work environment claims. This section will trace the development of the hostile work environment claim prior to USERRA.

Harassment, or hostile work environment, was first recognized as a form of discrimination protected under Title VII by the federal Fifth Circuit. The Fifth Circuit Court of Appeals in *Rogers v. EEOC* held that “the relationship between an employee and his working environment is of such significance as to be entitled to statutory protection.”⁸⁷ That case involved a Hispanic employee who filed a complaint with the EEOC.⁸⁸ The claim stated that the employer-doctor’s practice of segregating patients based on national origin constituted a discriminatory employment act in violation of Title VII.⁸⁹ Although the discriminatory act was not against the employee directly, the indirect segregation of patients created a hostile workplace for the minority employee.⁹⁰ In its analysis, the court justified the need to liberally interpret unlawful employment practices under Section 703(a)(1) of Title VII⁹¹ because of the articulated purpose of the Act: to “eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination.”⁹² The court opined:

84. *Harris*, 510 U.S. at 21.

85. *Rogers*, 454 F.2d at 237-38 (recognizing hostile environment claim under Title VII); *Patricia v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1293 (recognizing hostile environment claim under Title XI); *Fox v. GMC*, 247 F.3d 169, 177 (4th Cir. 2001) (recognizing hostile environment claim under the ADA); *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830, 834-35 (6th Cir. 1996) (recognizing hostile environment claim under the ADEA).

86. *Vickers v. City of Memphis*, 368 F. Supp. 2d 842, 844-45 (W.D. Tenn. 2005).

87. *Rogers*, 454 F.2d at 237-38.

88. *Id.* at 236.

89. *Id.*

90. *Id.* at 238-39. “An employer’s patient discrimination may constitute a subtle scheme designed to create a working environment imbued with discrimination and directed ultimately at minority group employees.” *Id.* at 239.

91. 42 U.S.C. § 2000e-2(a)(1) (2000).

92. *Rogers*, 454 F.2d at 238.

Employees' psychological, as well as economic, fringes are statutorily entitled to protection from employer abuse, and . . . the phrase "terms, conditions, or privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. I do not wish to be interpreted as holding that an employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee falls within the proscription of Section 703. But by the same token I am simply not willing to hold that a discriminatory atmosphere could under no set of circumstances ever constitute an unlawful employment practice. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.⁹³

Rogers introduced the idea that disparate treatment in the workplace of a protected group, be it based on race, sex, national origin or religion, can give rise to claims under Title VII to individuals who fall within the targeted group.⁹⁴ Title VII safeguards not only wages and schedules (standard employment remuneration that should not involve certain characteristics in its determination), but includes a more expansive view of employment benefits or "intangible fringe benefits" that are valued by the modern employee.⁹⁵ This case reflects formal equality principles in its desire to eliminate unfairness and injustice by precluding employees from being targets of discriminatory conduct even though the employees were not those directly affected by the disparate treatment.⁹⁶

While the hostile environment claim was initially accepted by the courts in racial discrimination cases, the subtleties of the theory were more fully flushed out in the sexual harassment arena by the U.S. Supreme Court in *Meritor Savings Bank, FSB v. Vinson*.⁹⁷ In *Meritor*, an assistant bank manager, Vinson, filed suit after being discharged for excessive use and abuse of sick leave.⁹⁸ Vinson filed a complaint alleging that during the four years she worked at the bank, her supervisor sexually harassed her in

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 240.

97. 477 U.S. 57 (1986).

98. *Id.* at 60.

violation of Title VII.⁹⁹ The conduct alleged was quite egregious, involving fondling in front of other employees and in private, suggestive remarks, demands for sexual favors during and after work hours, and repeated instances of forcible rape.¹⁰⁰ The Bank asserted that Title VII, in light of previous Supreme Court cases, limited discrimination claims to those that were of a tangible, economic nature.¹⁰¹ Borrowing from *Rogers*, the Supreme Court rejected this view with its unequivocal assertion that, “[t]he language of Title VII is not limited to ‘economic’ or ‘tangible’ discrimination. The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.”¹⁰²

Following the decision in *Meritor*, questions quickly arose as to the degree of severity or pervasiveness needed to rise to the level of actionable harassment. The Supreme Court clarified this question in *Harris v. Forklift Systems, Inc.*, stating that the egregious conduct that existed in *Meritor* was not the minimum standard by which to judge severe-enough abuse.¹⁰³ Harris, a female manager, was employed at Forklift Systems, Inc., an equipment rental company, for a period of two and a half years.¹⁰⁴ During her tenure, Harris found herself a target of repeated insults and sexual innuendos from the president of the company.¹⁰⁵ The president ridiculed Harris numerous times in front of other employees for being female, including calling her a “dumb ass woman,” telling the company the job demanded a man not a woman, asking Harris to remove money from the president’s front pockets, and purposely throwing money on the floor and then asking Harris to pick it up.¹⁰⁶ Harris complained to the president but the conduct did not stop.¹⁰⁷ Harris finally quit after the president jokingly asked Harris, in the presence of others, whether she had promised to sleep with a man with whom she was negotiating a deal.¹⁰⁸

The Supreme Court stated that actionable conduct need not be so severe as to be expected to “seriously affect[] the plaintiff’s psychological well-being.”¹⁰⁹ Attempting to find the middle ground between merely offensive conduct, which should not be actionable, and psychologically damaging conduct, the Court opined:

99. *Id.*

100. *Id.*

101. *Id.* at 64.

102. *Id.*

103. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993).

104. *Id.* at 19.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 22.

Title VII comes into play before the harassing conduct leads to a nervous breakdown. 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.¹¹⁰

As the focus shifts from psychological well-being to performance, the appropriate question becomes whether the environment is conducive for the plaintiff to perform at the same level as another similarly situated employee.¹¹¹

Further clarifying the "severe or pervasive" test, the Court held that the environment must be (1) objectively hostile, meaning that the severity of the harassment was to be judged from the perspective of a reasonable person in the plaintiff's position, and (2) subjectively hostile, meaning that the plaintiff must have found the conduct abusive and intolerable.¹¹² Provided both of these exist, "there is no need for it also to be psychologically injurious."¹¹³

The Court admonished that sexual harassment cases required the examination of all the circumstances in order to determine whether an environment is hostile or abusive.¹¹⁴ Factors to examine include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.¹¹⁵ The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.¹¹⁶

As can be gleaned from the Title VII line of hostile environment cases, particularly those relating to sexual harassment, four elements guide the

110. *Id.*

111. *Id.* ("[T]he very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.")

112. *Id.* at 21-22 ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.")

113. *Id.* at 22.

114. *Id.* at 23.

115. *Id.*

116. *Id.*

courts in finding whether a hostile work environment exists: first, harassing conduct must not be limited to isolated or merely offensive conduct but must be extreme, severe, or pervasive to create a hostile or abusive working environment; second, the employee must have reasonably perceived the environment to be hostile or abusive; third, the employee must have been harassed as a result of the protected characteristic; and fourth, the plaintiff must show the employer was responsible for the harassment.¹¹⁷ An employer may avoid such liability if it can show that (1) it took reasonable efforts to create an environment free of harassment and corrected known problems when they arose, and (2) the plaintiff employee unreasonably failed to invoke the procedures established by the employer.¹¹⁸

Though Title VII hostile work environment cases form the basis for USERRA hostile work environment claims, the differences between USERRA and Title VII should not be overlooked or minimized, as they are critical in the hostile environment analysis. Unlike Title VII and the ADA, which attempt to level the playing field for historically disadvantaged individuals excluded from employment opportunities based on immutable characteristics, USERRA provides antidiscrimination and accommodation protections to individuals making a voluntary choice that ultimately impacts job performance.¹¹⁹ These protections are extended not only based on a theory of morality or equality, but also on a theory of national interest.¹²⁰ The author contends that USERRA claims should be evaluated according to the effect the employer's treatment of the uniformed servicemember would have on one's decision to enlist in the uniformed services.¹²¹ This will be discussed in more detail below, but first we will look at the development of the claim of hostile work environment under USERRA.

IV. COURT TREATMENT OF HOSTILE WORK ENVIRONMENT CLAIMS RAISED UNDER USERRA

The body of law regarding the availability of a hostile work environment claim under USERRA is scant, but some courts have addressed the issue.

In *Petersen v. Department of the Interior*,¹²² Peterson, a disabled veteran who served in the Army for more than five years and was honorably discharged, was hired in 1993 by the National Park Service Ranger in a law enforcement position.¹²³ Two years later, Peterson was stripped of his law

117. *Id.*

118. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

119. *See supra* note 30 and accompanying text.

120. *See supra* notes 17-25 and accompanying text.

121. *See infra* Part V.-B.

122. 71 M.S.P.R. 227, 230 (M.S.P.B. 1996).

123. *Id.* at 230.

enforcement assignment and assigned other duties.¹²⁴ In 1995, Peterson filed a complaint with the Secretary of Labor alleging, among other things, that he was the victim of harassment at the Park Service because of his past military service.¹²⁵ Specifically, Peterson claimed that “[d]uring the application process and [from] the time of his hire, supervisors and co-workers . . . made negative comments about [his] status as a disabled veteran.”¹²⁶ He complained that a supervisor indicated he was forced to hire Peterson because Peterson was a disabled veteran.¹²⁷ Peterson also claimed he was harassed and belittled by coworkers, who called him such derogatory names such as “psycho,” “baby killer,” and “plate head.”¹²⁸ He reported that even though he complained to personnel, “no effective steps were taken to end the hostile conduct.”¹²⁹

The case came before a reviewing panel of the Merit Systems Protection Board.¹³⁰ The panel concluded that the purposes underlying the various antidiscrimination statutes—including Title VII, Title IX, the Rehabilitation Act, and the ADA—were similar in trying to eradicate particular forms of employment discrimination.¹³¹ Relying upon *Meritor*, the Board held that under the Congressional mandate requiring a broad interpretation, USERRA was intended to preserve the “well-established principle that discrimination encompasses hostile environment claims.”¹³² The Board concluded that harassment occurring because of service in the uniformed services is a violation of USERRA.¹³³ Given the strong deference accorded the Board in interpreting military law, the *Petersen* case appeared to resolve the question.

In a subsequent unpublished opinion in the case of *Church v. City of Reno*,¹³⁴ the Ninth Circuit Court of Appeals refused to follow *Petersen*.¹³⁵

124. *Id.*

125. *Id.*

126. *Id.* at 235.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 230. On November 10, 1998, Congress amended USERRA to include a provision that all federal employees have a right to have USERRA claims heard by the Merit Systems Protection Board, “without regard as to whether the complaint occurred before, on or after October 13, 1994 [the date USERRA was enacted].” See 38 U.S.C. § 4324(c)(1) (2000).

131. *Petersen*, 71 M.S.P.R. at 239.

132. *Id.* at 237.

133. *Id.* at 239.

134. 1999 WL 65205 *1 (9th Cir. Feb. 9, 1999).

135. *Id.* at *1 n.3 (denying plaintiff’s motion to show cause why the City of Reno and certain City employees should not be held in contempt for violating a previous consent decree by subjecting Church to a hostile work environment in violation of a previous consent decree enjoining the City from violating USERRA or the specific language of the consent decree).

There, in 1987, the City of Reno had entered into a consent decree agreeing not to “terminate, demote, punish, restrict or withhold accrual of benefits . . . or otherwise discriminate against an employee as a result of his participation in the Military Reserve or National Guard.”¹³⁶ Church complained that he was subjected to a hostile work environment due to caustic anti-military comments from coworkers.¹³⁷ The Ninth Circuit determined that any “benefit of employment” under USERRA must accrue from “an employment contract or agreement or an employer policy, plan, or practice;”¹³⁸ in other words, from the consent decree. Therefore, Church could only claim harassment under USERRA if the employer had somehow expressly provided that it would not create, or allow to exist, a hostile work environment.¹³⁹ Because Church was not able to show the consent decree expressly forbade harassment for prior military service, or that his employer promised a working environment “free from caustic comments by coworkers,” the court could not find that USERRA itself anticipated such a benefit.¹⁴⁰ The court rejected Church’s claim that a consent decree’s “otherwise discriminate” language included a prohibition against creation of a hostile work environment.¹⁴¹ The court simply refused to find, in its words, that the “notoriously ambiguous” term “discrimination” included a hostile work environment under USERRA.¹⁴² Unfortunately, the court gave no explanation for why it applied the anti-discrimination provisions of USERRA differently from similar language in Title VII or other federal anti-discrimination statutes.

Later, in the unreported case of *Miller v. City of Indianapolis*,¹⁴³ Miller and other firefighters filed a hostile work environment claim against the City of Indianapolis, arguing that supervisors in the fire department pressured them to “get out of the Guard” and that one firefighter was told that participation in the Guard “threw up a red flag” any time he was “marked off sick.”¹⁴⁴ Evidently, a supervisor also told Miller it was department policy to pressure employees to resign from the Guard.¹⁴⁵ The District Court for the Southern District of Indiana held that there existed no affirmative right to

136. *Id.* at *2.

137. *See id.* at *1.

138. The Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4303(2) (2000).

139. *See Church*, 1999 WL 65205, at *1.

140. *Id.* In addition, the court refused to recognize such a benefit because neither the U.S. Supreme Court nor the Ninth Circuit had interpreted USERRA or the VERRA as creating liability for a hostile work environment. *Id.*

141. *See id.* at *2.

142. *See id.*

143. No. IP-99-1735-CMS, 2001 WL 406346 (S.D. Ind. Apr. 13, 2001), *aff'd* 281 F.3d 648 (7th Cir. 2002).

144. *Id.* at *2.

145. *Id.*

employment in the Reserves¹⁴⁶ and that, even if a hostile work environment claim did exist under USERRA, the plaintiffs had failed to show pressure to resign from the Reserves created a hostile work environment “sufficiently severe or pervasive as to alter the conditions of . . . employment and create an abusive working environment.”¹⁴⁷

In 2002, the case was heard by the United States Court of Appeals for the Seventh Circuit.¹⁴⁸ There, without expressly holding that a hostile work environment harassment claim was available under USERRA, the court simply affirmed the lower court’s conclusion that no substantial evidence supported a harassment claim.¹⁴⁹ So the ultimate question remained open.

A puzzling case partially recognizing a USERRA hostile work environment claim was *Vickers v. City of Memphis*,¹⁵⁰ where the court held that hostile work environment and harassment claims are viable under USERRA, *but only if the plaintiff can establish that such harassment is a violation of the employment policy.*¹⁵¹ *Vickers* relied upon an earlier Sixth Circuit opinion later addressed by the Supreme Court, *Monroe v. Standard Oil*. The court held that USERRA’s precursor, VRRRA, was:

Intentionally framed in general terms to encompass the potentially limitless variation in benefits of employment that are conferred by an untold number and variety of business concerns [W]e read section 2021(b)(3) to protect only those employment benefits that a reservist can establish exist at his place of employment. In establishing their existence, incidents or advantages of employment must be ascertained by reference to employment rules or employer practices at the employer’s business establishment.¹⁵²

The *Vickers* court then accepted a hostile work environment claim by slightly modifying the *Meritor* “severe or pervasive” test.¹⁵³ The court required the conduct to be “sufficiently pervasive to alter the conditions of employment and create an abusive working environment,” *and* that Plaintiff is entitled to such a benefit of employment by virtue of an employer policy.”¹⁵⁴ The *Vickers* court appeared to follow the reasoning of *Church v.*

146. *Id.* at *7.

147. *Id.* at *8 (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

148. *Miller v. City of Indianapolis*, 281 F.3d 648 (7th Cir. 2002).

149. *See id.* at 653-54.

150. 368 F. Supp. 2d 842 (W.D. Tenn. 2005).

151. *Id.* at 845.

152. *Id.* at 844-45 (citing *Monroe v. Standard Oil Co.*, 613 F.2d 641, 645 (6th Cir. 1980)).

153. *Id.*

154. *Id.* (citation omitted) (emphasis added).

City of Reno,¹⁵⁵ which stated that unless there was some employer document or policy that prevented harassment, no such claim was available under USERRA.¹⁵⁶ The court failed to explain why a harassment claim for hostile work environment would only exist under USERRA if the employer established that principle as a policy.

On the heels of *Vickers*, the United States District Court for the District of Puerto Rico in the case of *Reyes v. Hosptial San Pable Del Este*¹⁵⁷ recognized that “[t]he law is unsettled as to whether hostile work environment claims are cognizable under USERRA.”¹⁵⁸ The court did not specifically hold that a hostile work environment claim was cognizable under the “benefits of employment” language of USERRA,¹⁵⁹ but rather, the court assumed, *arguendo*, that such a claim was tenable, applied traditional hostile working environment analysis, and found the plaintiff’s case insufficient.¹⁶⁰ In sum, the court concluded the plaintiff had failed to show that a single harassment episode, negative work reviews, and a threat to notify management of frequent absences created an “objectively” hostile work environment.¹⁶¹

Finally, in January 2006, in *Maher v. City of Chicago*,¹⁶² the United States District Court for the Northern District of Illinois refused to grant the City of Chicago’s summary judgment motion on Jerome Maher’s claim that he had been harassed as a result of his service in the Gulf War.¹⁶³ The court relied upon *Petersen v. Dept. of Interior* and held that “[h]arassment on account of prior military service can be a violation of USERRA.”¹⁶⁴ The court, quoting *Miller*, held that to be actionable, a claim for harassment under USERRA “must be supported by evidence that the employer’s conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment.”¹⁶⁵ The court reasoned that, while Maher’s claims of harassment were weak, that did not mean “the conduct about which he complain[ed was] not part of the ongoing alleged pattern of harassment, the actionability of which must be determined by a contextual, not an atomistic, analysis.”¹⁶⁶

155. *Id.* at 844 n.4.

156. No. 97-17097, 1999 WL 65205, at *1 (9th Cir. Feb. 9, 1999).

157. 389 F. Supp. 2d 205 (D.P.R. 2005).

158. *Id.* at 212.

159. *Id.*

160. *Id.* at 212-13.

161. *Id.* at 213.

162. 406 F. Supp. 2d 1006 (N.D. Ill. 2006).

163. *Id.* at 1023.

164. *Id.*

165. *Id.* (quoting *Miller v. City of Indianapolis*, 281 F.3d 648 (7th Cir. 2002)).

166. *Id.*; see also *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609, 615 (1st Cir. 1996).

The foregoing illustrates that while courts appear to be moving toward adopting a hostile work environment claim under USERRA, the law remains “unsettled.” This article stands for the proposition that the time has come for federal courts to unequivocally recognize a hostile work environment claim under USERRA. Support for that proposition is found below.

V. CLAIMS FOR EMPLOYMENT DISCRIMINATION BASED UPON THE
CREATION OF A HOSTILE WORK ENVIRONMENT DIRECTED AT A PERSON
BECAUSE OF SERVICEMEMBER STATUS SHOULD BE RECOGNIZED UNDER
USERRA

Courts and Congress, by amendment to USERRA if necessary, should unequivocally recognize the viability of hostile work environment discrimination claim under USERRA. This conclusion is mandated because it is consistent with the language of the statute itself, the legislative history of the statute, the principles of Title VII and other federal antidiscrimination statutes and the interests of national security.

A. *A Hostile Work Environment Claim Under USERRA Should Be
Recognized Because It Is Consistent with the Text of the Statute.*

USERRA’s express language supports a claim for a hostile work environment. USERRA states that a uniformed servicemember “shall not be denied . . . any benefit of employment”¹⁶⁷ It is patent that the term “benefit of employment” encompasses freedom from a hostile work environment. To conclude otherwise yields an illogical result.

Even the most ardent textualist interpreters, including Justice Scalia, agree that a statute’s text must be interpreted to avoid absurd results.¹⁶⁸ Arguing that freedom from abuse is a benefit that does not “accrue[] by reason of an employment contract or agreement or an employer policy, plan, or practice” as the *Vickers v. City of Memphis*¹⁶⁹ court did, is nonsensical.¹⁷⁰ There, the court concluded that if an employer does not explicitly indicate in writing that its company policy is to not abuse its employees, an abused employee has no redress.¹⁷¹ Did Congress intend the rights afforded to

167. 38 U.S.C. § 4311(a).

168. See, e.g., *City of Columbus v. Ours Garage & Wrecking Serv., Inc.*, 536 U.S. 424, 449 n.4 (2002) (Scalia, J., dissenting) (“A possibility so startling (and unlikely to occur) is well enough precluded by the rule that a statute should not be interpreted to produce absurd results.”).

169. 368 F. Supp. 2d 842, 844 (W.D. Tenn. 2005).

170. See 38 U.S.C. § 4303(2).

171. *Vickers*, 368 F. Supp. 2d at 844-45.

servicemembers to be determined by employer policy? The *Vickers* court appeared to follow the reasoning of the unpublished decision in *Reno*,¹⁷² which relied upon the Supreme Court's decision in *Monroe*.¹⁷³ However, any reliance on *Monroe* to define the rights of servicemembers under USERRA is misplaced. *Monroe* explained the provisions of the VRRRA—not USERRA.¹⁷⁴ The VRRRA was found inadequate, which is why USERRA was passed.¹⁷⁵ Moreover, if an employer has a policy against harassment, a plaintiff could seek relief on the basis of that policy alone, without regard to whether or not USERRA, or any other anti-discrimination law for that matter, applied. Therefore, any interpretation of USERRA to provide only a qualified claim of hostile work discrimination is misguided.

B. A Hostile Work Environment Claim Under USERRA Should Be Recognized Because It Is Consistent with Legislative Intent.

Simply because some interpretation flows from the text of a statute does not necessarily mean it is law. “It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”¹⁷⁶ This axiom, while generally true, has no application to USERRA, as the framers of the statute were explicit that USERRA is to be interpreted broadly for the benefit of servicemembers.¹⁷⁷

Whether to promote fairness to uniformed servicemembers, “to encourage noncareer service in the uniformed services,”¹⁷⁸ or to further the interests of national security, Congress clearly wanted this statute interpreted favorably to the interests of uniformed servicemembers.¹⁷⁹ Directing that the statute be “broadly construed and strictly enforced,”¹⁸⁰ the provisions were meant to be “broadly defined to include all attributes of the employment relationship which are affected by the absence of a member of the uniformed services because of military service.”¹⁸¹ In fact, so important is the mandate to construe USERRA broadly, one court has held it is one of the two fundamental principles underlying the act, rivaled only by

172. *Id.* at 844 n.4.

173. *Id.* at 844.

174. *See Monroe v. Standard Oil Co.*, 613 F.2d 641, 641 (6th Cir. 1980).

175. H.R. REP. NO. 103-65 (1993).

176. *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

177. H.R. REP. NO. 103-65 (1993).

178. The Uniformed Services Employment and Re-Employment Rights Act of 1994, 38 U.S.C. § 4301 (2004).

179. H.R. REP. NO. 103-65 (1993).

180. *Id.* at 23.

181. *Petersen v. Dept. of Interior*, 71 M.S.P.R. 227 (1996) (citing H.R. REP. NO. 103-65, Pt. 1, at 21 (1993)).

USERRA's principal purpose, the reemployment of uniformed servicemembers.¹⁸²

Equally favorable to a recognition of the hostile work environment claim is Congress's intention regarding the definition of "benefit." Congress effectively neutralized the use of the canon *expressio unius est exclusio alterius*¹⁸³ when it stated, "[t]he list of benefits is illustrative and not intended to be all inclusive."¹⁸⁴ Congress expressly freed courts to use independent judgment and to not be constrained by USERRA's text when interpreting the word *benefit* so as to give the greatest protection possible to servicemembers. Patently, a USERRA claim for hostile work environment discrimination is both "within [the] spirit, [and] within the intention of its makers."¹⁸⁵

C. A Hostile Work Environment Claim Under USERRA Should Be Recognized Because It Is Consistent with the Text of Title VII and Other Federal Anti-Discrimination Statutes.

1. Title VII of the 1964 Civil Rights Act Supports a Hostile Work Environment Claim.

The 1964 Civil Rights Act, Title VII states "[i]t shall be an unlawful employment practice for an employer . . . [to] discriminate against any

182. *Fishgold v. Sullivan Drydock*, 328 U.S. 275 (1946). In areas outside of hostile work environment claims, courts have been willing to honor the congressional mandate to construe USERRA broadly in favor of uniformed servicemembers. With respect to reemployment rights, courts have strengthened veterans' protections by construing the "cause" needed to fire a reemployed servicemember very narrowly in favor of the servicemember. *Duarte v. Agilent Technologies, Inc.*, 366 F. Supp. 2d 1039, 1046-47 (D. Col. 2005). The court in *Duarte* held that firing a reservist reemployed as a design consultant during his protected period was a violation of USERRA even though the employer was faced with severe difficulties. *Id.* at 1048. Typically, after reemployment, uniformed servicemembers are guaranteed a continuation of their employment for a period of six months to one year unless the employer can show cause for not continuing reemployment during the protected period. 38 U.S.C. § 4316(c). Though Agilent lost \$1.5 billion dollars the year before firing Duarte and no clients wanted Duarte working on their projects, the court held there was insufficient cause for termination. *Duarte*, 366 F. Supp. 2d at 1048. The court construed the statute in favor of the uniformed servicemember, interpreting the word "cause" narrowly to exclude the employer's difficult circumstances. *Id.* at 1048.

183. "[E]xpressio unius est exclusio alterius" is a maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another. *Metzger v. DaRosa*, 805 N.E.2d 1165, 1172 (Ill. 2004). When a statute lists a certain number of examples, it is understood that all examples not included are excluded. *Id.* The legislative history is significant because it tells that *expressio unius* does not apply to the definition of "benefit." *See, e.g., id.*

184. *Petersen*, 71 M.S.P.R. at 236 (citing H.R. REP. NO. 103-65, pt. 1, at 21 (1993)).

185. *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

individual with respect to . . . privileges of employment[.]”¹⁸⁶ USERRA provides that no servicemember shall be denied the “benefit of employment.”¹⁸⁷ There is no meaningful distinction between USERRA’s “benefit of employment” language and Title VII’s “privilege[] of employment.” USERRA’s term “benefit” includes all Title VII “privileges,” including freedom from a hostile work environment, and more.¹⁸⁸ Black’s Law Dictionary tells that *benefit* is necessarily a broader term than *privilege* by including the term *privilege* in the definition of *benefit*.¹⁸⁹ It says that a *benefit* is any “[a]dvantage, *privilege* . . . [p]rofit or gain.”¹⁹⁰ From this it is clear that the universe of benefits includes all privileges. Webster’s Dictionary agrees when it defines *privilege* as “a right or immunity granted as a *peculiar* benefit, advantage, or favor,”¹⁹¹ thus defining *privilege* as a “peculiar” type of benefit or advantage. In sum, *benefits* include all *privileges* and more, such that the employee privilege to be free from a hostile work environment is also a benefit of employment. The recognition of a USERRA claim for a hostile work environment is a corollary to a Title VII recognition of that claim.

The Supreme Court has stated that “Title VII affords employees the right to work in an environment free from discriminatory intimidation”¹⁹² Its expansive concept is to remove destructive measures that inhibit the “emotional and psychological stability of minority group workers.”¹⁹³ The Court is attempting to sustain equitable treatment for all. As minorities in the workplace, uniformed servicemembers are in as much need of emotional and psychological stability as any other class of workers or persons. In fact, considering the mental and emotional trauma associated with military service, their need may be greater when compared to other protected classes.¹⁹⁴ To deny uniformed servicemembers recourse in the face of a

186. 42 U.S.C. § 2000e-2(a)(1) (2002).

187. 38 U.S.C. § 4311(a) (2002).

188. *See id.* While people are generally deemed to hold privileges because of their positions, such as an attorney possessing an attorney-client privilege, benefits encompass any employee advantage. Having a boss that occasionally allows her employees to go home early on Fridays may be a benefit, but is not a privilege. Health insurance plans and a high salary are also benefits of employment, but not necessarily privileges. The presidential privilege of confidentiality, which allows the President to maintain records free from public scrutiny, is a privilege. This is a privilege because it is necessarily connected to the office of the President. But it is also a benefit because it is an advantage to the President: it frees the President from having to reveal personal papers to the public. Other privileges include husband-wife, physician-patient, and employer-employee, each of which attaches to a particular class of persons.

189. BLACK’S LAW DICTIONARY 166 (8th Ed. 2004).

190. *Id.* (emphasis added).

191. Definition of Privilege—Merriam-Webster Online Dictionary, <http://m-w.com/dictionary/privilege> (last visited Oct. 18, 2007) (italics added).

192. *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 65 (1986).

193. *Id.* (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)).

194. *See* Deborah White, *Iraq War Results & Statistics as of Sept. 23, 2007*, ABOUT.COM, <http://usliberals.about.com/od/homelandsecurity/a/IraqNumbers.htm> (last visited Aug. 8, 2006)

hostile work environment would be to unjustifiably single them out among minorities.

Also, because servicemembers put their lives and their families' well-being in jeopardy for society's benefit, the principles underlying Title VII society should watch over them and protect their interests. Anti-discrimination statutes are often justified on the basis of remedying past wrongs, on the grounds that because society has wronged those particular groups in the past, it is just that society now aid and look after their interests.¹⁹⁵ This type of "societal debt" reasoning is equally applicable to uniformed servicemembers. Instead of remedying a past wrong, society is repaying a present service. Because uniformed servicemembers are providing society with a crucial service, society should protect them from the hostile working environments to which they are subject because of their service. It is only fair to protect those who, in such an important capacity, protect us.

2. The ADA Recognizes a Hostile Work Environment Claim.

The ADA prohibits discrimination in the "[t]erms, conditions or privileges of employment."¹⁹⁶ This language is identical to that embodied in Title VII.¹⁹⁷ The 1995 case of *Haysman v. Food Lion, Inc.*¹⁹⁸ held that it would be "illogical to hold that ADA language identical to that of Title VII was intended to afford disabled individuals less protection . . . than remedies and procedures of Title VII . . ." ¹⁹⁹ The Court went on to affirmatively hold that a hostile work environment claim for harassment is available under the ADA.²⁰⁰ A series of subsequent cases have affirmed that principle.²⁰¹ The same reasoning should hold for USERRA claims.

("30% of US troops develop serious mental health problems within 3 to 4 months of returning home.")

195. Fay, *supra* note 30, at 302 n.3 (citing CIVIL RIGHTS IN AMERICAN HISTORY xi (Kermit Hall ed. 1987)).

196. 42 U.S.C. § 12112(a) (2001).

197. 42 U.S.C. § 2000e-2(a)(1) (2003).

198. 893 F. Supp. 1092 (S.D. Ga. 1995).

199. *Id.* at 1106.

200. *Id.* at 1106-07.

201. See *Fritz v. Mascotech Auto. Sys. Group, Inc.*, 914 F. Supp. 1481, 1494 (E.D. Mich. 1996); *Mannell v. Am. Tobacco Co.*, 871 F. Supp. 854 (E.D. Va. 1994); see also *Hendler v. Intelcom USA, Inc.*, 963 F. Supp. 200, 208 (E.D.N.Y. 1997); *Hogue v. MQS Inspection, Inc.*, 875 F. Supp. 714 (D. Co. 1995).

3. Title IX of the Education Amendments of 1972 Recognizes a Hostile Work Environment Claim.

Title IX of the Education Amendments of 1972 provides in relevant part that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”²⁰² Several cases have applied the Title VII principles and remedies to Title IX cases. In the case of *Brown v. Hot, Sexy and Safer Productions, Inc.*²⁰³ the reviewing federal appellate court concluded that “[b]ecause the relevant caselaw under Title IX [was] relatively sparse, we apply Title VII caselaw by analogy.”²⁰⁴ The court, quoting *Meritor*, concluded that Title VII, and hence Title IX by analogy, “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.”²⁰⁵ The same meaning of Title VII should apply by analogy to USERRA claims.

4. The Rehabilitation Act of 1973 Provides for a Hostile Work Environment Claim.

Title VII theories have long been applied when claims under section 794 of the Rehabilitation Act of 1973²⁰⁶ are at issue.²⁰⁷ That section, mirroring the language of Title IX, provides that

no otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance²⁰⁸

The Sixth Circuit Court of Appeals in *Pendleton v. Jefferson Local School District Board of Education* held that a hostile work environment claim under the Rehabilitation Act is cognizable under the language of section 794.²⁰⁹ Specifically, the court held that to determine otherwise “would have

202. 20 U.S.C. § 1681(a) (2000).

203. 68 F.3d 525 (1st Cir. 1995).

204. *Id.* at 540.

205. *Id.*

206. 29 U.S.C. § 794.

207. See *Jasany v. U.S. Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985); *Doe v. N.Y. Univ.*, 666 F.2d 761 (2d Cir. 1981); *Prewitt v. U.S. Postal Serv.*, 662 F.2d 292 (5th Cir. 1981).

208. § 794(a).

209. No. 91-3126, 1992 WL 57421, at *9 (6th Cir. Mar. 25, 1992).

the restrictive result of making an employer who *fires* an employee because of a handicap liable, while leaving untouched an employer who harasses or otherwise engages in discriminatory conduct against a handicapped individual, which, as a direct result, causes further deterioration of a person's physical condition"²¹⁰

Based upon the broad interpretation Congress intended to be given to anti-discrimination statutes, and the concomitant response of federal courts in applying the principles and remedies of Title VII's hostile work environment claims, other anti-discrimination acts, including USERRA, should be treated the same.

D. Recognizing a Hostile Work Environment Claim Furthers the Interests of National Security.

Perhaps dwarfing in importance the interests of fairness and equity are USERRA's roots in national security. Congress has given sweeping and sometimes startling amounts of power to the President in the interest of ensuring national security. For example, Congress enacted the International Emergency Economic Powers Act (IEEPA), which, in the interest of national security, authorizes the President to undertake a broad array of economic sanctions, including the seizure of property against foreign persons, organizations, or nations if the President finds that there exists an "unusual and extraordinary threat . . . to the national security."²¹¹ Additionally, Congress recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," and authorized him "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the September 11 attacks.²¹² Thus we see that even the honored safeguard of checks and balances can sometimes be dwarfed by the interests of national security.

In view of congressional willingness to ensure sound national security, it is no surprise that Congress intended that courts interpret USERRA broadly in favor of uniformed servicemembers.²¹³ Even among policies as important

210. *Id.* at *12 (emphasis added). Other cases have reached the same conclusion. See *Spells v. Cuyahoga Cmty. Coll.*, 889 F. Supp. 1023, 1028 (N.D. Ohio 1994); *Rothman v. Emory Univ.*, 828 F. Supp. 537, 542 (N.D. Ill. 1993).

211. See 50 U.S.C. § 1701(a). The President must also declare a national emergency with respect to the threat. § 1701(b).

212. Authorization for Use of Military Force, PUB. L. NO. 107-40, 115 Stat. 224 (2001).

213. H.R. REP. NO. 103-65 at 23 (1993).

as creating equality in workplaces and removing racial, gender, and ethnic discrimination, national security is paramount. The creation of a prejudice-free, poverty-free, educated, and serviceable America requires a nation whose autonomy and longevity are secure. All intranational considerations stand upon the foundation of national security.

And USERRA, with its goal of promoting enlistment in the uniformed services, is an important part of this foundation.²¹⁴ Reservists are becoming an increasingly central part of defending our nation. As noted above, “[t]he use of noncareer military personnel for active duty assignments has become more prevalent as the United States has both reduced the number of full-time soldiers and increased its military involvement throughout the world.”²¹⁵ Over 530,000 civilian soldiers have been mobilized since September 11, 2001 and forty percent of American forces in Iraq are reserve troops, a number that is expected to rise.²¹⁶ The importance of creating a climate that encourages service in the Reserves is greater today than ever.

More than 390,000 civilian soldiers have demobilized during this “War on Terror,” most returning to the United States with hopes of continuing their former employment.²¹⁷ USERRA unquestionably protects uniformed servicemembers with reemployment rights and protection against adverse employment actions based on uniformed service, but without recourse against hostile work environments, there remains a gap in the adequacy of the protection. When deciding whether to enlist, uniformed servicemembers must believe a decision to enlist will neither jeopardize their employment,

214. Representative Evans illustrated USERRA’s root in national security as well as the need for adequate enforcement. 144 CONG. REC. H1396-98 (daily ed. Mar. 24, 1998) (statement of Rep. Evans). Here, he speaks of the need to cover state employers in the statute, but the reasoning can be equally persuasive when dealing with recognizing claims for a hostile work environment:

Federal law must assure that the appropriate remedies are available when violations of [USERRA] threaten our Nation’s ability to attain and maintain a strong military force By passing [the amendment ensuring protection for state employees] we are . . . fulfilling our Constitutional duty to “provide for the common Defence” of our nation. With the need to utilize the resources of the National Guard and Reserves to meet our Total Force military responsibilities, it is essential that those who volunteer to serve our country be protected by adequate safeguards of their right to obtain and retain suitable civilian employment. The United States has a strong national interest in assuring that its military readiness will not be undermined by policies and practices which can deter competent and qualified citizens from military service The ability of the United States to attract and retain the competent and qualified personnel necessary to meet our national security interests will be undermined absent a remedy [against state employers]

Id.

215. Jeffrey M. Hirsch, *Can Congress Use Its War Powers to Protect Military Employees from State Sovereign Immunity?*, 34 SETON HALL L. REV. 999, 999 (2004).

216. News Release, National Conference of State Legislatures, Labor Department Issues First-Ever Regulations Protecting the Reemployment Rights of America’s Soldiers (Dec. 16, 2005), <http://www.ncsl.org/programs/employ/USERRA.htm> [hereinafter Labor Department Regulations]; Quinn, *supra* note 5, at 237 (citing Bradley Graham, *Reservists May Face Longer Tours of Duty*, WASH. POST, Jan. 7, 2005, at A1).

217. Labor Department Regulations, *supra* note 216.

nor subject them to a discriminatorily abusive working environment. If effectuated, this strengthening of USERRA will encourage enlistment in the Reserves and boost troop morale. Conversely, if those returning Reservists who are subjected to a hostile work environment have no legal protection, an awareness of the lack of interest in the plight of the returning uniformed servicemember will spread, enlistment will be deterred, morale will be damaged, and national security will be compromised.

VI. CONCLUSION

The increase in the use of part-time military to support the “War on Terror” has placed an extraordinary burden upon employers, who are required to comply with the reemployment provisions of USERRA. There is no question this compliance can be burdensome.²¹⁸ Given that an unprecedented number of Reservists and Guard members will be leaving and returning to work, it is inevitable that tension in the workplace will result as employers and other workers must accommodate this disruption. Because of this, servicemembers are likely to face increased hostility at work from frustrated co-workers and managers. Without a recognized claim under USERRA, servicemembers may suffer hostile work environment discrimination in employment.

Currently the law does not provide for a claim to remedy these conditions.²¹⁹ This is wrong. The statute provides that all benefits of employment should accrue to servicemembers. The intent of Congress was that USERRA’s protections be interpreted broadly. Other anti-discrimination statutes are in accord with that principle, and recognizing it in the context of USERRA is central to national security. Recognizing a USERRA claim for hostile work environment is at once necessary, natural, and wise.

218. *Id.*

219. *See supra* Part IV.

