

## **Court: USERRA Doesn't Guard GIs Against Hostile Work Environments**

By Mathew B. Tully

For the first time, a federal appellate court has weighed in on whether the Uniformed Services Employment and Reemployment Rights Act (USERRA) protects service members from hostile work environments in which their military duty is the primary source of discord. The verdict: it does not.

The U.S. Court of Appeals for the 5th

Circuit recently shot down a class-action lawsuit filed by members of the U.S. Armed Forces Reserves and Air National Guard against their employer, Continental Airlines. The plaintiffs, who are pilots for the airline, alleged they had been subjected to harassing, discriminatory and degrading comments and conduct due to their military service.

The pilots alleged in *Derek Carder, et al v. Continental Airlines, Inc*

. that Continental supervisors chided and derided them over military leave issues, calling them “scams” and saying they “need to choose” between Continental and the Navy. A district court had ruled in favor of Continental, which argued that USERRA does not prohibit harassment of service members. The Fifth Circuit, in New Orleans, upheld this lower court’s ruling.

Case Basics

USERRA, in general, prohibits employers from denying a service member “initial employment, reemployment, retention in employment, or any benefit of employment” by an employer because of his or her military service.

Unlike other laws that protect employees from hostile work environments, such as the Civil Rights Act and Americans with Disabilities Act, USERRA does not specify prohibited discriminatory actions as those that impact the “terms, conditions and privileges” of employment.

The pilots argued that USERRA’s protections for “any benefit of employment,” coupled with its stated intent to “prohibit discrimination against persons because of their service in the uniformed service,” should be broadly interpreted to guard military members against hostile work environment conditions.

The Fifth Circuit took a narrower view and said USERRA’s discrimination prohibitions apply to firing and other employment decisions based on an employee’s military service. The court took “any benefit of employment” to include the protections of seniority-based rights, such as salary and pension benefits, outlined in the act.

## What employers need to know

### The Carder

decision does not give employers a green light to harass without restraint employees who are in the reserves, National Guard or returning from active duty.

Employers should refrain from attempting to circumvent USERRA's prohibitions against employment denials based on military duty by harassing service members to the point where they quit.

If such harassment becomes intolerable and drives an employee who served or is serving in the military to resign, it could merit a valid claim of constructive discharge under USERRA.

## What service members need to know

Employers can get away with chiding and deriding employees about their military service, but only to a point.

If an employer harasses an employee about his or her military service to the point where such harassment become intolerable and drives him or her to quit, he or she can sue the employer under USERRA for constructive discharge.

As the Fifth Circuit stated: "The availability of such relief would prevent an employer from circumventing the express purpose of engaging in some intolerable form of harassment."

Service members who believe they are being unlawfully harassed or who were denied employment because of their military duty should contact a military law attorney.