

2011

Brief Of The John Marshall Law School Veterans Legal Support Center & Clinic, The Veterans Legal Assistance Clinic At Thomas Jefferson School Of Law, The Lewis B. Puller, Jr. Veterans Benefits Clinic At The College Of William & Mary, The Veterans Law Clinic at the North Carolina Central University School of Law as Amici Curiae in Support of Petitioners, Carder v. Continental Airlines (Supreme Court of the United States 2011) (No. 10-1546)

John Marshall Law School Veterans Legal Support Center & Clinic

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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**

**MOTION FOR LEAVE TO FILE BRIEF OF
AMICI CURIAE AND BRIEF OF THE JOHN
MARSHALL LAW SCHOOL VETERANS LEGAL
SUPPORT CENTER & CLINIC, THE VETERANS
LEGAL ASSISTANCE CLINIC AT THOMAS
JEFFERSON SCHOOL OF LAW, THE LEWIS B.
PULLER, JR. VETERANS BENEFITS CLINIC
AT THE COLLEGE OF WILLIAM & MARY,
THE VETERANS LAW CLINIC AT WIDENER
LAW SCHOOL, AND THE VETERANS
LAW CLINIC AT THE NORTH CAROLINA
CENTRAL UNIVERSITY SCHOOL OF LAW AS
AMICI CURIAE IN SUPPORT OF PETITIONERS**

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**MOTION FOR LEAVE TO FILE
BRIEF AMICI CURIAE**

Pursuant to this Court's Rule 37.3(b), The John Marshall Law School Veterans Legal Support Center & Clinic, The Veterans Legal Assistance Clinic at Thomas Jefferson School of Law, The Lewis B. Puller, Jr. Veterans Benefits Clinic at the College of William & Mary, The Veterans Law Clinic at Widener Law School, and The Veterans Law Clinic at the North Carolina Central University School of Law respectfully request leave of the Court to file this brief amici curiae in support of Petitioners.

Written consent to the filing of this brief has been granted by counsel for the Petitioners. Counsel for Respondent Continental Airlines, Inc. declined consent, necessitating the filing of this motion.

DATED: July 25, 2011

Respectfully submitted,

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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).

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37 the undersigned submit this brief as amici curiae in support of Petitioners Derek Carder, Mark Bolleter, Drew Daugherty, and Andrew Kissinger, on behalf of themselves and others similarly situated.¹ Amici curiae are attorneys that have extensive experience working with veterans, servicemembers, and their families.

In 2008, The John Marshall Law School established the Veterans Legal Support Center & Clinic (VLSC), one of the first law school clinics in the nation dedicated to addressing the various legal issues affecting veterans. The initial focus of the VLSC was to assist veterans with appeals before the United States Department of Veterans Affairs (VA). Additionally, the VLSC works to ensure that veterans obtain all resources and services to which they are entitled. Through extensive advocacy on behalf of veterans, the VLSC has developed a unique understanding of veteran issues.

The Lewis B. Puller, Jr. Veterans Benefits Clinic (VBC) was established at the nation's oldest law school at the College of William & Mary in 2008. Its purpose is to provide Virginia's 700,000 veteran

¹ Pursuant to Supreme Court Rule 37.6, counsel for amici curiae certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amici curiae or their counsel has made a monetary contribution to the preparation or submission of this brief.

military service members — especially those who are indigent, homeless or nearly homeless — with information about, and assistance in pursuing, the service-related disability compensation benefits to which they are entitled. The VBC is unique, as it is the only legal clinic in the nation addressing not only the legal challenges, but also the demonstrated psychological effects, that our injured veterans face as they return to civilian life. The clinic is able to offer dual legal and medical services due to its partnership with Virginia Commonwealth University's Center for Psychological Services and Development (CPSD). It represents veterans at all stages of the VA process and in physical evaluation boards and discharge upgrades. The VBC specializes in post-traumatic stress disorder and traumatic brain injury representation.

The Veterans Legal Assistance Clinic (VLAC) at Thomas Jefferson School of Law provides legal representation to the residents, alumni, and affiliates of the Veterans Village of San Diego recovery program for homeless veterans with substance abuse problems. The VLAC provides representation on a wide range of civil legal matters, including child support, child custody and visitation, dissolution of marriage, Social Security and VA benefits, and bankruptcy and other credit and debt matters. The VLAC is committed to seeing that veterans and their families receive full compensation for any injuries sustained during their period of service to our country.

The Veterans Law Clinic at Widener Law School provides pro bono representation to more than 140

veterans with disability claims pending before the VA. Since its founding in 1997, the Widener Veterans Law Clinic has assisted disabled veterans in recovering more than \$1.5 million in disability benefits. Often, such veterans struggle with employment due to their disabilities. When work environments are hostile to the demands of military service, including the occasional absences required of Reserve and National Guard forces, the challenges already facing returning veterans are significantly exacerbated. Only a legal remedy will provide the relief such veterans need. The Widener Veterans Law Clinic supports the instant brief.

The Veterans Law Clinic at North Carolina Central University School of Law opened its doors in January 2007. The Veteran's Law Clinic handles all types of claims at all stages of the VA claims adjudication process including judicial review. Under extensive supervision, law students assist veterans and their families with the complexities and technical aspects of filing their claims with the VA Regional Offices nationwide, the Board of Veterans Appeals, and the United States Court of Appeals for Veterans Claims.

After working extensively with veterans, amici curiae recognize the priority that National Guard and Reserve members place on their civilian employment. Harassment in the workplace causes tension between members of the National Guard and Reserve and their civilian employers, which, if not legally protected

against, harms the interests of not only the member but also the military as a whole.

For the foregoing reasons, the motion of the VLSC, VBC, VLAC, Widener Veterans Law Clinic, and the Veterans Law Clinic at the North Carolina Central University School of Law to file a brief *amici curiae* should be granted.

SUMMARY OF ARGUMENT

Society has relied heavily on a small percentage of the population who serve as citizen soldiers in the military to protect this country. The issue currently being encountered by the National Guard and Reserve Component (‘‘Guard and Reserve’’²), a large segment of the military, is military obligation harassment in the workplace. Congress recognized the importance of preserving the civilian employee-employer relationship of Guard and Reserve members when it passed USERRA in 1994.

Throughout American history, citizen soldiers and militias, now the Guard and Reserve, have been

² The United States Reserve Component is comprised of the Army National Guard, the Air National Guard, the Army Reserve, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve. LAWRENCE KAPP, CONG. RESEARCH SERV., RL30802, RESERVE COMPONENT PERSONNEL ISSUES: QUESTIONS AND ANSWERS 9 (2010), available at <http://www.fas.org/sgp/crs/natsec/RL30802.pdf>.

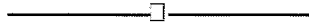
called upon to serve this country against domestic and foreign threats. The reliance on the Guard and Reserve has only increased unabated in the post-9/11 era. Guard and Reserve units have endured deployments that are more frequent and longer in duration than in previous conflicts. These repeated and lengthy deployments have created tension for servicemembers in the workplace.

In contrast to the Fifth Circuit's opinion in *Carder, et al. v. Continental Airlines, Inc.*, 636 F.3d 172 (5th Cir. 2011), harassment of members of the military in the workplace is a social problem in need of a remedy. Department of Defense (DOD) and Department of Labor (DOL) statistics on USERRA claims indicate that harassment based upon military service is a substantial problem facing members of the Guard and Reserve.

Under the court's analysis in *Carder*, there is no adequate remedy to address the problem of harassment of members of the military in the workplace. The *Carder* court's sole remedy of constructive discharge leaves a servicemember with no real options. It is a false choice for a Guard or Reserve member to have to decide between civilian employment and running afoul of the Uniform Code of Military Justice. The logic of the *Carder* decision has the potential to severely damage national security by harming Guard and Reserve recruitment and retention.

The Fifth Circuit's interpretation of USERRA directly counters its overall purposes and goals.

Harassment of members of the Guard and Reserve in the workplace is a widespread social problem in need of a remedy.



ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE INVIDIOUS AND IRRATIONAL HARASSMENT OF MEMBERS OF THE MILITARY IN THE WORKPLACE IS A WIDESPREAD SOCIAL PROBLEM IN NEED OF A REMEDY.

A. THE UNITED STATES NATIONAL GUARD AND RESERVE COMPONENTS HAVE PROVEN INDISPENSABLE TO NATIONAL SECURITY.

Throughout American history, citizen-soldiers have answered the call to duty. Citizen soldiers first defended America as Minutemen and members of state militias.³ After the American Revolution, these soldiers [sheathed their swords] and returned to place [hand on plow to resume the life of citizen and farmer.]⁴ One of Congress's first acts was to recognize the need for state forces with passage of a Militia

³ American War of Independence, THE AMERICAN REVOLUTIONARY WAR, <http://www.americanrevolutionarywar.net> (last visited Jul. 15, 2011).

⁴ 3 TITUS LIVIUS, THE RISE OF ROME ¶14 (T.J. Luce trans., Oxford Univ. Press ed. 1998).

Act in 1792 for "every able bodied male citizen between the ages of 18 and 45."⁵

The Reserve components were formalized in the twentieth century beginning with the Militia Act of 1903 that created the modern National Guard.⁶ The Army Reserve was created in 1908, Navy Reserve in 1915 and Marine Reserve in 1916.⁷ Currently, the National Guard operates under a unique dual command "a state command for state activation and an Army command for federal activation."⁸

Significant deployments of the Guard and Reserves occurred after they were formed into distinct national security assets. During World War I, the Guard comprised approximately forty percent of the combat units in the American Expeditionary Forces.⁹ Following the attack on Pearl Harbor, Guard and

⁵ MILITIA ACT "4 (1792).

⁶ Protecting America for 370 years, THE NATIONAL GUARD, <http://www.ng.mil/features/birthday/index.html> (last visited Jul. 15, 2011).

⁷ See National Museum of the Army Reserve, UNITED STATES ARMY RESERVE, www.usar.army.mil/arweb/history/pages/nmar.aspx (last visited Jul. 15, 2011); History: About the Reserves, AMERICA'S NAVY RESERVE, www.navyreserve.com/about/history.html (last visited Jul. 15, 2011); Highlights of Marine Corps Reserve History: 1916-2006, UNITED STATES MARINE CORPS, http://www.tecom.usmc.mil/HD/Frequently_Requested/Highlights_Reserve_History.html (last visited Jul. 15, 2011).

⁸ 10 U.S.C. "10501 (2011).

⁹ About the National Guard, THE NATIONAL GUARD, <http://www.ng.mil/about/default.aspx> (last visited Jul. 15, 2011).

Reserve units were among the first units to deploy overseas to fight in both the European and Pacific theaters of war.¹⁰ The Air Force Reserve and the Air National Guard were created on the eve of the Cold War.¹¹ The Guard and Reserve were involuntarily activated four times during the Cold War: the Korean War, the Berlin Crisis, the Cuban Missile Crisis, and the Vietnam War.¹²

In the 1994 USERRA legislation, Congress noted the changing role of the Guard and Reserve in the post-Cold War era. The end of the Cold War resulted in a military drawdown, whereby the Guard and Reserves were transformed from a strategic reserve to an operational reserve even though the end strength of the U.S. military had been reduced from 3,700,000 to 2,100,000 by 2000.¹³ In the period from

¹⁰ *Id.*

¹¹ 49 SAMUEL J. NEWLAND, *THE NATIONAL GUARD: STATE VERSUS NATIONAL CONTROL* No. 1, 68-70 (Pub. Admin. Rev. ed. 1989).

¹² Kapp, *supra* note 2 (stating that involuntary activations included: the Korean War (1950-1953; 857,877 reservists involuntarily activated), the Berlin Crisis (1961-1962; 148,034 reservists involuntarily activated), the Cuban Missile Crisis (1962; 14,200 reservists involuntarily activated), and the Vietnam War/U.S.S. Pueblo Crisis (1968-1969; 37,643 reservists involuntarily activated)).

¹³ ANTHONY H. CORDESMAN, *Trends in US Military Forces and Defense Spending: Peace Dividend or Underfunding?*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES 6 (1999), <http://csis.org/files/media/csis/pubs/peacedividendorunderfunding%5B1%5D.pdf>; see also ROBERT L. GOLDICH, *CONG. RESEARCH SERV.*, 97-719 F, *THE ARMY RESERVE COMPONENTS: STRENGTH AND FORCE STRUCTURE* (Continued on following page)

1990 to 2001, there were numerous involuntary activations of the Guard and Reserve forces.¹⁴

USERRA's protections for members of the Guard and Reserve against workplace discrimination and preservation of re-employment rights went largely untested in the courts prior to September 11, 2001, even though their role in national security has steadily increased. Following the attacks on September 11, 2001, Reserve Components were called upon not only to provide domestic security, but also to deploy to Afghanistan and Iraq repeatedly.¹⁵ There is no indication that the tempo of Guard and Reserve deployments will be

ISSUES 12-13 (1997), available at www.cq.com/graphics/crsreports/97-719_1997-07-15.pdf.

¹⁴ Kapp, *supra* note 2 (these involuntary activations include: the intervention in Haiti (1994-1996; 6,250 reservists involuntarily activated); the Bosnian peacekeeping mission (1995-2004; 31,553 reservists involuntarily activated); the ongoing Kosovo mission (1999-present; 11,485 reservists involuntarily activated through 2003; no available data since then); the Persian Gulf War (1990-1991; 238,729 reservists involuntarily activated); the low-intensity conflict with Iraq (1998-2003; 6,108 reservists involuntarily activated); and current military operations □ Operation Enduring Freedom, Operation Iraqi Freedom, and Operation New Dawn (2001-present; over 816,941 reservists involuntarily activated as of Jul. 12, 2011). Unlike the once-a-decade average for activations during the Cold War, Guard and Reserve members have been involuntarily activated an average of once every 36 months since 1990. *Id.*

¹⁵ Kapp, *supra* note 2 (these forces contributed about 1 million service days per year between 1986 and 1989. From 1996 to 2001, they contributed approximately 13 million service days per year. In the decade since 9/11, reserve component service days have averaged approximately 50 million service days per year).

reduced.¹⁶ To the contrary, there are indications that the deployment tempo will increase.¹⁷

B. INVIDIOUS AND IRRATIONAL HARASSMENT OF MEMBERS OF THE MILITARY IN THE WORKPLACE IS A SIGNIFICANT PROBLEM.

The Fifth Circuit's opinion in *Carder* noted that there was no evidence to show "invidious and irrational discrimination and harassment" of Guard and Reserve members in the workplace was a widespread social problem in need of a remedy.¹⁸ However, the

¹⁶ The current Afghanistan and Kuwait deployment rotation schedules includes three Brigade Combat Teams involving 10,000 personnel beginning in late summer 2011 and will continue through early 2012. These units have previously deployed to Iraq or Afghanistan. See News Release, U.S. DEP'T OF DEF., DOD Identifies Units for Upcoming Afghanistan Deployment (Jun. 17, 2011), available at <http://www.defense.gov/releases/release.aspx?releaseid=14583>; see also News Release, U.S. DEP'T OF DEF., DOD Identifies Units for Upcoming Afghanistan and Kuwait Rotation (Mar. 3, 2011), available at <http://www.defense.gov/releases/release.aspx?releaseid=14304> (the 37th Infantry Brigade Combat Team, Ohio Army National Guard, the 27th Infantry Brigade Combat Team, New York National Guard and the 55th Heavy Brigade Combat Team, Pennsylvania National Guard).

¹⁷ See OFFICE OF THE UNDER SEC. OF DEF. FOR ACQ., TECH., AND LOG., Rep. on Deployment of Members of the National Guard and Reserve in the Global War on Terrorism, app. E (2007), available at <http://www.acq.osd.mil/dsb/reports/ADA478163.pdf> (including a memorandum from Secretary of Defense Robert Gates recognizing the increased burden of deployments continuing into the future).

¹⁸ *Carder*, 636 F.3d at 172.

Government Accountability Office noted as early as 2002 that in “every focus group in every unit visited, some reservists had complaints about their employers. Some said that their supervisors were hostile toward their reserve duty and had actively encouraged them to leave the reserves.”¹⁹

Furthermore, the available data on USERRA complaints is contrary to the Carder court's assertion. USERRA complaints are handled formally and informally — formally by the Department of Labor Veterans' Employment and Training Service program (“DOL VETS”)²⁰ and informally by the Department of Defense Employer Support of the Guard and Reserve program (“ESGR”).²¹ The DOL VETS Annual USERRA Reports to Congress (“DOL Reports”) includes an

¹⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 02-608, DOD ACTIONS NEEDED TO BETTER MANAGE RELATIONS BETWEEN RESERVISTS AND THEIR EMPLOYERS 16 (2002).

²⁰ DOL VETS receive formal USERRA-related complaints against civilian employers. Representatives of VETS investigate USERRA complaints and try to resolve disputes, but if they are unable to resolve servicemember complaints, DOL informs the servicemembers that they may request to have their complaints referred to the Department of Justice (“DOJ”) or to the Office of Special Counsel (“OSC”). Unresolved complaints are referred by DOL to DOJ to investigate, mediate, and litigate. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 06-60, MILITARY PERSONNEL, FEDERAL MANAGEMENT OF SERVICEMEMBER EMPLOYMENT RIGHTS CAN BE FURTHER IMPROVED 2 (2005).

²¹ The ESGR performs most of its work through volunteers and specially-trained impartial ombudsmen who act as informal mediators for USERRA issues that arise between servicemembers and their employers. *Id.*

accounting of USERRA complaints. The DOL VETS Reports paint a striking picture about formal USERRA complaints.

In the 2009 DOL VETS report, there were 1,431 USERRA based complaints.²² In particular, out of 483 discrimination complaint cases reviewed by DOL VETS, military obligation discrimination was at issue in 447.²³

In addition to comprising the vast majority of discrimination claims in 2009, the issue of military obligation discrimination made up the largest percentage of overall USERRA issues reviewed by DOL VETS.²⁴ In fact, from 2006 to 2009 the issue of military obligation discrimination has consistently comprised the largest single category of USERRA issues reviewed by DOL VETS.²⁵

Informal USERRA complaints can be pursued through ESGR.²⁶ In 2009, ESGR received 15,870

²² U.S. DEP'T OF LAB. FY2009 USERRA ANN. REP. 12 (2010).

²³ *Id.*

²⁴ *Id.* at 10. The next largest issue facing members of the Guard and Reserve was reinstatement which consisted of 331 complaints. *Id.* at 12.

²⁵ DEP'T OF LAB., *supra* note 22 at 10 (stating 34.2 percent). See also U.S. DEP'T OF LAB. FY2008 USERRA ANN. REP. 11 (2009) (stating 35.6 percent); U.S. DEP'T OF LAB. FY2007 USERRA ANN. REP. 7 (2008) (stating 36.7 percent); U.S. DEP'T OF LAB. FY2006 USERRA ANN. REP. 5 (2007) (stating 33.6 percent).

²⁶ See *supra*, note 21.

USERRA related inquiries.²⁷ A significant number of these USERRA related inquiries are not accepted by ESGR for referral to their Ombudsmen Program for informal mediation by ESGR volunteers.²⁸ Currently, if an inquiry is not handled by the Ombudsman Program, the underlying issue of that inquiry is not published in ESGR Annual Reports.²⁹ This means that ESGR does not effectively report the number of inquiries they receive which contain allegations of harassment.

Even assuming Congress is made aware of every formal and informal harassment claim made by a member of the Guard or Reserve, such information does not capture all instances of anti-military harassment in the workplace. A 2004 Defense Manpower Data Center survey indicated, "formal and informal complaint numbers do not capture most USERRA problems experienced by servicemembers because most servicemembers do not seek assistance for their USERRA problem."³⁰ In short, the DOL VETS and ESGR Annual Reports do not illustrate the full extent

²⁷ EMPLOYER SUPPORT OF GUARD AND RESERVE ANN. REP. 17 (2009).

²⁸ See *id.* (out of the 15,870 inquiries, 2,475 became ombudsmen cases in 2009).

²⁹ *Id.*

³⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 20 at 26. Survey results showed that "at least 72 percent of the Selected Reserve members who had experienced USERRA problems never filed a complaint, either formal or informal, to seek assistance in resolving their problems." *Id.* at 27.

that the Guard and Reserve face harassment in the workplace.

Due to the significant problem of harassment in the workplace facing members of the Guard and Reserve now, more than ever, an adequate remedy must be found.

C. CONSTRUCTIVE DISCHARGE AS THE SOLE REMEDY UNDER USERRA FOR HARASSMENT OF MEMBERS OF THE MILITARY IS INADEQUATE.

Although the Fifth Circuit denied the existence of a hostile work environment claim under USERRA, the court took solace in the belief that if the anti-military harassment grew so intolerable as to force a servicemember to resign, then a constructive discharge claim could be available.³¹ As the Petitioner notes, not only is the Fifth Circuit's position contrary to this Court's hostile work environment jurisprudence, it also forces members of the Guard and Reserve to choose between their commitment to serve and their employment.³² However, the decision between military duty and civilian employment is a false choice, because the consequences of selecting employment over duty are severe.

³¹ Carder, 636 F.3d at 181-82.

³² Brief of the Petitioner at 28-32, Carder, et al. v. Continental Airlines, Inc., No. 10-1546 (Jun. 24, 2011).

Members of the Guard and Reserve signed enlistment contracts for a specified duration of service.³³ Although members of the Guard and Reserve can be released from service for a variety of reasons, a hostile work environment is not listed as a valid reason for separation.³⁴

Activated members of the Guard and Reserve are subject to the Uniform Code of Military Justice (UCMJ).³⁵ Being absent without leave (AWOL) and missing the movements of a ship or plane are

³³ See 10 U.S.C. §12103(d) (2011) (a person, may be enlisted in the Army National Guard or the Air National Guard, or as a Reserve for service in the Army Reserve, Navy Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve, for a term of not less than six years nor more than eight years); see also U.S. Army Regulation (AR) 601-210, para. 2-16(c) (Enlistment in the [Army Reserve] or [Army National Guard] will be for a period of 8 years); U.S. Airforce National Guard Instruction 36-2002, para. 1.12 (Feb. 2, 2010) (An individual who enlists in the [Air National Guard] must concurrently enlist as a Reservist of the Air Force in the same grade for a period equal to his/her [Air National Guard] enlistment. The term of enlistment for all [non-prior service] applicants will be for a period of not less [than] six years); Chief of Naval Operations Instructions 1000.26A, para. 5(a) (Nov. 20, 2006) (stating the mandatory service obligation for the Navy and Naval Reserve is eight years).

³⁴ See e.g., U.S. Army Regulation 635-200 (listing reasons for separation from the Army). Army Reserve members are separated for the same reasons as active duty Army personnel. Para. 1-11(2)(a). See also Air Force Instruction 36-3209 (Apr. 14, 2005) (listing reasons for separation of Air Force Reserve and Air National Guard personnel).

³⁵ Art. 2 Uniform Code of Military Justice (UCMJ), 10 U.S.C. §802(a)(3).

punishable violations of the UCMJ.³⁶ The maximum punishments for these violations are sentences of two years confinement and a dishonorable discharge.³⁷ In addition to facing serious penalties, a failure to adhere to service requirements and orders would result in the loss of available benefits upon discharge.³⁸ For all intents and purposes, a member of the Guard and Reserve cannot choose between their military service and their civilian employment. Consequently, under the Fifth Circuit's analysis, a member of the Guard or Reserve has no other option but to endure the harassment or resign from civilian employment.

The impact of forcing Guard and Reserve members to endure harassment until it becomes so intolerable as to cause them to resign their civilian employment would damage recruitment and retention in the Guard and Reserve. Being able to serve the country while at the same time maintaining civilian employment, is an incentive for Guard and Reserve recruitment and retention.

³⁶ Art. 86 UCMJ, 10 U.S.C. §855 (AWOL); Art. 87 UCMJ, 10 U.S.C. §855 (missing movement).

³⁷ MANUAL FOR COURTS MARTIAL, UNITED STATES (2008 ed.), Part IV, para. 11.e.(1) (for missing the movement of a ship or plane by design). The maximum penalty for being absent without leave is confinement for two years and a dishonorable discharge. Para. 10.e.(2)(d).

³⁸ See 38 U.S.C. §101(2) (2011) (defining a veteran for the purposes for veteran's benefits as a servicemember who was discharged under conditions other than dishonorable).

Congress recognized that being protected from harassment in the workplace was important to membership in the Guard and Reserve when they stated that one of the purposes of USERRA was "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."³⁹ Accordingly, the remedy of constructive discharge is inadequate to combat harassment of members of the Guard and Reserve in the workplace.

□

CONCLUSION

Harassment of Guard and Reserve members in the workplace is a widespread societal problem in need of a remedy. While members of the Guard and Reserve comprise only a fraction of this nation's population, they have historically comprised a significant part of this nation's combat forces. Their role has only increased since 9/11 and shows no sign of decreasing. When harassment in the workplace becomes a problem for members of the Guard and Reserve, as the data on USERRA claims indicates, it becomes a problem for society as a whole.

The Carder court's remedy of constructive discharge is inadequate to resolve the issue of workplace harassment because it leaves the servicemember with

³⁹ 38 U.S.C. §4301(a).

the untenable choice between employment or commitment to serve this country. Servicemembers who have chosen to serve in the Guard and Reserve should not be forced to sacrifice their employment or military service. For the foregoing reasons, this court should grant petitioners' writ of certiorari.

Respectfully submitted,

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