THE SEVENTH CIRCUIT FIRES A WARNING SHOT: "RIGHTS AND BENEFITS" INCLUDES PAID MILITARY LEAVE WHEN EMPLOYERS OFFER PAY FOR "COMPARABLE ABSENCES"

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As a matter of first impression in the federal appellate courts, a three-judge Seventh Circuit panel broadly interpreted the Uniformed Services Employment and Reemployment Act ("USERRA"),[2] to require private employers under some circumstances to provide paid leave to employees absent from work due to military service.[3] *White* held that an employer's failure to provide paid military leave, while on the other hand offering paid leave for other comparable leaves of absence, impermissibly violates USERRA's equal-treatment rule for reservists and National Guardsmen.[4] The net effect of this holding is clear: service members and employers must understand the Seventh Circuit's reasoning and its future impact on employment policies and practices.

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[1] The views expressed in this article are those of the author and do not necessarily represent the views of the United States Army, United States Army Judge Advocate General's Corps, Department of Defense or any other federal agency. All information used in preparing this article is publicly available information and was not otherwise obtained through the author's employment with the Department of Defense.

[2] 38 U.S.C. § 4301, et seq.

[3] *White v. United Airlines, Inc.*, 987 F.3d 616, 619 (7th Cir. 2021).

[4] *Id.* at 625. In mentioning the "equal treatment rule," the Seventh Circuit appears to be referring to one of the intended purposes of passing the USERRA, namely "to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a)(3).

I. HISTORY OF THE USERRA: A LONGSTANDING EFFORT TO "GET IT RIGHT"

The USERRA traces its history to pre-World War II protections and draft-era policies.[5] By minimizing disruption and prohibiting discrimination, the federal statute only recently enacted in 1994 is far from the first of its kind in encouraging non-career, volunteer service in the armed forces.[6] In fact, the USERRA's predecessor statutes form the backdrop for its interpretation today: "Courts have universally acknowledged the propriety of relying on cases analyzing predecessor statutes, such as the Military Selective Service Act of 1967 and the Veterans' Reemployment Rights Act (VRRA), when considering claims under the USERRA."[7] As acknowledged in the Code of Federal Regulations, Congress has even mentioned such a desire to add to these historic protections:

> In enacting USERRA, Congress emphasized USERRA's continuity with the VRRA and its intent to clarify and strengthen the law. Congress also emphasized that Federal laws protecting veterans' employment and reemployment rights for the past fifty years has been successful and that the large body of case law that has developed under those statutes remained in full force and effect, to the extent it is consistent with the USERRA.[8]

No matter what Congress has called its federal statutes protecting veterans' employment rights, each has been enacted against the backdrop illustrated by the U.S. Supreme Court. That is, plain and simple, they exist to protect "those who left private life to serve their country in its hour of great need."[9] While our Nation's need for voluntary uniformed service remains steadfast, the statutory language used to protect their

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[5] *See Rogers v. City of San Antonio*, 392 F.3d 758, 764–69 (5th Cir. 2004) (comprehensively discussing legislative history and jurisprudence of veterans' protections since 1940); *Travers v. FedEx Corp.*, 473 F. Supp. 3d 421, 425–28 (E.D. Pa. 2020) (same). *See also* Susan M. Gates, Geoffrey McGovern, Ivan Waggoner, John D. Winkler, Ashley Pierson, Lauren Andrews & Peter Buryk, *Supporting Employers in the Reserve Operational Forces Era*, RAND CORP. (2013), https://www.rand.org/pubs/research_reports/RR152.html.

[6] *See* 38 U.S.C. § 4301(a). Notwithstanding how the USERRA was born out of prior veterans' protection legislation, its protections appear quite different than its predecessors, including the Veterans' Reemployment Rights (VRR) laws and Selective Training and Service Act of 1940. *Compare* USERRA, 38 U.S.C. §§ 4301–35, *with* Veterans' Reemployment Rights Act, 38 U.S.C. §§ 2021–26 (1976), *and* Selective Training and Service Act of 1940, 50a U.S.C. §§ 301–18 (1940).

[7] *Hoefert v. Am. Airlines, Inc.*, 438 F. Supp. 3d 724, 733 n.6 (N.D. Tex. 2020).

[8] 20 C.F.R. § 1002.2.

[9] *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

return to civilian employment has transformed over the years into what the USERRA's text considers these individuals' "rights and benefits."

II. THE USERRA'S "RIGHTS AND BENEFITS"

As a general matter, the USERRA carries out Congress's longstanding intentions by protecting seniority- and non-seniority-based "rights and benefits"[10] for reservists and National Guardsmen "absent from employment for service in a uniformed service."[11] As for which non-seniority "rights and benefits" a service member is entitled under section 4316(b), the USERRA's language stems from a Third Circuit interpretation of the Vietnam Era Veteran's Readjustment Act in *Waltermyer v. Aluminum Co. of America*.[12] In *Waltermyer*, the employer's collective bargaining agreement limited eligibility for holiday pay to individuals who worked during the week, except persons absent for reasons "beyond their control" such as jury duty, testifying in court, defined illness or layoff.[13] While military leave was excluded under the collective bargaining agreement, the court found that Plaintiff's military leave shared "essential features" with the exemptions, particularly in that his "lack of choice" mirrored the crux justifying each exemption.[14] Because of the similarities between the listed exemptions and military leave, *Waltermyer* reasoned that the USERRA's prohibition against discrimination under the Vietnam Era Veterans' Readjustment Act established "equality . . . not preferential treatment," thereby entitling Plaintiff to holiday pay.[15] Again, since Plaintiff's military leave was

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[10] Congress broadly defined in USERRA that "benefit," "benefit of employment," or "rights and benefits" includes "any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select hours or location of employment." 38 U.S.C. § 4303(2); *see also Scanlan v. Am. Airlines Grp., Inc.*, 384 F. Supp. 3d 520, 526 (E.D. Pa. 2019) (noting that these terms are "extremely broad").

[11] *See* 38 U.S.C. § 4316(a)–(b). The USERRA also expansively defines "service in the uniformed services," once again suggesting that the statute be liberally interpreted in favor of service members. *See* 38 U.S.C. § 4303(13) (explaining that "service in the uniformed service" includes, among other things, active duty, active duty for training, full-time National Guard duty, and fitness for duty examinations); *see also Gordan v. Wawa, Inc.*, 388 F.3d 78, 81 (3d Cir. 2004) (reiterating that courts must "construe USERRA's provisions liberally, in favor of the service member.").

[12] 804 F.2d 821, 825 (3d. Cir. 1986). *See Rogers v. City of San Antonio*, 392 F.3d 758, 768 (highlighting that "[t]he reports of both the Senate and the House expressed an intention to codify *Waltermyer* in this [section of USERRA]").

[13] *Waltermyer*, 804 F.2d at 822.

[14] *Id.* at 825.

[15] *Id.* at 824–26; *see Scanlan*, 384 F. Supp. 3d at 524–25, 384 F. Supp. 3d 520, 524-25 (E.D. Pa. 2019) (summarizing same).

comparable to the other exemptions, his absence was required to be treated as such, thereby entitling him to holiday pay.[16] Unfortunately for clarity's sake, *Waltermyer*'s comparability analysis has been inconsistently applied by the federal courts in determining whether a service member is entitled to pay for short-term military leave.

On one hand, *Travers* presents a textual interpretation of "rights and benefits" entitlements for service members. There, the district court relied almost exclusively on the "rights and benefits" definition in 38 U.S.C. § 4303(2) in dismissing a U.S. Naval reservist's complaint alleging an entitlement to paid short-term military leave under the USERRA.[17] Since the USERRA's definition section of "rights and benefits" "unambiguously excludes paid military leave," the court reasoned, Congress could not possibly have intended to provide it.[18] This narrow interpretation, as Mr. Travers argued before the district court, ignores how section 4303(2)'s use of the words "including" and "any" indicates only an inclusive list of examples, not an exhaustive list.[19] Mr. Travers also argued how such a holding ignores how *expressio unius est exclusio alterius*, or "the expression of one thing suggests the exclusion of others," is inapplicable where the term "including" introduces a list of multiple items.[20] Relying primarily on the text, the court in *Travers* nonetheless held no service member could ever be entitled to paid short-term military leave, no matter how comparable it is to other forms of paid short-term leave.[21] This holding in *Travers* stands in the face of the directive that, according to the U.S. Supreme Court, "interpretative doubt is to be resolved in the veteran's favor."[22] While the Third Circuit ultimately vacated this holding,[23] it emphasizes the varying treatment USERRA plaintiffs receive across our lower federal courts.

In line with this, another decision on paid short-term military leave for another commercial airline pilot and U.S. Air Force reservist arises out of the Eastern District of Pennsylvania like *Travers*, albeit with a different outcome.[24] In *Scanlan*, the court presumed plaintiff's military leave, which was unpaid, was comparable to other forms of short-term

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[16] *Waltermyer*, 804 F.2d at 825.

[17] *Travers v. FedEx Corp.*, 473 F. Supp. 3d 421, 425, 435 (E.D. Pa. 2020).

[18] *Id.* at 425.

[19] *Id.* at 435 (citing *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 943 (7th Cir. 2015)).

[20] *Id.*

[21] *Id.* at 437.

[22] *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

[23] *Travers v. Fed. Express Corp.*, 8 F.4th 198, *199 (3d Cir. 2021) (reasoning, in vacating the district court's decision, that "the best reading of USERRA directs employers to provide the benefit of compensation when they choose to pay other employees for comparable forms of leave.").

[24] *Scanlan v. Am. Airlines Grp., Inc.*, 384 F.3d 520, 522 (E.D. Pa. 2019).

leave paid by defendant American Airlines—such as jury duty, sick leave, or union leave—and therefore compensable.[25] In finding Mr. Scanlan's complaint adequately alleged his entitlement to pay for his short-term military leave because of its similarity to other forms of leave paid by American Airlines, the court reasoned that section 4316(b)(1) "requires employees on military leave to be provided with comparable rights and benefits to which those on non-military absences are entitled."[26] "While compensation for time on military leave is not required when it would be preferential treatment," the court went on, "§ 4316(b)(1) mandates payment when failure to pay such compensation constitutes unequal treatment for those on reserve duty."[27] Under the circumstances at hand in *Scanlan*, noticeably akin to those in *Waltermyer* says the court, Mr. Scanlan's request for short-term paid military leave must survive dismissal because "[e]qual treatment exists only if those employees on short-term military leave have the same rights and benefits as other employees in comparable situations."[28] As this case continues to develop,[29] the body of case law across the federal courts, far more inclusive than discussed here, continues to develop. This brings us to the strongest case for paid short-term military leave: *White v. United Airlines Inc.*[30]

III. THE SEVENTH CIRCUIT REINVIGORATES THE USERRA PROTECTIONS FOR "COMPARABLE ABSENCES"

The plaintiff in this putative class action against United Airlines, Inc. and United Continental Holdings, Inc. is a United Airlines pilot who is also a reservist in the U.S. Air Force.[31] As a reservist, he must of course take short-term absences from work to perform his military duties.[32] During his short-term absences, which were usually just a few days at a time, United Airlines would not pay him.[33] Although not providing any of its employees paid military leave for short term periods

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[25] *Id.* at 524.
[26] *Id.* at 527.
[27] *Id.*
[28] *Id.* at 528.
[29] The *Scalan* case was recently certified as a Rule 23(a) class action on 8 October 2021 with three subclasses (one subclass for each of Plaintiff's three alleged USERRA violations), and Plaintiff was appointed as the class representative for each subclass. *See Scanlan v. Am. Airlines Grp., Inc.*, No. 18-40402021, 2021 WL 4704708, *12. The certification was made after considering the general notion that "USERRA seeks to treat those employees in non-career military service equally with employees not engaged in military service." *Id.* at *2.
[30] 987 F.3d 616 (7th Cir. 2021).
[31] *White*, 987 F.3d at 619.
[32] *Id.*
[33] *Id.*

of duty, United Airlines offered paid leave for other short-term leaves of absence such as jury duty or being out sick.[34] Its policy also credited employees for paid, but not unpaid, short-term absences under a profit-sharing plan, which of course limited plaintiff's contributions while on military leave.[35] "In a nutshell," as the trial court summarized, "Plaintiff argues that Defendants, given their policy of compensating employees for certain other types of short-term leaves of absence, should be required to pay Plaintiff for his time on short-term leave in military service."[36] Plaintiff's argument fell flat before the trial court.

The lower court disagreed with Plaintiff and dismissed his amended complaint with prejudice, compelling his appeal.[37] On appeal, the Seventh Circuit reversed the dismissal and remanded for further analysis.[38] The court framed the issue as "whether USERRA's mandate that military leave be accorded the same 'rights and benefits' as comparable, nonmilitary leave requires an employer to provide paid military leave to the same extent that it provides paid leave for other absences, such as jury duty and sick leave."[39] Put simply, the appellate court found that if plaintiff's military leave is like other leaves of absence paid out by United Airlines, he should be compensated for it. To otherwise deny him of this pay would deny him of the non-seniority "rights and benefits" afforded to him under the USERRA while absent from work due to his military service.[40] Without finding Plaintiff's military leave comparable, and thus payable like other kinds of short-term leave paid by United Airlines, the Seventh Circuit remanded the case for a determination of whether it is, insinuating that it might only be discernable after ample discovery.[41] With the trial court remand looming, Defendants petitioned the Seventh Circuit for a rehearing *en banc*, only to be denied a short month later.[42] This case leaves unanswered many important questions concerning service member entitlements in the realm of short-term military leave.

Notwithstanding the uncertainty looking forward, the Seventh Circuit's holding is grounded in the USERRA's text and the Department

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[34] *Id.*

[35] *Id.*

[36] *White v. United Airlines, Inc.*, 416 F. Supp. 3d 746, 738 (N.D. Ill. 2019).

[37] *Id.* at 739–40.

[38] *White*, 987 F.3d at 625.

[39] *Id.* at 619.

[40] *See* 20 C.F.R. §§ 1002.149–50.

[41] *White*, 987 F.3d at 625.

[42] *White v. United Airlines Inc.*, 7th Cir., No. 19-2546 (Feb. 3, 2021), *petition for rehearing en banc denied* (March 10, 2021); *see* Jeffrey Rhodes, *USERRA May Require Employers to Pay Reservists on Military Leave*, SHRM (April 13, 2021), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/court-report-userra-may-require-paying-reservists-on-military-leave.aspx.

of Labor's ("DOL") appropriately promulgated regulations.[43] As the text instructs, and the court cited verbatim:

> A person who is absent from a position of employment by reason of service in the uniformed services shall be deemed to be on furlough or leave of absence while performing such service; and entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.[44]

As the court also recognizes, DOL expanded on the USERRA's explanation of rights and benefits to individuals absent from employment because of military service, stating that "[i]f the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services."[45] To determine whether two forms of leave are comparable, DOL instructs courts to consider the duration, purpose, and voluntariness of the leaves of absence.[46] In cautioning against an interpretation that it must compensate periods of comparable short-term military leave, United Airlines relied on legislative history in claiming that such a finding would "effect a costly sea-change for public and private employers, essentially making [the Seventh Circuit's] interpretation an 'elephant[] in [a] mousehole[].'"[47] United Airlines' policy analogy failed to show that such a holding is incompatible under the USERRA and practical managerial and human resources administration.[48]

IV. *WHITE*'S IMPACT: UNDERSTANDING HOW TO PUT THE ELEPHANT THROUGH THE MOUSEHOLE

White undoubtedly impacts employers and service members alike. It's even caused the Third Circuit in *Travers* to reconsider how its

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[43] *See White*, 987 F.3d at 620–21.
[44] *Id.* at 620; 38 U.S.C. § 4316(b)(1) (emphasis added).
[45] 20 C.F.R. § 1002.150(b).
[46] *Id.*
[47] *White*, 987 F.3d at 624 (quoting *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001)).
[48] *See id.*

constituent lower courts evaluate the USERRA's protections.[49] To ensure USERRA compliance, employers must now readdress and quite possibly recalibrate paid leave policies, collective bargaining agreements, and employment agreements. At the very least, they must offer similar leave practices for comparable leaves of absence, notwithstanding the fact that one person's leave might be taken to perform military duties with substantially higher compensation than, say, jury duty.[50] While the underlying factual question remains whether the two forms of leave are treated equally by the employer, "[c]ase law regarding whether military leave is comparable to jury duty/witness leave is sparse," and as is the case in many federal circuits, "binding case law is virtually non-existent."[51] This lack of case law, among other things, will create uncertainty and unpredictability in USERRA litigation and human resources and hiring practices. Most notably, whether a service member is entitled to pay for short-term military absences will vary from Soldier to Soldier, depending on their civilian employment and military duties, even if both Soldiers work for the same employer.

What's more is that a close call between whether paid leave absences are comparable may demand additional discovery, prohibiting a case's early dismissal while simultaneously encouraging earlier settlement discussions. And in the event an employer considers an arbitration agreement to keep a case out of court, other unique issues will surely arise. In *Bodine v. Cook's Pest Control Inc.*,[52] for instance, the Eleventh Circuit upheld an order compelling a Soldier to arbitrate his USERRA claims under the Federal Arbitration Act based on an arbitration agreement with two clauses that defendant conceded violated the USERRA.[53] The *Bodine* court even went so far as leaving it up to the arbitrator to determine whether these concededly unlawful terms were

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[49] In particular, the Third Circuit in *Travers* ultimately follows *White* in vacating and remanding the district court's dismissal of Mr. Travers' USERRA allegations for a leave comparability analysis. *See Travers v. Fed. Express Corp.*, 8 F.4th 198, *202, fn.8, 10 (3d Cir. 2021). As in *White*, the Third Circuit first highlights how "USERRA describes a process for evaluating alleged disparate treatment of servicemembers on military leave by an employer." *Id.* at *203. The standard of review is not whether a servicemember is entitled paid leave for military absence, the Third Circuit explains. *Id.* It is instead whether the employer "extends a right and benefit in the form of pay to the group of employees who miss work for non-military reasons, but then denies pay to the group absent for military service." *Id.* The functional protection of the USERRA is clear: "[it] does not allow employers to treat servicemembers differently by paying employees for some kinds of leave while exempting military service." *Id.* at *209.

[50] *See, e.g.*, *Brill v. AK Steel Corp.*, 2012 WL 893902, *1, *5 (S.D. Ohio 2012) (partially denying employer's summary judgment motion on leave comparability issue despite that "[plaintiff] is paid more by the government for his military leave than jurors are paid for jury duty").

[51] *Id.* at *5.

[52] 830 F.3d 1320, 1322–23 (11th Cir. 2016).

[53] *Id.* at 1320.

enforceable.[54] These new issues and considerations will impose higher costs of drafting and negotiating employment agreements, updating employment policies and practices, and managing litigation in an uncertain legal landscape.[55] Most importantly, these things also run the risk of diluting the intended impact of the USERRA on effectively protecting reservists and Guardsmen when our Nation needs them most.

CONCLUSION

Careful consideration of the Seventh Circuit's recent holding in *White* requires that employers and service members alike reevaluate paid leave entitlements for absences from work to perform military duties. Doing so requires a comprehensive review of the USERRA's predecessor statutes and congressional intent in their enactments, oftentimes conflicting lower court opinions, and the unique circumstances of each employer-Soldier relationship. After all, to be clear, when an employer offers pay to employees for short-term absences but fails to compensate service members for comparable short-term military absences, *White* says such a practice violates the USERRA. Subject to any non-binding judgment on remand, this case has already raised a host of new administrative and employment issues surrounding what "rights and benefits" under the USERRA that service members have earned in answering the call to serve.

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[54] *See id.* at 1328.

[55] For instance, two large scale settlements concerning "rights and benefits" during short-term military absences inhibit legal development in this realm. *See Nickolas Tsui., et. al. v. Walmart Inc.*, Case 1:20-CV-12309, Doc. 1 (E.D. Mass. 2020) (certified class action complaint alleging entitlement under the USERRA to short-term military leave paid by Walmart that settled 30 December 2020); *see also Huntsman v. Southwest Airlines Co.*, No. 4:17-CV-03972-JD (N.D. Cal. 2019) (certified class action that settled in 2019 that alleged sick time accrual and retirement benefits while on short-term military leave under the USERRA).