IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30670

TYLER CHRISTIANSEN; TREVOR DIETRICH; SHAUN DONELAN; MATTHEW HENDRICKSON; KELSEY LAMBERT; ETHAN MAY; and CHRISTOPHER THACKER,

Plaintiffs,

VS.

MAJOR GENERAL MARK MORRELL, ADJUTANT GENERAL OF THE SOUTH DAKOTA DEPARTMENT OF THE MILITARY,

Defendant.

APPEAL FROM THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE DOUGLAS HOFFMAN
CIRCUIT COURT JUDGE

BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

Citations to the settled record as reflected by the Clerk's Index are designated with "R." and the page numbers. This includes any citations to the transcript of the bench trial that is paginated within the settled record. Citations to the Appendix are designated as "App." and the page number.

JURISDICTIONAL STATEMENT

Under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), the proper jurisdiction for a claim brought under that statute depends on the type of employer: state, federal, or private. 38 U.S.C. §§ 4323(b), 4324(c)(1). Congress has granted state courts jurisdiction over actions brought by an employee against a state as an employer. 38 U.S.C. § 4323(b)(2). For purposes of USERRA, adjutant generals of the states are considered to be the employers of National Guard civilian technicians, even though such technicians are considered federal employees for most other purposes. 38 U.S.C. § 4303(4)(B); 20 C.F.R. §§ 1002.5(d)(2), 1002.305(d) & 1002.306. As a result, National Guard technicians must file suit under USERRA against a state adjutant general in state court. *See Torres v. Texas Dep't of Pub. Safety*, 597 U.S. 580, 595 (2022).

This Court has jurisdiction under SDCL 15-26A-3(1), (2) and/or (4).

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request the privilege of appearing for oral argument before this Honorable Court.

STATEMENT OF THE ISSUES

I. **In depriving National Guard dual-status or civilian technicians of employment benefits by not allowing accrual or use of military leave while performing active duty under Title 10, even though those same benefits are available to other National Guard technicians during periods of active military duty, did their employer violate USERRA?**

The circuit court did not reach this question because it considered the issue of statutory interpretation briefed by the parties to be moot in light of its holding that anti-military animus was a necessary element of a USERRA claim in these circumstances involving the denial of a benefit available only to members of the military.

- 5 U.S.C. § 6323(a)(1)
- 32 U.S.C. § 709(g)(2)
- 10 U.S.C. § 101(d)(6)
- *King v. St. Vincent's Hosp.*, 502 U.S. 215 (1991)

II. **Where an employment benefit is only available to members of the military, does a USERRA claimant need to show that anti-military hostility or animus was a motivating factor in the denial of that benefit in order to establish a USERRA violation?**

The circuit court held, *sua sponte*, that without proof of anti-military discrimination or hostility, there could be no USERRA claim as a matter of law, a legal position the Defendant had not taken.

- *Adams v. Department of Homeland Security*, 3 F.4th 1375 (Fed. Cir. 2021)
- *Pucilowski v. Department of Justice*, 498 F.3d 1341 (Fed. Cir. 2007)
- *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003)
- *United States v. Missouri*, 67 F.Supp.3d 1047 (W.D.Mo. 2014).

STATEMENT OF THE CASE

This is an appeal from Judgment of Dismissal on claims brought by members of the South Dakota Air National Guard seeking relief under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. § 4301 *et seq*.

On July 11, 2019, seven full-time civilian technicians and members of the South Dakota Air National Guard brought this action in Minnehaha County Circuit Court in the Second Judicial Circuit. (R. 2). The complaint alleged that the National Guard violated USERRA by depriving plaintiffs of employment benefits in not allowing them to accrue military leave while on active duty under Title 10 orders, even though other National Guard technicians were allowed to accrue military leave during such periods of active military duty. (R. 7). Plaintiffs sought declaratory and injunctive relief allowing them to accrue such benefits, damages for their lost benefits, and statutory attorney fees and expenses. (R. 8).

The complaint was filed against the Adjutant General of the South Dakota Air National Guard in his official capacity because Congress has directed that for purposes of USERRA, the "employer" of a National Guard civilian technician employed under 32 U.S.C. § 709 is the adjutant general of the State in which the technician is located. 38 U.S.C. § 4303(4)(B).

On August 27, 2019, the Adjutant General filed his answer contending, among other things, that plaintiffs were prohibited from accruing leave under

the circumstances by 32 U.S.C. § 709. (R. 22-24). Following discovery, a pre-trial conference before the Honorable Douglas E. Hoffman, Circuit Judge, was held on July 10, 2023. (R. 308). Thereafter, the parties entered into a joint stipulation of facts and submitted pre-trial briefs on the legal issues. (R. 80, 163, 174, 185, 190).

On December 1, 2023, a bench trial was held before Judge Hoffman at the Minnehaha County Courthouse. (R. 324). By agreement of the parties, the trial was reserved solely for evidence on the legal issues related to liability under USERRA and the court would receive additional evidence on the issue of damages in the event it found in favor of plaintiffs. (R. 331-32).

The plaintiffs attended the trial. (R. 327). Because the parties stipulated to most or all of the material facts, only one witness testified: Brigadier General Deborah Bartunek, Director of the Joint Staff for the South Dakota National Guard. (R. 335-36). At the close of the bench trial, the court asked rhetorically: "So, at the end of the day I got to get the green eye shade out and sharpen up the pencil and scrutinize all these statutes and put them into the context of the particular facts basically as stipulated in this case and figure out what the law requires?" (R. 380).

On December 5, 2023, Judge Hoffman issued his decision by email. (R. 196; App. 7). To everyone's surprise, however, the court declined to resolve the legal issue raised and briefed by the parties. Instead, the court held that, in its view of the law, plaintiffs' USERRA claims required them to

demonstrate that the National Guard's denial of their military leave was motivated by "antimilitary animus" and that because no such hostility had been established or even alleged, the Adjutant General was entitled to judgment as a matter of law. (R. 196; App. 7). As the court explained:

> There isn't even an allegation, let alone any evidence in the mostly stipulated case, that the Defendant, or any of his agents, acted out of anti-military animus in this case. . . .
>
> Rather, their entire case is predicated upon their legal opinion that the General has misinterpreted the governing legislation. So, this case, in essence, is entirely one of statutory interpretation, and that is certainly why all the salient facts could be stipulated by the parties.
>
> Having now studied the statutes in question, and considered the context in which they exist, I conclude that the statutes are ambiguous and there is a paucity of authority interpreting them in this context.
>
> Clearly, reasonable minds can differ as to whether the Plaintiffs' or the Defendant's interpretation is correct, and it isn't necessary for this Court to make that determination at this time.
>
> My primary finding of fact in this case is that the Defendant's determination on the benefit issue in this case was made upon a good faith attempt to interpret complex federal statutes and was not motivated in any way upon illegal military animus.
>
> Consequently, as a matter of law, there is no USERRA violation in this matter, and the case shall be dismissed upon the merits.

(R. 196-97; App. 7-8). The court's *sua sponte* rationale for dismissing the case had never been argued or raised by the Adjutant General, who instead had made an argument based on his construction of the statutes. The court stated it would not construe the relevant statutes or resolve the legal issue

raised because it was "moot given my opinion that, regardless of that determination, there is no USERRA violation in this case." (R. 197; App. 8).

On January 3, 2024, plaintiffs filed a motion for new trial and reconsideration of the memorandum decision. (R. 207). The motion provided legal authority demonstrating that where, as here, the benefit in question is only available to members of the military, a USERRA claimant does *not* need to show that anti-military bias was a substantial or motivating factor in the denial of the benefit. (R. 211) (citing *Adams v. Department of Homeland Security*, 3 F.4th 1375, 1377-78 (Fed. Cir. 2021)).

Defendant submitted proposed findings of fact and conclusions of law. (R. 200). Plaintiffs submitted their own proposed findings of fact and conclusions of law. (R. 221; App. 11). Each side also filed written objections to the other's proposals. (R. 217).

On March 12, 2024, Judge Hoffman issued another email decision denying plaintiffs' motions for new trial and reconsideration and adhering to his previous view of the law. (R. 239; App. 9).

On March 14, 2024, the circuit court entered its findings of fact and conclusions of law. (R. 248; App. 3). As determined by the court:

> There is a paucity of legal authority interpreting the relevant federal benefit statutes present in this action, and reasonable minds can differ as to their interpretation.
>
> But it is clear that no decision in this case, whether correct or incorrect, was made by the Defendant with regard to the applicability of said benefits to the Plaintiffs' status, based upon discriminatory motive, military animus, hostility toward the

> Plaintiffs' service obligations, or any reason other than a good faith attempt to follow the applicable benefit laws.
>
> Thus, as a matter of law, there is no USERRA violation here, even of the Defendants misinterpreted the applicable law, which is an issue this Court does not reach.
>
> Accordingly, this case will be dismissed upon its merits.

(R. 251 at ¶ 7; App. 6). That same day, the court entered its judgment of dismissal. (R. 255; App. 1). The following day, the court entered its order denying plaintiffs' motion for new trial and reconsideration of the memorandum decision. (R. 257; App. 110).

This appeal followed.

STATEMENT OF THE FACTS

Plaintiffs Tyler Christiansen, Trevor Dietrich, Shaun Donelan, Matthew Hendrickson, Kelsey Lambert, Ethan May, and Christopher Thacker are members of the South Dakota Air National Guard who were hired as full-time civilian technicians, also known as "dual status technicians," under 32 U.S.C. § 709. (R. 2, 22, 80, 82-86, 338-39). The term "dual status" refers to the fact that such technicians are both civilian employees and members of the National Guard. (R. 339).

This is so because "[m]ilitary membership in the National Guard is a condition of employment for dual status military technicians." (R. 339). As dual-status National Guard technicians, plaintiffs were federal employees of the Department of the Air Force but under the South Dakota Air National Guard's direction and control for purposes of their employment and

administration. (R. 3, 23, 81-86, 338-39).

As a result, there is no dispute that plaintiffs are qualified employees and members of the uniformed services as defined by 38 U.S.C. § 4303(3) and (16) and protected by USERRA. (R. 3, 23, 353-54, 355).

Beginning in 2016, plaintiffs each accepted orders to what is called Active Guard and Reserve ("AGR") duty with the 114th Fighter Wing at Joe Foss Field Air National Guard Station in Sioux Falls. (R. 81-86, 339-40, 352). The AGR orders for each plaintiff are attached as exhibits to the joint stipulation of facts. (R. 89-162, 340). Each AGR order is essentially the same with the exception of the names and dates. (R. 347).

The effect of these AGR orders was to place each plaintiff on leave from his or her civilian position without pay and instead place them on active military duty. (R. 340, 355). Under USERRA, National Guard civilian or dual-service technicians who accept AGR orders have the right to return to their civilian positions. (R. 341).

One of the benefits of service in the National Guard is accrual of paid military leave at a rate of fifteen (15) days per fiscal year while on active-duty orders under 5 U.S.C. § 6323(a)(1). Although military leave may not be accrued or used by dual-status civilian technicians while on AGR active duty under 32 U.S.C. 709(g)(2), it *is* accrued and may be used when performing active duty under Title 10 as a matter of law. (R. 349).

The AGR orders issued to each of the plaintiffs stated that upon

approval and by order of their command, plaintiffs would "convert" from AGR duty to what is called active duty under 10 U.S.C. §§ 12301(d) or 12302, otherwise known as "Title 10 Orders." (R. 345, 350, 355-56). As set forth in each AGR order:

> Upon approval and by order of federal command authority, ANG AGR Airmen will convert to Title 10 U.S.C. Section 12301(d)/ 12302/ 12304 status (as appropriate) when performing duty, OCONUS or CONUS, supporting Active Duty requirements for operations/ missions/ exercises.
>
> This AGR order will be amended to include any Title 10 duty for 30 or more consecutive days and reflect the Title 10 authority, Title 10 duty inclusive dates, named mission and GMAJCON being supported. Less than 30 consecutive days of Title 10 duty will be captured on AF INT 1299, Officer's Certificate of Statement of Service and certified by the commander.
>
> While performing duty under Title 10 orders, AGB Airmen are assigned to the 201st MSS, ANGRC, Joint Base Andrews, MD for ADCON purposes and subject to the Uniform Code of Military Justice (UCMJ).
>
> AGR Airmen will revert to their original Title 32 U.S.C. Section 502(f) status upon completion of this period.
>
> This policy applies to both CONUS and OCONUS duty supporting current or future operations.
>
> By order of the commander, ANG AGR Airmen will convert to Title 10 U.S.C. 10147 status when performing duty OCONUS for training purposes.

(R. 89 at ¶6) (emphasis supplied). In other words, the original orders included the option to "convert" or switch each of the plaintiffs from AGR active duty under Title 32 to active duty under Title 10 and then, following the airman's performance of that duty, to "revert" to the original AGR duty

under Title 32. (R. 345, 356).

That is exactly what happened to each of the plaintiffs. After being issued AGR orders, the plaintiffs received further orders converting them to active duty under Title 10. (R. 81-86, 352). For example, Airman Christiansen received the following orders on June 19, 2018:

> AGR Airman will convert to Title 10 U.S.C. 12302 in support of 13223J – OPERATION FREEDOM SENTINEL from 20 Jul 2018 to 01 Dec 2018 GMAJCOM LC – HQ AIR COMBAT COMMAND (HQ ACC)

(R. 100). After plaintiffs were converted to active duty under Title 10 orders, however, they did not accrue paid military leave as required and were not allowed to use any accrued military leave as required in violation of 5 U.S.C. § 6323 and 5 C.F.R. § 353.208, even though those same benefits were available to other National Guard technicians during periods of active military duty. (R. 349-53).

At trial, the Adjutant General contended that even though the plaintiffs indisputably converted from active duty under Title 32 to active duty under Title 10, that change in their duty status should not be recognized because, regardless of the type of "duty" being performed by the technicians, their original "orders" were AGR orders. (R. 345, 350-51). The Adjutant General's rationale for this theory was that a technician who was converted from AGR status to Title 10 status should not receive the same benefits of other National Guard technicians because the Title 32 order should be viewed to "encompass the Title 10 duties they would be assigned to, and then

go back to the Title 32, but it does not dispute the order." (R. 345, 350-51).

Plaintiffs contended that Title 10 active duty is Title 10 active duty, no matter the nature of the original activation order, and that treating them differently from other technicians serving on Title 10 active duty on the basis of their military status in order to deny them the same leave that other National Guard technicians receive as a benefit of employment is a clear violation of their federally protected rights under USERRA. (R. 360-61, 364).

STANDARD OF REVIEW

A. Appellate Review

The circuit court entered judgment of dismissal on plaintiffs' claims as a matter of law. This Court reviews all questions of law de novo. *See Billman v. Clarke Mach., Inc.*, 2021 S.D. 18, ¶ 22, 956 N.W.2d 606, 609. Questions of statutory interpretation and application also are reviewed under the de novo standard with no deference to the circuit court's decision. *See LeFors v. LeFors*, 2023 S.D. 24, ¶ 24, 991 N.W.2d 675, 683. This includes federal statutes and regulations. *See In re Estate of Flaws*, 2016 S.D. 60, ¶ 18, 885 N.W.2d 336, 342.

B. Rules of Construction under USERRA

Interpreting USERRA's predecessor laws, the Supreme Court held they must be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *see also Alabama Power*

Co. v. Davis, 431 U.S. 581, 584-85 (1977); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 n.9 (1991). Congress intended this same standard to apply to USERRA with "full force and effect in interpreting these provisions." H.R. Rep. No. 103-65, pt. 1 at 19 (1993). The Department of Labor's regulations implementing USERRA likewise direct "that this interpretive maxim apply with full force and effect in construing USERRA and these regulations." 70 Fed. Reg. 75,246 at *75246 (Dec. 19, 2005). As a result, it settled law that this liberal rule of construction governs the interpretation of USERRA. *See, e.g., Mace v. Willis*, 897 F.3d 926, 928 (8th Cir. 2018) (holding that USERRA "must be broadly construed in favor of its military beneficiaries").

ARGUMENT

I. BECAUSE NATIONAL GUARD TECHICIANS ASSIGNED TO AGR DUTY ARE ENTITLED TO MILITARY LEAVE WHEN ON ACTIVE DUTY UNDER TITLE 10, JUST LIKE ANY OTHER DEPLOYED NATIONAL GUARD MEMBER, THE DEFENDANT VIOLATED USERRA IN DENYING THAT LEAVE.

A. As a matter of law, plaintiffs were entitled to 15 days of paid military leave while on active duty under Title 10.

The South Dakota Air National Guard employs technicians to provide administrative, personnel, maintenance, and other support to the Guard's soldiers. These employees are referred to as "dual status technicians" because they are both full-time federal civilian employees of the Department of the Air Force and reservists in the Guard. The Guard is also responsible for staffing a full-time, active-duty military program called the Active Guard and Reserve (AGR). Unlike dual status technicians, AGR soldiers are on

active military duty for the Guard. Dual status technicians often apply for and are accepted into full-time positions in the AGR program. Each of the plaintiffs in this case were accepted into this program and on active duty.

1. Guaranteed paid leave under section 6323(a)(1)

One of the benefits of employment available to all federal employees serving in the National Guard, including plaintiffs, is the accrual of paid military leave at a rate of fifteen days per fiscal year while on active duty orders. *See O'Farrell v. Department of Defense*, 882 F.3d 1080, 1081-82 (Fed. Cir. 2018); *Butterbaugh v. Department of Justice*, 336 F.3d 1332, 1333 (Fed. Cir. 2003). This benefit is established under Section 6323 of Title 5 of the United States Code:

> **§ 6323. Military leave; Reserves and National Guardsmen**
>
> **(a)(1)** Subject to paragraph (2) of this subsection, *an employee as defined by section 2105 of this title* or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for active duty, inactive-duty training (as defined in section 101 of title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title 32), or engaging in field or coast defense training under sections 502-505 of title 32 as a Reserve of the armed forces or member of the National Guard.
>
> Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year.

5 U.S.C. 6323(a)(1) (emphasis supplied). To qualify for fifteen days of paid leave under this statute, a service member thus must be "an employee as

defined by section 2105 of this title [Title 5]."

National Guard dual-status technicians qualify as employees under this section as members of a uniformed service engaged in the performance of a federal function under authority of law and subject to the supervision of an adjutant general designated under 32 U.S.C. § 2105(1)(C), 1(F), (2) & (3). Federal employees performing miliary service, moreover, must be permitted to use military leave available to them. 5 C.F.R. § 353.208.

2. The carve-out under section 709(g)(2)

Under a specific exception carved out in section 709(g)(2) of Title 32, however, the accrual of military leave does not apply to National Guard technicians while performing AGR duty as further defined in that statute. Section 709(g)(2) provides that "[i]n addition to the sections referred to in paragraph (1), section 6323(a)(1) also does not apply to a person employed under this section who is performing active Guard and Reserve [AGR] duty (*as that term is defined in section 101(d)(6) of title 10*)." 32 U.S.C. § 709(g)(2) (emphasis supplied). Application of the exception from the general requirement to grant fifteen days of paid military leave thus turns on the definition of AGR duty found in 10 U.S.C. § 101(d)(6).

As defined in section 101(d)(6), the term "active Guard and Reserve duty" means "active duty performed by a member of a reserve component of the Army, Navy, Air Force, or Marine Corps, or *full-time National Guard duty* performed by a member of the National Guard pursuant to an order to

full-time National Guard duty, *for a period of 180 consecutive days or more for the purpose of organizing, administering, recruiting, instructing, or training the reserve components*." 10 U.S.C. 101(d)(6)(A).

3. The carve-out does not apply to plaintiffs.

That exception does not apply to the plaintiffs here. When a technician is converted from AGR duty to Title 10 duty, he or she meets the definition of an "employee" under 5 U.S.C. 6323(a)(1), because active duty under Title 10 orders does not meet the statutory definition of "active Guard and Reserve duty" for purposes of the carve-out. In such cases, National Guard technicians are entitled to accrual and use of paid military leave under section 6323(a)(1). Although this is a question of first impression that has not been resolved by any court, that is the only interpretation based on the plain language of the relevant statutes consistent with the prevailing requirement that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King*, 502 U.S. at 220 n.9.

To refresh, the carve-out in 32 U.S.C. 709(g)(2) applies only to those who are performing AGR duty as that term is defined in 10 U.S.C. 101(d)(6). Under 32 U.S.C. § 709, military leave for National Guard technicians under 5 U.S.C. § 6323(a)(1) "does not apply to a [National Guard technician] who is performing active Guard and Reserve duty (as that term is defined in section 101(d)(6) of title 10)." 32 U.S.C. § 709(g)(2). Based on the parenthetical in section 709(g)(2), the definition of "active Guard and Reserve duty" in 10

U.S.C. § 101(d)(6) determines whether a National Guard technician is entitled to military leave under 5 U.S.C. § 6323(a)(1). In other words, the statutory prohibition does *not* depend on whether a National Guard technician originally received AGR orders, but instead on whether a National Guard technician is performing "active Guard and Reserve duty" *as that term is defined in section 101(d)(6) of Title 10.*

In section 101(d)(6), "active Guard and Reserve duty" is defined as "*full-time National Guard* duty performed by a member of the National Guard pursuant to an order to full-time National Guard duty, *for a period of 180 consecutive days or more for the purpose of organizing, administering, recruiting, instructing, or training the reserve component.*"[1] 10 U.S.C. § 101(d)(6) (emphasis supplied). Thus, the statutory definition of "active Guard and Reserve duty" has three requirements. To qualify as performing excluded AGR duty, a technician must:

1. be a National Guard member performing full-time National Guard duty;

2. for a period of 180 consecutive days or more;

3. for the purpose of organizing, administering, recruiting, instructing, or training the reserve component.

See 10 U.S.C. § 101(d)(6). The key issues are whether plaintiffs, while performing duty under Title 10 orders, performed such duty for a period of 180 consecutive days or more and whether they performed such duty for the

[1] Reserve components includes the National Guard. *See* 10 U.S.C. § 101(c).

purpose of organizing, administering, recruiting, instructing, or training the reserve components.

First, with one exception, plaintiffs did not perform duty under Title 10 0rders for more than 180 days.[2] That point alone should disqualify those duty periods from meeting the definition of "active Guard and Reserve duty."

Second, the purpose element of the definition of AGR duty under 10 U.S.C. § 101(d)(6) is not met here because the purpose of Title 10 orders is inconsistent with the definition of AGR duty under 10 U.S.C. § 101(d)(6). The purpose of "active Guard and Reserve duty" according to 10 U.S.C. § 101(d)(6) is to organize, administer, recruit, instruct, or train the reserve components.

Under this definition, plaintiffs' duty under Title 10 orders is not "active Guard and Reserve duty." It is undisputed that plaintiffs did not perform duty under Title 10 orders "for the purpose of organizing, administering, recruiting, instructing, or training the reserve components." 10 U.S.C. § 101(d)(6). Rather, the purpose of plaintiffs' duty under their Title 10 orders was to support Active Duty requirements for operations, missions, and exercises.

Plaintiffs' AGR orders all state that "[u]pon approval and by order of federal command authority, ANG AGR Airmen will convert to Title 10 U.S.C. Section 12301(d)/12302/12304 status (as appropriate) when performing duty,

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[2] Kelsey Lambert performed duty on Title 10 orders for 213 days, from April 9, 2017, to November 8, 2017. (R. 84-85).

OCONUS or CONUS, *supporting Active Duty requirements for operations/missions/exercises*." (R. 89-154 - Ex. A, ¶ 4; B ¶ 6; Ex. C, ¶ 6; Ex. H, ¶ 7; Ex. N, ¶ 7; Ex. Q, ¶ 7; Ex. T, ¶ 6; Ex. X, ¶ 7; Ex. BB, ¶ 7) (emphasis supplied). Indeed, the Adjutant General stipulated that the purpose of plaintiffs' Title 10 orders was "supporting Active Duty requirements for operations/missions/exercises[.]" (R. 81-86 at ¶¶ 5, 10, 12, 16, 20, 24, 29, 34).

On their face, the stated purpose of plaintiffs' Title 10 duty thus conflicts with the plain language in the definition of AGR duty in 10 U.S.C. § 101(d)(6), which clearly states that AGR duty is to be performed "*for the purpose of organizing, administering, recruiting, instructing, or training the reserve component.*" 10 U.S.C. § 101(d)(6) (emphasis supplied). Supporting active duty requirements for operations/missions/exercises is far different than organizing, administering, recruiting, instructing, or training the reserve component. Those entirely separate duties cannot be reconciled. Thus, when serving on Title 10 duty, plaintiffs were not "performing active Guard and Reserve duty (as that term is defined in section 101(d)(6) of title 10)." 32 U.S.C. § 907(g)(2).

Instead, plaintiffs converted to Title 10 duty upon the receipt of Title 10 orders. The plain language of both plaintiffs' original AGR orders and subsequent Title 10 orders expressly memorializes this change in the type of duty they were performing. The original AGR orders each state that "'This AGR order will be amended *to include* any Title 10 duty[.]" (R. 89) (emphasis

supplied). Each AGR order further provides that:

> Upon approval and by order of federal command authority, ANG AGR Airmen will *convert* to Title 10 U.S.C. Section 12301(d)/12302/12304 status (as appropriate) when performing duty, OCONUS or CONUS, supporting Active Duty requirements for operations/missions/exercises . . . . AGR Airmen will *revert* to their original Title 32 U.S.C. Section 502(f) status upon completion of this period.

(R. 89-154 - Ex. A, ¶ 6; Ex. B, ¶ 6; Ex. C, ¶ 6; Ex. H, ¶ 7; Ex. N, ¶ 7; Ex. Q, ¶ 7; Ex. T, ¶ 6; Ex. X, ¶ 7; Ex. BB, ¶ 7) (emphasis supplied).

Similarly, plaintiffs' subsequent Title 10 orders state, "AGR Airman will *convert* to Title 10 U.S.C. . . . [.]" (R. 100-159 - Ex. E, ¶ 6; Ex. I, ¶ 6; Ex. J, ¶ 6; Ex. O, ¶ 6; Ex. P, ¶ 6 Ex. R, ¶ 6; Ex. S, ¶ 6; Ex. U, ¶ 6; Ex. V, ¶ 6; Ex. Y, ¶ 6; Ex. Z, ¶ 6; Ex. AA, ¶ 6; Ex. CC, ¶ 6; Ex. DD, ¶ 6) (emphasis supplied).

The plain and ordinary meaning of "convert," of course, is "[t]o change (something) from one use, function, or purpose to another; adapt to a new or different purpose." *American Heritage Dictionary of the English Language* (5th ed. 2011). The definition of "revert" is "[t]o go back to a former condition, practice, subject, or belief." *Id.* The AGR orders thus anticipated that plaintiffs' status would change from AGR duty to Title 10 duty and, after Title 10 duty was completed, change back to AGR duty. None of the orders say anything about remaining on AGR duty while performing Title 10 duty.

In context, it is apparent that the AGR orders are meant to be amended to document periods of Title 10 duty that exceed 30 days, not to somehow nullify the legal effect of plaintiffs' Title 10 duty or subsume it into

their AGR duty as the Adjutant General argued below.

In sum, 32 U.S.C. § 709(g)(2) provides that paid military leave under 5 U.S.C. § 6323(a)(1) does not apply to a technician who is performing AGR duty "(as that term is defined in section 101(d)(6) of title 10)." However, plaintiffs' active duty under their Title 10 orders does not meet the definition of AGR duty under 10 U.S.C. § 101(d)(6). As a result, the carve-out from the otherwise iron-clad entitlement to fifteen days of annual paid military leave does not apply and plaintiffs should have accrued and been allowed to use military leave under 5 U.S.C. § 6323(a)(1) while performing Title 10 duty.

B. Paid military leave is a "benefit of employment" within the meaning of USERRA.

Under USERRA, a person "who is a member of, . . . performs, has performed, . . . or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or *any benefit of employment by an employer* on the basis of that membership, . . . *performance of service*, . . . or obligation." 38 U.S.C. § 4311(a) (emphasis supplied).

The term "benefit of employment" is given an "expansive interpretation." *Pucilowski v. Department of Justice*, 498 F.3d 1341, 1344 (Fed. Cir. 2007). It includes "any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice." 38 U.S.C. § 4303(2).

Federal law is well settled that paid military leave to which a technician is legally entitled is a "benefit of employment" under USERRA. *Pucilowski*, 498 F.3d at 1344 (holding that "military leave afforded by 5 U.S.C. § 6323(a) is a benefit of employment under USERRA); *see also Belaustegui v. Int'l Longshore & Warehouse Union*, 36 F.4th 919, 925-29 (9th Cir. 2022); *O'Farrell*, 882 F.3d 1080, 1081 (Fed. Cir. 2018); *Pucilowskie*, 498 F.3d at 1343-44; *Butterbaugh*, 336 F.3d at 1336; *United States v. Missouri*, 67 F.Supp.3d 1047, 1050-53 (W.D.Mo. 2014). As set forth in the leading legal treatise on USERRA:

> [T]he employee may have a right to paid military leave under a statute separate from USERRA. Failure of an employer to comply with such a law can be an unlawful denial of a benefit of employment under USERRA. *Liability under USERRA can attach even though paid military leave necessarily would be a benefit available only to military employees.*

The USERRA Manual, § 3:5 (Pay) (August 2023 update) (emphasis supplied).

C. USERRA's protections extend to benefits available only to service members.

Here, the Adjutant General violated USERRA by depriving plaintiffs of employment benefits by not allowing the accrual of military leave under 5 U.S.C. § 6323(a)(1) or use of military leave pursuant to 5 C.F.R. § 353.208 while on Title 10 orders, even though those same benefits are available to other National Guard technicians during periods of active military duty.

USERRA's protections are triggered whenever a person's service in the uniformed services is a "*motivating factor* in the employer's action, unless the

employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service." 38 U.S.C. § 4311(c) (emphasis supplied). Military status is a motivating factor if the defendant relied on, took into account, considered, or conditioned its decision on that consideration. *See Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1234 (11th Cir. 2005). Here, plaintiffs' specific military status and performance of service plainly was a motivating factor in the denial of employment benefits because it was necessarily taken into account and considered by their employer when denying them paid military leave. 20 C.F.R. § 1002.23.

D. The circuit court's requirement that the Adjutant General must have acted under anti-military bias in order for plaintiffs to state a USERRA claim was legal error that should be reversed.

In its email memorandum and subsequent findings of fact and conclusions of law, the circuit court held that the absence of antimilitary hostility or bias precluded the USERRA claims as a matter of law. That was legal error that this Court should reverse.

In cases involving denial of benefits available only to service members, such as paid military leave, federal law is well settled that this requirement is satisfied so that proof of discriminatory intent is unnecessary. In such cases, military service is inherently considered in granting or denying the benefit. As a result, 'eligible military personnel are entitled to military leave from their civilian employer as a USERRA protected benefit." *United States v. Missouri*,

67 F.Supp.2d at 1051. Again, as set forth in the leading USERRA treatise:

> **Benefits extended only to servicemembers.** Nothing in USERRA's definition of "benefit of employment" not the Act's antidiscrimination section limits protection from discriminatory denials of employment benefits to benefits provided to both military and nonmilitary employees. . . .
>
> If a benefit of employment is available only to servicemembers, a servicemember claiming to have been denied the benefit in violation of USERRA necessarily must prove entitlement to the benefit. However, the servicemember would not be required to show that his or her military service was a motivating factor in an employer's decision to deny the benefit, the U.S. Court of Appeals for the Federal Circuit ruled in *Adams v. Department of Homeland Security*.

The USERRA Manual, § 7:8 (Prohibited adverse actions – Denial of "any benefit of employment"/miscellaneous adverse actions) (August 2023 update).

In *Adams v. Department of Homeland Security*, 3 F.4th 1375 (Fed. Cir. 2021), an employee of the U.S. Customs and Border Patrol was also a member of the Arizona Air National Guard. In 2018, he was activated for three periods of service to support various missions. Adams sought differential pay for these periods under 5 U.S.C. § 5538. He first brought his claim to Merit Systems Protection Board (MSPB), the federal agency that hears and decides administrative claims under USERRA. After his claim was denied, Adams petitioned for review with the Federal Circuit, which has federal jurisdiction over all appeals from the MSPB. *See id.* at 1377.

In analyzing his claim, the Federal Circuit recognized that the standard for establishing a USERRA violation for denial of benefits available only to members of the uniformed services does not require any showing of

anti-military animus:

> Generally, an employee making a USERRA claim under 38 U.S.C. § 4311 must show that (1) they were denied a benefit of employment, and (2) the employee's military service was "a substantial or motivating factor" in the denial of such a benefit. *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001) (citation omitted).
>
> However, when the benefit in question is only available to members of the military, claimants do not need to show that their military service was a substantial or motivating factor.

Adams, 3 F.4th at 1377-78.

That is a longstanding conclusion that has been consistently applied by the Federal Circuit and other courts interpreting USERRA's protections.[3] *See Belaustegui*, 36 F.4th at 925-29 ("Under defendants' reasoning, when an employer adopts a policy to implement USERRA's guarantees, the policy's protections cannot be 'benefits of employment' under § 4303(2) because they are available only to servicemembers. That logic is circular"); *Butterbaugh*, 336 F.3d at 1336 ("[W]e agree with the Board that, in contrast to cases under *Sheehan* . . . the question in this case is not whether Petitioners' military status was a substantial or motivating factor in the agency's action, for agencies only grant military leave to employees who are also military

[3] While not binding on this Court, citations to the U.S. Court of Appeals for the Federal Circuit are considered particularly persuasive, because most USERRA claims involving federal benefits are brought before the Merit Systems Protection Board (MSPB) and the sole jurisdiction for judicial review of an MSPB decision is the Federal Circuit. 5 U.S.C. § 7703(b)(1)(A). Dual-status technicians are deemed to be state employees under USERRA and thus, "[t]he MSPB lacks jurisdiction over claims of National Guard technicians alleging violations of USERRA." *The USERRA Manual*, § 9.5.

reservists"); *Maiers v. Dep't of Health & Hum. Servs.*, 524 F.App'x 618, 623 (Fed. Cir. 2013) ("In *Butterbaugh*, we determined that claimants need not show that their military service was a substantial [or] motivating factor when the benefits at issue were only available to those in military service").

In situations involving military benefits, therefore, a USERRA claimant is "only required to show that he [or she] was denied a benefit of employment" to establish a claim. *Adams*, 3 F.4th at 1378.

This case is similar to *United States v. Missouri*, 67 F.Supp.3d 1047 (W.D.Mo. 2014), in which the federal government successfully sought to enjoin the Missouri National Guard's policy of refusing to allow dual status technicians entering the Army's AGR program to assume LWOP-US status and thereby denying them the fifteen days of military leave allowed by law. The Defendant argued that as a military employer it could not discriminate on the basis of military service and that the military leave under 5 U.S.C. 6323(a) is not a USERRA-protected benefit because it protects only rights which an employer also gives to non-military employees. The district court rejected both arguments and held that the Missouri National Guard, a civilian employer in those circumstances, violated USERRA by refusing to provide military benefits to the technicians. *See id.* at 1052-53.[4]

---

[4] *United States v. Missouri* was decided before the enactment of the carve-out in 32 U.S.C. 709(g)(2), but as discussed above, that carve-out does not apply to the plaintiffs here as a matter of law because they were not "performing active Guard and Reserve duty (as that term is defined in section 101(d)(6) of title 10)." 32 U.S.C. § 709(g)(2).

The circumstances of the present case are also similar to those in a case alleging a USERRA cause of action in New York state court. In *Jopson v. Maguire*, 810 N.Y.S.2d 302 (N.Y. Sup. Ct. 2006), current and former federal technicians employed by the New York Army and Air National Guard brought an action under USERRA alleging that the Adjutant General had improperly applied the statute governing the computation of their military leave. The Adjutant General moved to dismiss on the basis that he was not acting under antimilitary bias. As the court explained in denying the motion:

> Defendant contends that the complaint fails to state a cause of action under USERRA because plaintiffs do not and cannot allege discriminatory animus, a necessary element of many anti-discrimination statutes. It is undisputed that one purpose of USERRA is to prohibit discrimination against persons in their employment because of their service in the uniformed services.
>
> . . . However, USERRA may also be invoked to compel compliance with statutes governing the computation of military leave for National Guard reservists.

Id. at 1000 (citing *Butterbaugh*, 336 F.3d at 1332).

In contrast, the cases cited by the circuit court for its conclusion of law that anti-military bias was a necessary element of plaintiffs' USERRA claims are inapposite because neither case addressed the situation in which there was a denial of employment benefits available only to members of the military. In *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), the Supreme Court explained that:

> If a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the

> ultimate employment action, then the employer is liable under USERRA.

Id. at 422. However, *Staub* was concerned with a very narrow issue addressing the meaning of "motivating factor" in a situation where the official who imposes the adverse employment action is not motivated by any discriminatory animus, but where that action was influenced by previous company action which is the product of discriminatory animus. It neither involved nor addressed the situation of a denial of benefits available only to military personnel.

The other decision cited by the circuit court was *Ayoub v. Board of County Comm'rs ex rel. County of Santa Fe*, 964 F.Supp.2d 1288, 1289-90 (D.N.M. 2013). In that case, a county corrections officer recently hired and still on probationary status alleged that he was fired from his position upon informing his employer that he had enlisted. In other words, the case did not involve the denial of benefits available only to service members, but rather alleged a discriminatory and retaliatory termination of employment.

The circuit court committed legal error in entering judgment of dismissal based on its view that a USERRA claim involving denial of employment benefits available only to members of the military requires anti-military hostility or animus. It should be reversed as a matter of law.

CONCLUSION

In addition to being members of the uniformed services, plaintiffs are civilian employees of the Department of the Air Force under the supervision

and control of the National Guard, which denied them paid military leave to which they were entitled under federal law on the basis of their military status. Because plaintiffs' active duty under Title 10 orders did not meet the definition of "active Guard and Reserve duty" set forth in 10 U.S.C. 101(d)(6), the exception from such benefits in 32 U.S.C. 709(g)(2) does not apply.

As a result, plaintiffs were entitled to accrue and take military leave under 5 U.S.C. § 6323(a)(1) while serving on active duty under Title 10. The Adjutant General therefore violated USERRA in denying such military leave to plaintiffs, who are entitled under the law to be restored all employment benefits denied because of these unlawful acts and practices.

WHEREFORE, Plaintiffs Tyler Christiansen, Trevor Dietrich, Shaun Donelan, Matthew Hendrickson, Kelsey Lambert, Ethan May, and Christopher Thacker respectfully request that this Honorable Court reverse the lower court's Judgment of Dismissal (R. 255; App. 1) and Order Denying Plaintiffs' Motion for New Trial and Reconsideration of Memorandum Decision (R. 257; App. 10), and remand to the circuit court with instructions to grant them their requested relief on their USERRA claims, including their reasonable attorney fees and litigation expenses under 38 U.S.C. § 4323(h)(2).

In addition, plaintiffs are filing a separate motion with this Court under SDCL 15-26A-87.3 to respectfully request their reasonable appellate attorney fees and the return of their filing fees in accordance with 38 U.S.C. § 4323(h)(1) & (2).

Respectfully submitted this 27th day of June, 2024.

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**admitted pro hac vice*

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 6,878 words, excluding the table of contents, table of cases, jurisdictional statement, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLANTS and the APPENDIX were served via Odyssey File and Serve upon the following:

Robert B. Anderson rba@mayadam.net

LTC Jason A. Campbell Jason.a.campbell28.mil@mail.mil

on this 27th day of June, 2024.

Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

APPENDIX

Page

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

TYLER CHRISTIANSEN, TREVOR DIETRICH, SHAUN DONELAN, MATTHEW HENDRICKSON, KELSEY LAMBERT, ETHAN MAY, AND CHRISTOPHER THACKER, Plaintiffs, v. MAJOR GENERAL MARK MORRELL, ADJUTANT GENERAL OF THE SOUTH DAKOTA DEPARTMENT OF THE MILITARY, Defendant.	49CIV19-001915 **JUDGMENT OF DISMISSAL**

A trial to the Court was held before the Honorable Douglas E. Hoffman, Circuit Court Judge, sitting without a jury on December 1, 2023, beginning at 9:00 o'clock a.m. CST in Courtroom 5A of the Minnehaha County Courthouse in Sioux Falls, South Dakota.

Plaintiffs appeared personally and through their attorneys Brian Lawler, Pilot Law, P.C., of San Diego, California, and Robert Vorhoff, of New Orleans, Louisiana. Pamela Reiter of Reiter Law, LLC, Sioux Falls, SD was the Plaintiffs' local counsel. The Defendant appeared through Brigadier General Deborah Bartunek and the Defendant's attorneys Lieutenant Colonel Jason Campbell, of Rapid City, South Dakota, and Robert B. Anderson, of Pierre, South Dakota.

After hearing all the evidence, reviewing the exhibits which were offered and accepted into evidence, either prior to the hearing or during the hearing, and having considered the written and oral arguments of the parties, and their stipulations, the Court entered a written Memorandum Opinion in the form of an email dated December 5, 2023. Plaintiffs' Motion for

New Trial and Reconsideration of Memorandum Decision was denied via an email dated March 11, 2024, and the Court's written Findings of Fact and Conclusions of Law were entered on March 14, 2024, all of which are incorporated herein by reference. Upon the foregoing, and good cause appearing therefore, it is hereby

ORDERED, ADJUDGED, AND DECREED that this action be dismissed upon its merits and with prejudice.

Dated this 14 day of March, 2024.

BY THE COURT:

Honorable Douglas Hoffman
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, CLERK OF COURTS
BY: _____, DEPUTY
(SEAL)

UNIFIED JUDICIAL SYSTEM JUSTICE STATE OF SOUTH DAKOTA

FILED
MAR 14 2024
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

TYLER CHRISTIANSEN, TREVOR DIETRICH, SHAUN DONELAN, MATTHEW HENDRICKSON, KELSEY LAMBERT, ETHAN MAY, AND CHRISTOPHER THACKER, Plaintiffs, v. MAJOR GENERAL MARK MORRELL, ADJUTANT GENERAL OF THE SOUTH DAKOTA DEPARTMENT OF THE MILITARY, Defendant.	49CIV19-001915 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

A trial to the Court was held before the Honorable Douglas E. Hoffman, Circuit Court Judge, sitting without a jury, beginning at 9:00 am on December 1, 2023, CST in Courtroom 5A of the Minnehaha County Courthouse in Sioux Falls, South Dakota.

Plaintiffs appeared personally and through their attorneys Brian Lawler, Pilot Law, P.C., of San Diego, California, and Robert Vorhoff, of New Orleans, Louisiana. Their local counsel is Pamela Reiter of Reiter Law Firm, LLC in Sioux Falls, SD. The Defendant appeared through Brigadier General Deborah Bartunek and the Defendant's attorneys- Lieutenant Colonel Jason Campbell, of Rapid City, South Dakota, and Robert B. Anderson, of Pierre, South Dakota.

After hearing all the evidence, reviewing the exhibits which were offered and accepted into evidence either prior to the hearing or during the hearing, and having considered the written and oral arguments of the parties and their stipulations of fact, the Court entered a written Memorandum Opinion in the form of an email dated December 5, 2023. Said Opinion is

attached hereto, labeled as Exhibit A, and incorporated herein by reference. The Court then denied Plaintiffs' Motion for New Trial and Reconsideration of Memorandum Decision by way of email dated March 11, 2024, which is attached and incorporated hereto as Exhibit B. The Court now makes and enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Plaintiffs in this case were all, at one time, dual-status technicians serving as civilian employees of Defendant or his predecessor, and hired pursuant to the authority of 32 U.S.C. § 709.

2. At some point, all Plaintiffs received and accepted Active Guard Reserve (AGR) orders. *See Stipulation and Trial Exhibit 1.*

3. Upon receipt and acceptance of the AGR orders, the Plaintiffs entered active duty with the South Dakota Air National Guard. Once each of the Plaintiffs received and accepted AGR orders, they remained on AGR orders continuously.

4. All Plaintiffs, except for Donelan and Hendrickson, remain on Active-Duty status due to the AGR orders. Donelan resigned in March of 2022 from the South Dakota Air National Guard, and Hendrickson resigned in June of 2021.

5. At no time did any of the Plaintiffs in this action return to their prior civilian technician jobs after they received AGR orders.

6. All orders issued to the Plaintiffs in this case are incorporated into Exhibit 1 and are described further in the "Joint Stipulation of Facts" which was admitted into evidence at or prior to trial.

7. Once AGR orders were issued and accepted, none of the Plaintiffs requested to return to their prior civilian technician jobs.

8. The dispute at issue in this case came to light in approximately 2017/2018 when Plaintiffs requested the use and/or accrual of military leave in connection with their civilian jobs after they received and accepted AGR orders. The Plaintiffs claimed entitlement to such leave, and the Defendant determined that, under the applicable federal law, the Plaintiffs were not entitled to the same, and denied their claims in this regard. Plaintiffs then brought this action seeking relief under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301, *et seq.* (USERRA).

9. Brigadier General Deborah Bartunek, who testified live at trial and who the Court had an opportunity to observe during such testimony, served in a variety of capacities for the South Dakota Army and Air National Guard including, at one time, head of human resources.

General Bartunek was the decision maker in this case. This Court finds General Bartunek's testimony, that the decision to deny the benefits to which the Plaintiffs claim entitlement herein was motivated solely by the National Guard's good faith interpretation of federal statutes that control such determination, to be credible and unchallenged. The Court finds that Defendant's decision to deny accrual and/or use of military leave to Plaintiffs as a benefit of their civilian jobs, as testified to by witness Bartunek, was motivated solely by an attempt by Defendants to correctly interpret and apply controlling federal statutes.

10. The Defendant's determination on the benefit issue relating to whether Plaintiffs could accrue and/or use military leave as a benefit of their civilian jobs after receipt and acceptance of their AGR orders was made in good faith.

11. The Defendant's determination to deny certain benefits to Plaintiffs in this case was not motivated in any way by any discriminatory animus or hostility towards the Plaintiffs' membership, performance, or obligation to the military, and the same was not a motivating factor in the Defendant's denial of the benefits sought by Plaintiffs.

12. At no time did Defendant employer, nor any of his agents, act out of any hostility toward the Plaintiffs or their military service or duties.

13. There was no discriminatory intent on the part of the Defendant or his agents or predecessors when the Plaintiffs' requests for use and/or accrual of military leave was denied.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties.

2. This Court has jurisdiction over the subject matter of this action.

3. USERRA was enacted to prohibit discrimination against military personnel serving in the uniformed services by their civilian employers, and to prevent retaliation and acts of reprisal against them on the basis of their membership, performance, or obligation in or to the military.

4. The terminology "on the basis of" as it relates to USERRA requires that the Plaintiffs' military membership, service, or obligation be a "motivating factor" in the civilian employer's discriminatory or retaliatory actions.

5. In order to show an actionable USERRA claim, Plaintiffs must prove that a motivating factor of their employer's decision to deny them a benefit of employment arises from hostility to the employee's membership in or obligation to a uniformed service. This translates into "an anti-military animus".

6. Plaintiffs were not the target of discriminatory or retaliatory actions at all, whether resulting from anti- military discrimination, hostility or animus, or any other reason.

Therefore, neither the Defendant nor his agents violated USERRA in denying Plaintiffs' requests for use and/or accrual of military leave after issuance and acceptance of the AGR orders.

7. There is a paucity of legal authority interpreting the relevant federal benefit statutes presented in this action, and reasonable minds can differ as to their interpretation. But it is clear that no decision in this case, whether correct or incorrect, was made by the Defendant with regard to the applicability of said benefits to the Plaintiffs' status, based upon discriminatory motive, military animus, hostility toward the Plaintiffs' service obligations, or any reason other than a good faith attempt to follow the applicable benefit laws. Thus, as a matter of law, there is no USERRA violation here, even if the Defendants misinterpreted the applicable law, which is an issue this Court does not reach. Accordingly, this case will be dismissed upon its merits.

Dated this 14 day of March, 2024.

BY THE COURT:

Honorable Douglas Hoffman
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, CLERK OF COURTS
BY: _____, DEPUTY

(SEAL) UNIFIED JUDICIAL SYSTEM STATE OF SOUTH DAKOTA

FILED
MAR 14 2024
Minnehaha County, S.D.
Clerk Circuit Court

Robert Anderson

From:	Hoffman, Judge Doug <Doug.Hoffman@ujs.state.sd.us>
Sent:	Tuesday, December 5, 2023 3:41 PM
To:	Kummer, Bryce; Pamela Reiter; Russell, Lisa
Cc:	Robert Anderson; Brian Lawler; Robert Vorhoff
Subject:	RE: Christiansen v. Morrell (previously Marlette) , CIV 19-001915

Dear Counsel,

I have reviewed the pleadings and briefs in the case and have come to a decision.

38 USC § 4301 sets forth the purposes of USERRA, which are to minimize disadvantages to the civilian careers of part-time military personnel and to prohibit discrimination against them by their civilian employers. Specifically, 38 USC § 4311, entitled "Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited," forbids denial of any employment benefit by an employer against a member of, or person who performs services for, the uniformed services "*on the basis of* that membership,... performance,... or obligation." (Emphasis added.) *Id.* at § 4311(a).

"On the basis of" is more particularly defined as requiring that the plaintiff's military membership, service or obligation be a "motivating factor" in the employer's action. *Id.* at § 4311(c)(1). To sustain a cause of action for a USERRA violation, as the United States Supreme Court has unanimously stated, the Plaintiffs must show that a motivating factor of their civilian employer's decision to deny them some benefit of employment was "hostility to the employee's membership in or obligation to a uniformed service," in other words, "antimilitary animus." *Staub v. Proctor Hosp.*, 562 US 411, 418, 422 (2011) ("If a supervisor performs an act motivated by anti-military animus that is intended by the supervisor to cause an adverse employment action... then the employer is liable under USERRA.") This is consistent with the overarching understanding that USERRA is an ant-discrimination law, akin to Title VII. *Id.* at 418.

Indeed, in *Ayoub v. Bd. of Cty. Commrs.*, 964 F. Supp. 2d 1288 (D. NM 2013) the court, relying upon *Staub*, held that there was no anti-military animus shown under the facts of the case, particularly in lieu of the fact that most of the targeted decision-makers in the matter were either military members or veterans, and thus denied the claims. *Id.* at 1298-1300 ("Plaintiff must show evidence which infers treatment resulting from anti-military motivation.")

In the case at bar, the defendant is the Adjutant General of the South Dakota Department of the Military, who is, as pleaded in the Complaint, the "head of the Department of the Military and the Commanding General for both the South Dakota Air and Army National Guard." There isn't even an allegation, let alone any evidence in the mostly stipulated case, that the Defendant, or any of his agents, acted out of anti-military animus in this case. The only live witness in this matter, Brigadier General Deborah Bartunek, who formerly was head of Human Resources for the entire South Dakota Department of the Military, testified that her decision to deny the benefits to which plaintiffs claim entitlement was motivated solely by her interpretation of the federal statutes that control that determination. Plaintiffs did not even attempt to impeach the authenticity of that testimony. Rather, their entire case is predicated upon their legal opinion that the General has misinterpreted the governing legislation. So, this case, in essence, is entirely one of statutory interpretation, and that is certainly why all the salient facts could be stipulated by the parties.

Having now studied the statutes in question, and considered the context in which they exist, I conclude that the statutes are ambiguous and there is a paucity of authority interpreting them in this context. Clearly, reasonable minds can differ as to whether the Plaintiffs' or the Defendant's interpretation is correct, and it isn't necessary for this Court to make that determination at this time.

1

My primary finding of fact in this case is that the Defendant's determination on the benefit issue in this case was made upon a good faith attempt to interpret complex federal statutes and was not motivated in any way upon illegal military animus. Consequently, as a matter of law, there is no USERRA violation in this matter, and the case shall be dismissed upon the merits.

This Court does not have jurisdiction to determine whether the benefits sought by Plaintiffs are owing outside the context of a valid USERRA claim. That is entirely a matter of federal law which the Congress has not delegated authority to state courts to determine. Rather, it is a matter to be addressed within the federal system. Accordingly, this Court does not reach that issue, as it is moot given my opinion that, regardless of that determination, there is no USERRA violation in this case.

Counsel for the Defendant is directed to please prepare, file and serve proposed findings of fact and conclusions of law consistent with this opinion in accordance with the applicable rules of civil procedure, to which the Plaintiffs may object and propose alternatives. Thereafter a final judgment will be entered herein.

Thank you for the opportunity to consider this most interesting case. I have copied, and am directing, Clerk Lisa Russell to file a copy of this email for the record.

Douglas E. Hoffman
Circuit Court Judge
Second Judicial Circuit
Sioux Falls, South Dakota

Hoffman, Judge Doug

From: Hoffman, Judge Doug
Sent: Monday, March 11, 2024 5:18 PM
To: Brian Lawler; Robert Anderson; Russell, Lisa
Cc: Pamela Reiter; Natalie Perry; rvorhoff@vorhoff-legal.com
Subject: RE: [EXT] CHRISTIANSEN, ET AL. v. MORRELL - 49CIV19-001915 - MAGT File: 7595

Dear Counsel,

I have reviewed the Plaintiffs' Motion for New trial and Reconsideration of Memorandum Decision, and all the points and authorities submitted by both sides in relation thereto. I am denying the motion. In my view these cases are all inapposite. In all but one, the defendant was a federal agency rather than a military entity. In *Faris v. Department of the Air Force*, 2022 WL 4376408 at *2 (Fed. Cir. 9/22/2022), the Plaintiff was a civilian employee of the Air Force, but his claim was denied because there was no USERRA violation. Therefore, the quote from *Adams v. Dep't of Homeland Sec.*, 3 F4th 1375, 1377 (Fed. Cir.) cert den. 142 SCT 2835 (2022) was merely preliminary *obiter dicta* and not actually germane to the analysis of the case or its holding. I believe that the reasoning set forth in my Memorandum Decision herein is the correct application of the USERRA law to the particular facts of this case and I shall adhere to it.

I will have Clerk Lisa Russell file this email for the record and direct Mr. Anderson to submit an Order for my signature consistent with this ruling. I will now turn my attention to finalizing the Findings of Fact, Conclusions of Law, and Judgment of Dismissal. Thank you,

Douglas E. Hoffman
Circuit Court Judge
Second Judicial Circuit
425 N. Dakota Ave.
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doug.hoffman@ujs.state.sd.us

From: Brian Lawler <blawler@pilotlawcorp.com>
Sent: Friday, March 8, 2024 4:33 PM
To: Hoffman, Judge Doug <Doug.Hoffman@ujs.state.sd.us>; Robert Anderson <rba@mayadam.net>
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Subject: RE: [EXT] CHRISTIANSEN, ET AL. v. MORRELL - 49CIV19-001915 - MAGT File: 7595

Judge Hoffman,

My apologies for the oversight, the Plaintiffs will not be filing a Reply Brief. Sorry for the inconvenience.

V/R,
Brian

Brian J. Lawler, Esq.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

TYLER CHRISTIANSEN, TREVOR DIETRICH, SHAUN DONELAN, MATTHEW HENDRICKSON, KELSEY LAMBERT, ETHAN MAY, MICHAEL ROLLAG, AND CHRISTOPHER THACKER, Plaintiffs, v. MAJOR GENERAL MARK MORRELL, ADJUTANT GENERAL OF THE SOUTH DAKOTA DEPARTMENT OF THE MILITARY, Defendant.	49CIV19-001915 **ORDER DENYING PLAINTIFFS' MOTION FOR NEW TRIAL AND RECONSIDERATION OF MEMORANDUM DECISION**

Following this Court's initial Memorandum Decision, the parties submitted proposed Findings of Fact and Conclusions of Law, and Plaintiffs filed a Motion for New Trial and Reconsideration. After consideration of the submissions and arguments of the parties and good cause appearing therefore, it is now

ORDERED that Plaintiffs' Motions for New Trial and Reconsideration of Memorandum Decision should be and are hereby denied.

Dated this 15 day of March, 2024.

BY THE COURT:

Honorable Douglas Hoffman
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, CLERK OF COURTS

Unified Judicial System SEAL State of South Dakota

Deputy

FILED
MAR 15 2024
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT
	)	
	)	CASE NO. 49CIV19-001915
TYLER CHRISTIANSEN, TREVOR DIETRICH, SHAUN DONELAN, MATTHEW HENDRICKSON, KELSEY LAMBERT, ETHAN MAY, AND CHRISTOPHER THACKER	)	
	)	**PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**
Plaintiffs,	)	
v.	)	
MAJOR GENERAL MARK MORRELL, ADJUTANT GENERAL OF THE SOUTH DAKOTA DEPARTMENT OF THE MILITARY,	)	
Defendant.	)	

A trial to the Court was held before the Honorable Douglas Hoffman, Circuit Court Judge, sitting without a jury, on December 1, 2023, at 9:00 a.m., Central Standard Time, in Courtroom 5A of the Minnehaha County Courthouse in Sioux Falls, South Dakota.

Plaintiffs appeared personally and through their attorneys Brian J. Lawler, of Pilot Law, P.C., San Diego, California, and Robert T. Vorhoff, of New Orleans, Louisiana. The Defendant appeared through Brigadier General Deborah Bartunek and the Defendant's attorneys Lieutenant Colonel Jason Campbell, of Rapid City, South Dakota, and Robert B. Anderson, of Pierre South Dakota.

After hearing all the evidence, reviewing the exhibits which were offered and accepted into evidence, either prior to the hearing or during the hearing, and having considered both the written and oral arguments of the parties, the Court now makes and enters the following Findings of Fact and Conclusions of Law:

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Findings of Fact

1. Plaintiffs Tyler Christiansen, Trevor Dietrich, Shaun Donelan, Matthew Hendrickson, Kelsey Lambert, Ethan May, and Christopher Thacker are all members of the South Dakota Air National Guard ("SDANG") who brought this action seeking relief under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301, *et seq.* ("USERRA").

2. Plaintiffs were all full-time civilian National Guard technicians under 32 U.S.C. § 709.

3. As National Guard technicians, Plaintiffs are federal civilian employees of the Department of the Air Force.

4. One of the benefits of employment available to Plaintiffs as National Guard technicians is the accrual of paid military leave at a rate of fifteen days per fiscal year while on active duty orders.

5. Plaintiffs all accepted orders to Active Guard and Reserve ("AGR") duty with the 114th Fighter Wing at Joe Foss Field Air National Guard Station in Sioux Falls, South Dakota. *See* Joint Stipulation of Facts (Nov. 15, 2023); Trial Exhibit 1.

6. Plaintiffs' AGR orders all explicitly state: "Upon approval and by order of federal command authority, ANG AGR Airmen will convert to Title 10 U.S.C. Section 12301(d)/12302/12304 status (as appropriate) when performing duty, OCONUS or CONUS, supporting Active Duty requirements for operations/missions/exercises." *See* Joint Stipulation of Facts (Nov. 15, 2023); Trial Exhibit 1.

7. Generally, the accrual of military leave does not apply to National Guard technicians who are performing AGR duty, as that term is defined in section 101(d)(6) of title 10.

8. While on AGR duty, Plaintiffs all received orders for active duty under title 10 U.S.C. ("Title 10 Orders") for varying periods of time. *See* Joint Stipulation of Facts (Nov. 15, 2023); Trial Exhibit 1.

9. Plaintiffs' Title 10 Orders state: "AGR Airman will convert to Title 10 U.S.C. 12302," or "AGR Airman will convert to Title 10 U.S.C. 12301(d)." *See* Joint Stipulation of Facts (Nov. 15, 2023); Trial Exhibit 1.

10. With one exception, Plaintiffs did not perform duty under Title 10 Orders for more than 180 days. *See* Joint Stipulation of Facts (Nov. 15, 2023); Trial Exhibit 1.

11. The purpose of Plaintiffs' duty under their Title 10 Orders was to "support Active Duty requirements for operations, missions, exercises." *See* Joint Stipulation of Facts (Nov. 15, 2023); Trial Exhibit 1.

12. All orders issued to the Plaintiffs in this case are incorporated into group Exhibit 1 and described further in the Joint Stipulation of facts, which were admitted in evidence at trial.

13. Plaintiffs did not accrue paid military leave while on Title 10 Orders and they were not allowed to use any accrued military leave while on Title 10 Orders.

14. Brigadier General Deborah Bartunek testified live at trial that the decision to deny military leave to Plaintiffs was motivated solely by the National Guard's good faith interpretation of federal law.

15. There was no discriminatory intent on the part of Defendant when Plaintiffs' request for military leave was denied.

16. Any finding of fact more properly designated as a conclusion of law is hereby incorporated as such.

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Conclusions of Law

1. USERRA prohibits "discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a)(3).

2. Under USERRA, the terms "benefit," "benefit of employment," or "rights and benefits" are defined as:

> the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

38 U.S.C. § 4303(2).

3. Section 4311 of USERRA protects persons who serve or have served in the uniformed services from acts of discrimination and reprisal. For example, a person "who is a member of, . . . performs, has performed, . . . or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, . . . performance of service, . . . or obligation." 38 U.S.C. § 4311(a).

4. Section 4311(c) further provides:

> An employer shall be considered to have engaged in actions prohibited:
>
> (1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service.

38 U.S.C. § 4311(c).

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5. However, where the benefit in question is only available to members of the military, Plaintiffs do not need to show their military service was a substantial or motivating factor. *Adams v. Department of Homeland Security*, 3 F.4th 1375, 1377-78 (Fed. Cir. 2021).

6. Military leave under 5 U.S.C. § 6323 is only available to members of the military.

7. An employee performing military service must be permitted to use any military leave accrued under 5 U.S.C. § 6323. 5 C.F.R. § 353.208.

8. According to 10 U.S.C. § 101, "Active Guard and Reserve duty" means full-time National Guard duty performed by a member of the National Guard pursuant to an order to full-time National Guard duty, for a period of 180 consecutive days or more for the purpose of organizing, administering, recruiting, instructing, or training the reserve component. 10 U.S.C. § 101(d)(6).

9. Generally, National Guard technicians who are performing AGR duty, "as that term is defined in section 101(d)(6) of title 10," are not allowed to accrue military leave under 5 U.S.C. § 6323. *See* 32 U.S.C. § 709(g)(2).

10. Plaintiffs' Title 10 Orders were inconsistent with the definition of AGR duty published in 10 U.S.C. 101(d)(6).

11. Plaintiffs were no longer performing AGR duty, as that term is defined in 10 U.S.C. § 101(d)(6) while they were on Title 10 Orders.

12. Because Plaintiffs were no longer performing AGR duty while they were on Title 10 Orders, 32 U.S.C. § 709(g)(2) did not apply to them while on Title 10 Orders, and they were entitled to accrue and use military leave under 5 U.S.C. § 6323.

13. Plaintiffs were wrongfully denied employment benefits by not being allowed the accrual and use of military leave while on Title 10 Orders.

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14. Defendant's denial of benefits to Plaintiffs was a violation of USERRA.

15. Any conclusion of law more properly designated as a finding of fact is hereby incorporated as such.

Dated this 31st day of January, 2024.

Respectfully submitted,

/s/ Pamela R. Reiter

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30670

TYLER CHRISTIANSEN; TREVOR DIETRICH; SHAUN DONELAN; MATTHEW HENDRICKSON; KELSEY LAMBERT; ETHAN MAY; and CHRISTOPHER THACKER;

Plaintiffs,

v.

MAJOR GENERAL MARK MORRELL, ADJUTANT GENERAL OF THE SOUTH DAKOTA DEPARTMENT OF THE MILITARY,

Defendant.

APPEAL FROM THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE DOUGLAS HOFFMAN
CIRCUIT COURT JUDGE

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NOTICE OF APPEAL FILED March 29, 2024

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PRELIMINARY STATEMENT

Plaintiffs-Appellants Tyler Christiansen, Trevor Dietrich, Shaun Donelan, Matthew Hendrickson, Kelsey Lambert, Ethan May, and Christopher Thacker will be collectively referred to as "Appellants" and individually by their surname. Defendant-Appellee Adjutant General Mark Morrell (sued in his official capacity) will be referred to as "The Adjutant General". Reference to the record from the Circuit Court will be made by reference to the page numbers in the Clerk's Index designated by "R ___". Reference to the transcript of the court trial will be made in the same way by "R ___", and the transcript page assigned in the Clerk's Index.

JURISDICTIONAL STATEMENT

Appellants' appeal from a final judgment of the Circuit Court which dismissed Appellants' action on its merits and with prejudice. R 255. The Court's decision was supported by Findings of Fact and Conclusions of Law (R 248) and both an initial Memorandum Opinion by the Court (R 196) and a subsequent confirmation of that Opinion. R 239.

In this action, the Plaintiffs seek relief under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). Subject matter jurisdiction may exist in both state and federal courts for actions brought under USERRA. 38 U.S.C. §§ 4323(b) and 4324(c)(1). In the circumstances giving rise to these claims, the State of South Dakota is deemed to be the Plaintiffs' employer. 38 U.S.C. § 4323(b)(2). As a result, The Adjutant General of the State of South Dakota is considered to be Plaintiffs' technical employer for the purpose of this action. 38 U.S.C. § 4303(4)(B); 20 C.F.R. §§ 1002.5(d)(2), 1002.305(d), and 1002.306. During the pendency of this action, General

Marlette retired and was replaced by Major General Mark Morrell. R 70, 73. Therefore, Adjutant General Mark Morrell is the proper defendant, and the Circuit Court had subject matter jurisdiction pursuant to the above.

This Court has jurisdiction pursuant to SDCL § 15-26A-3(1), (2), and/or (4).

STATEMENT OF THE ISSUES

Appellee chooses to restate the issues as follows, with issue I corresponding to issue II as stated in the Appellants' brief and issue II generally responsive to issue I in the same brief.

I. DID THE CIRCUIT COURT ERR IN HOLDING THAT A USERRA CLAIMANT MUST SHOW AN ANTI-MILITARY HOSTILITY, ANIMUS, OR DISCRIMINATORY INTENT IN ORDER TO SUCCESSFULLY ASSERT A CLAIM UNDER USERRA FOR DENIAL OF EMPLOYMENT BENEFITS?

Based on the plain meaning of the USERRA statutes, the Circuit Court held that proof of discriminatory intent or hostility to the employees' membership or obligation to a uniformed service was a necessary element of an actionable USERRA claim.

- 38 U.S.C. § 4301(a)
- 38 U.S.C. § 4311(a)
- *Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010)
- *New York State Dep't. of Soc. Servs. v. Dublino*, 413 US 405 (1973)
- *Kelly v. Omaha Public Power District*, 75 F.4th 877 (8th Cir. 2022)

II. **HAD THE CIRCUIT COURT DETERMINED THAT THE APPELLANTS COULD NOT SHOW A VIOLATION OF USERRA THAT WOULD SUPPORT THEIR CLAIM FOR EMPLOYMENT BENEFITS BASED BOTH ON AGR AND TITLE 10 STATUS, SUCH DECISION WOULD HAVE BEEN CORRECT AND CONSISTENT WITH THE PROPER APPLICATION OF USERRA.**

Based on the Court's ruling described in issue I above, the Circuit Court declined to engage in statutory construction. However, The Adjutant General's application of USERRA in the context of the AGR Orders was correct, and because the Appellants lost no benefits from civilian employment due to periods of Title 10 service, they have no viable USERRA claim for benefits now.

- 32 U.S.C. § 709(g)(2)
- *American Heritage Dictionary of the English Language* (5th Ed. 2011)
- USERRA Overview osc.gov

STATEMENT OF THE CASE

On July 11, 2019, Appellants filed a complaint with the Second Judicial Circuit Court in Minnehaha County seeking both declaratory and injunctive relief which would have the effect of granting them further employment benefits during a time when they served on Active Guard Reserve (AGR) Orders. R 2, in general, p. 7 and 8.

The essence of Appellants' complaint is that they were denied the ability to accrue and utilize military leave while under Title 10 Orders. The Adjutant General filed an answer which, among other things, asserted that Appellants were prohibited from accruing the leave they sought by the clear and unambiguous provisions of 32 U.S.C. § 709 which states that military leave may not be accrued or utilized during the pendency of AGR Orders. R 22, p. 3. Appellants contend that, during the course of the Title 10 Orders, the exemption from military benefits created by 32 U.S.C. § 709(g)(2), which

prohibits the accrual or utilization of those benefits while under AGR Orders, does not apply. R 2. There is no dispute, however, that any period of Title 10 service had no affect on the Appellants' civilian employment, and, when the Title 10 service was complete, all Appellants were returned to AGR status – if they ever left that status. In short, Appellants' position depends on their argument that they are entitled to relief under USERRA because they were denied benefits of employment which they were otherwise entitled when they converted to Title 10 status. However, prior to their Title 10 status, they were clearly in AGR status, and it is absolutely undisputed that they were not entitled to those benefits at that time. Therefore, they were denied nothing that they were previously entitled to.

Following documentary discovery, a pretrial conference was held before the Honorable Douglas E. Hoffman, Circuit Court Judge, on July 10, 2023. R 308. Thereafter, the parties entered into a joint stipulation of facts which included, among other things, all Orders received by the individual Appellants during the relevant period of time. R 80-162.

On December 1, 2023, a trial to the court was held before Judge Hoffman. R 324. The parties had agreed that the trial would address only evidence on the legal issues related to potential liability under USERRA, and if the Court decided adversely to The Adjutant General, a subsequent court trial would be held on the issue of damages. R 331-332.

Appellants called no witnesses, and The Adjutant General called only one witness – Brigadier General Deborah Bartunek – who was director of the joint staff for the South Dakota National Guard. R 335-336.

On August 27, 2019, The Adjutant General had filed his answer to the complaint (R 22) which answer contained a defense of failure to state a claim upon which relief can be granted (R 22) and several responses which made it clear that The Adjutant General did not concede that the Complaint stated a viable cause of action based on USERRA. *See*, for example, First Defense and Second Defense, ¶ 2 (R 22), ¶ 13 (R 23).

Shortly after the trial on December 5, 2023, Judge Hoffman issued his Memorandum Opinion by email. R 196, App. 1. Judge Hoffman declined to interpret or determine the meaning and effect of the statutes relied upon by the parties. He found that the lack of "... illegal military animus" was critical in determining whether the Appellants had presented a viable USERRA claim. R 197, App. 1, p. 5. Based on that legal conclusion, the Circuit Court dismissed Appellants' claims. *See* Judgment, R 255.

On January 3, 2024, The Adjutant General submitted his proposed findings of fact and conclusions of law. R 200. On January 31, 2024, Appellants filed a motion for a new trial and reconsideration of the Court's Memorandum Decision. R 207. The Appellants submitted proposed findings of fact and conclusions of law on January 31 as well as their motion for new trial and reconsideration. R 221. Each party filed objections to the other's proposals. R 217, 236.

By email dated March 11, 2024 – filed with the clerk on March 12 – Judge Hoffman issued a second opinion denying Appellants' motion for new trial and reconsideration. R 239, App. 2. In that opinion, he reaffirmed his prior decision and made it clear that the decision made by The Adjutant General denying Appellants' prior claims for additional military benefits was not made "... based upon discriminatory

motive, military animus, hostility toward the Appellants' service obligations, or any reason other than a good faith attempt to follow the applicable benefit laws." R 239.

Consistent with findings of fact and conclusions of law which the Court entered (R 248), the Circuit Court followed with a judgment dismissing the case on its merits. R 255; App. 3.

Appellants then filed a timely notice of appeal. R 266. This appeal followed.

STATEMENT OF FACTS

All Appellants were employed on a full-time basis as civilian employees of the federal government as "dual status technicians". As such, they were required to also be members of the National Guard. R 339, 340. In this case, the Appellants were all members of the South Dakota Air National Guard (SDANG). R 340. Brigadier General Deborah Bartunek was, at the time of the court trial, a 40-year veteran of the military service and was serving as director of the joint staff for the South Dakota National Guard. R 336, 337. She is and was familiar with the development of the dispute which is now before this Court involving the denial of military leave to the Appellants once they received and accepted AGR Orders. R 338. She was involved in the decision-making process to deny the leave requests. Finding of Fact 9, R 249-250.

General Bartunek was familiar with and had reviewed the documents included in the joint stipulation of facts which were submitted to the Circuit Court and introduced into evidence at trial. R 344. Her testimony compliments the stipulation. No other evidence was offered by either party.

At some point in late 2016 or early 2017, all of the individual Appellants received AGR Orders. R 340. R 80, *et. seq*. The effect of these Orders was to place the individual Appellants on Active Military Duty. R 341.

A member of the National Guard, whether Air or Army branches, who is placed on AGR Orders and who accepts those Orders is not allowed to accrue or utilize military leave while on AGR Orders. *See* 5 U.S.C. § 6323(a)(1) and 32 U.S.C. § 709(g)(2). Appellants do not dispute this. Basically, a civilian employee of the Department of the Military who receives AGR Orders is on leave without pay from the civilian job. Therefore, the sequence of events involved the Appellants all leaving their civilian job as a dual status technician, accepting AGR Orders and going on Active Guard Reserve status.

A review of the stipulation of facts (R 80) entered into by the parties and the attached exhibits reflect that the type of duty and purpose of the Orders are clear and unambiguous and substantially similar, if not identical. In ¶ 1 of the Orders issued to each of the individual Appellants, the Orders are described:

> 1. TYPE OF DUTY/AUTHORITY: ACTIVE GUARD RESERVE INITIAL TOUR (TITLE 32) 32 USC 328 & 502(F) & ANGI 36-101 (see, in general, Exhibits); or
> 1. TYPE OF DUTY/AUTHORITY: ACTIVE GUARD RESERVE CONTINUATION TOUR (TITLE 32) 32 USC 328 & 502(F) & ANGI 36-101 (see, in general, Exhibits); or
> 1. TYPE OF DUTY/AUTHORITY: FULL TIME NATIONAL GUARD DUTY – ACTIVE GUARD RESERVE – CONTINUATION TOUR 32 USC 502(f)(1) & 32 USC 328 (see, in general, Exhibits).

The original AGR Order is clearly specified as an AGR Order, and the continuation Orders which mention Title 10 duty are all labeled "Type of Duty: AGR Continuation Tour".

In ¶ 6 of each of the original Orders, the potential conversion of the Appellants to Title 10 duty is discussed. In that same paragraph, the Order clearly states: "This AGR Order will be amended to include any Title 10 duty for 30 or more consecutive days and reflect the Title 10 authority, Title 10 duty inclusive dates, named mission and GMAJCOM being supported." (emphasis ours). ¶ 6 of the various Orders amending the original Orders also include similar language to reflect that: "Modified to include ...". (emphasis ours)

General Bartunek testified that the acceptance of the AGR Orders by each of the Appellants is what kept them away from their federal technician job. R 353. This, again, cannot be disputed. However, the benefits now sought by Appellants were only available during the time they served as federal technicians – they were not available once they accepted those AGR Orders. It is undisputed that the Appellants all left their technician jobs when accepting AGR Orders and that the Title 10 duty occurred during the scope of the AGR service. She further testified that the word "convert" which appears in the same ¶ 6 of the original Orders did not destroy or alter the status of the Appellants still serving under AGR Orders. R 356, 357.

All of the Appellants had the right to reject these Orders, continue serving in their dual-status technician position, and decline the opportunity to go on active duty. R 341.

None of the Appellants rejected the Orders, and all the AGR Orders were effective when accepted. R 341, 342. Had any of them rejected those Orders, the Orders would have been terminated, and their employment as dual status technicians would have continued without interruption or change. R 342. Had they rejected the Orders and continued as dual status technicians, the benefits they now seek would have continued.

Once issued, AGR Orders may be continued (R 343), and the Orders in this case reflect that there was a continuation of these Orders without break in service or interruption. R 343, 344. Appellants Hendrickson and Donelan resigned in June, 2021, and March, 2022, respectively, and, therefore, all Orders to them terminated at that time. However, AGR Orders for the other Appellants were continued. R 349. Reading and interpretation of the Orders in question were illustrated by General Bartunek's testimony relating to the Tyler Christiansen Orders which are in the Stipulation of Facts containing Exhibits A-G. R 344-348; R 80, *et seq*. Although, the Orders for each of the Appellants are not identical, they are substantially similar, and the legal effect is consistent. No separate Orders labeled "Title 10 Orders" or anything similar exist.

General Bartunek further explained the language in the AGR Orders which indicate that they may convert to Title 10 Orders and that such a conversion did not have the effect of revoking or suspending the AGR Orders but instead that the Title 10 duties and Orders would be encompassed within the original AGR Orders. R 346 (That is "included" in the AGR Orders as referenced in ¶ 16 of each of the Orders). That, in fact, is what occurred in these cases. It is undisputed that no new AGR Orders were issued, and none were rescinded. The original Orders remained in place and remained effective despite periods of Title 10 service within the confines of those original Orders. R 346-348.

> Q: If and when that happened, and I think all these Appellants were converted on one or more occasions to Title 10 status, did that have the effect of terminating the type – the AGR status?
>
> A: It did not.
>
> Q: AGR status continued?

A: It did.

Q: And the Title 10 conversion was within the scope of the AGR Order?

A: It's within the AGR Order, yes.

R 351, 352.

General Bartunek's testimony is the only testimony or explanation regarding the interpretation and application of these Orders.

32 U.S.C. § 709(g)(2) specifies that dual status technicians serving on Active Guard and Reserve (AGR) Orders do not qualify for the accrual or utilization of military leave benefits which are listed in 5 U.S.C. § 6323(a)(1).

It should be noted that the leave which Appellants seek now is military leave, the purpose of which is to permit National Guard technicians to leave their technician employment and attend military training for up to 15 days each year and still receive the salary from their dual status technician job.

After reviewing the testimony and the exhibits, the Court entered its initial Memorandum Opinion (R 196), its email ultimately confirming that Opinion (R 239), and the Judgment of Dismissal (R 255) which brings this case to this Court.

ARGUMENT

Standard of Review

"Conclusions of law are reviewed under a de novo standard of review, and no deference is given to the trial court's conclusions of law." *Melstad v. Kovac*, 2006 S.D. 92, ¶ 6, 723 NW.2d 699, 702. "Factual findings are examined under the clearly erroneous standard." *Eagle Ridge Ests. Homeowners Ass'n, Inc. v. Anderson*, 2013 S.D. 21, ¶ 12. 827 NW.2d 859, 864. *FDJ, LLC, et al. v. Determan*, 2024 S.D. 42, ___ NW.2d ___.

The "liberal construction" rule cited by the Appellants in their Standard of Review statement and based on the decision in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285, S. Ct. 1105, 90 L. Ed. 1230 (1946), states only that – that construction should be liberal in favor of veterans. However, it cannot reject or change the general rule that a statute cannot be interpreted to nullify its intent or plain language. *New York State Dep't. of Soc. Servs. v. Dublino*, 413 US 405, 419 (1973).

I. THE CIRCUIT COURT ACTED APPROPRIATELY IN HOLDING THAT A USERRA CLAIM MUST SHOW AN ANTI-MILITARY HOSTILITY, ANIMUS, OR DISCRIMINATORY INTENT IN ORDER TO SUCCESSFULLY ASSERT A CLAIM UNDER USERRA FOR DENIAL OF EMPLOYMENT BENEFITS.

The Circuit Court decision that the Appellants must prove Appellee acted in a discriminatory manner out of hostility to Appellants due to their membership in a Uniformed Service should be affirmed. Before delving into the statutory construction and interpretation issues here, Appellants must prove that they are theoretically entitled to relief and have a statutory remedy.

Appellants have based their claim for a remedy on USERRA (*see Complaint* R 2). Before determining whether Appellants were wrongfully deprived of benefits to which they were otherwise entitled, they must prove that such deprivation violated the statutory scheme of USERRA which creates the remedy they seek.

The Court first noted that 38 U.S.C. § 4301, which contains the "mission statement" of USERRA, provides that the law has been enacted to prohibit discrimination against civilian employees by their employers. 38 U.S.C. § 4301. The catchline, or title, for 38 U.S.C. § 4311 is "Discrimination against persons who serve in the uniformed services and acts or reprisal prohibited". The statute prohibits discrimination or denial of

employment benefits to a person who performs uniformed services "... on the basis of that membership, performance, or obligation". *See* 38 U.S.C. § 4311(a).

Appellants were civilian employees of the South Dakota Air National Guard and Department of the Military over which General Morrell presides. The Circuit Court was correct when it stated that the essence of this particular action is a claim by former civilian employees of the Department of the Military of the State of South Dakota which is based on allegations that Appellee failed to properly construe and apply statutes and, therefore, denied certain benefits to the Appellants. Those benefits which are in question are benefits which Appellants received while they served in their civilian capacity as dual status technicians – not while in AGR or Title 10 status. In order to obtain a remedy under that statute, however, it will be necessary to show a violation of USERRA which creates the right to such a remedy. The Circuit Court properly found that Appellants could not make that showing.

It is true that the Circuit Court raised this issue sua sponte. In doing so, the Circuit Court raised a "pure question of law". The parties did have the opportunity to address the Circuit Court's decision through subsequent proposals of findings of fact and conclusions of law. R 200, 221, 231, and 236. The parties had additional opportunity to address the issues raised by the Court through Appellants' motion for new trial and reconsideration. R 207, 209. The Court considered the parties' submissions and then acted on its initial Opinion which represents an exception to the requirement that an issue be raised by the parties at trial. "The exception to the standard involves a 'pure question of law' which may be inquired into sua sponte, especially if it risks a miscarriage of justice." *In re Estate of Smid*, 2008 S.D. 82, 756 NW.2d 1 citing Childers & Davis,

Federal Standards of Review § 6.03 (3d ed. 1999). Also see *Manuel v. Wilka*, 2000 S.D. 61, 610 NW.2d 458.

The Circuit Court had an additional reason for raising this question of law as it did because the exact factual/legal situation the parties faced in this case has never been addressed by the United State Supreme Court and not directly by any inferior federal court under the same circumstances.

In *Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010), a District Court judge raised an issue sua sponte and, in part, relied on that issue to dismiss plaintiff's claims. The same was true in a habeas setting in *Trest v. Cain*, 522 U.S. 87 (2024). In that case, the Court raised several issues sua sponte. In the Court's decision, they stated:

> We do not say that a court must always ask for further briefing when it disposes of a case on a basis not previously argued. But often, as here, that somewhat longer (and often fairer) way 'round is the shortest way home.

This is exactly what the Circuit Court did in this case. The Circuit Court issued its Memorandum Opinion, invited comment by the parties, asked for and received proposed findings of fact and conclusions of law and briefs before finalizing his decision on the issue raised sua sponte.

The rule regarding issues raised on a sua sponte basis is much stronger when an Appellant raises such issues in support of an argument for reversal. *Carpenters' Pension Fund of Ill. v. Neidorff*, 30 F.4th 777 (8th Cir. 2022).

Appellants recognize the general concept and rule that statutes protecting veterans should be liberally construed for the benefit of the veteran. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 US 275, 285, 66 S. Ct. 1105, 90 L. Ed. 1230 (1946). This general

concept has been adopted in reference to USERRA as well. *Clarkson v. Alaska Airlines, Inc.*, 59 F.4th 424, 429 (9th Cir. 2023).

However, the U.S. Supreme Court has a more broad-based rule regarding statutory construction, reflecting that they will not interpret federal statutes to negate their own stated purposes. *New York State Dep't. of Soc. Servs. v. Dublino*, 413 US 405, 419 (1973). "We cannot interpret federal statutes to negate their own stated purposes". *King v. Burwell*, 576 US 473 (2015).

Two decisions which synthesize these concepts are *Stringer v. Hughs*, 2020 US Dist. Lexis 221555, and *Motorola Solutions, Inc. v. Hytera Communications Corp., Ltd.*, 2024 US App. Lexis 16120 (2024). The court in *Stringer* held that "If the statutory language is plain, the court must enforce it according to its terms."

It is important, then, to do as the Circuit Court did in this case and to review the clear statutory purposes of USERRA.

38 U.S.C. § 4301(a) states:

> (a) The purposes of this chapter are –
>
> > (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. ...

38 U.S.C. § 4311 states:

> Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited.
>
> (a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.
> (b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person ... (mainly dealing with acts of reprisal)

In this case, Appellants contend that they were denied the right to accrue military leave while serving on Title 10 status. In making that claim, Appellants contend that they should be restored to the military benefits they received while working as federal technicians. However, the intervening step of being placed on AGR Orders severs that connection and destroys any USERRA claim. In denying the accrual or utilization of military leave, the Appellants were simply being treated the same as any other National Guard member on AGR status.

Appellants, in their phrasing of issue I and elsewhere in their brief, contend that these Appellants were deprived of benefits which were made available to other National Guard technicians. There is absolutely no evidence in the record or elsewhere to support the Appellants' contention that these Appellants were treated differently than other National Guard dual service technicians who were similarly situated. Nothing in the record reflects that any dual status technician who received AGR Orders, then Title 10 Orders which were referenced and described the same way in the initial AGR Orders, received the benefits which the Appellants here were denied.

In this case, it is plain that Appellants' and Appellee's position on the issues relating to accrual of leave is simply that – a difference of opinion relating to statutory construction and not motivated by any discriminatory intent or purpose. More importantly for The Adjutant General's position, the denial of military leave to Appellants was absolutely consistent with USERRA and did not deprive Appellants of any benefits or restoration to employment status due to their military service.

Kelly v. Omaha Pub. Power Dist., 75 F.4th 877, 884 (8th Cir. 2022), is an example of how courts treat the discrimination requirement when the benefit at issue is not a benefit available only to members of the military. Admittedly, it does not resolve the issue in question here but gives a glimpse of how that requirement could easily be imposed to give full effect to the USERRA statutory scheme as written. Plaintiff Kelly was a Navy veteran who left the service, was reemployed, and then applied for tuition assistance from his employer under a program that was available. Kelly was also receiving GI Bill assistance. His employer denied his application for assistance due to the fact that he was receiving the GI Bill educational assistance. The Eighth Circuit affirmed the District Court's dismissal of Kelly's action based on the lack of discriminatory intent on the part of the employer. The Court ultimately held:

> In sum, Kelly has "failed to present sufficient evidence to make" the requisite "threshold showing" that his status as a military veteran was "a motivating factor" in OPPD's decision to deny him EEP benefits. *McConnel*, 944 F.3d at 990. His discrimination claim under USERRA thus fails, and the district court properly granted summary judgment in OPPD's favor.

The Circuit Court's actions, which gave full effect to the USERRA statutory wording and did not simply ignore portions of it, can be reconciled with the concept that

statutes should be construed to the benefit of a veteran. *Reynolds v. RehabCare Group East, Inc.*, 590 F. Supp. 2d 1107, 1121-22 (S.D. Iowa 2008). The court there held that:

> This obligation for liberal construction does not, however, require the Court to discard traditional concepts of fairness and reasonableness in a strained effort to find liability where none actually exists. ... ("Even a liberal construction [of USERRA] must have some limits.")

The Circuit Court's action protects the integrity of the USERRA statutes and gives meaning to the entire statutes – not just a portion. The authorities relied on by Appellants simply ignore these requirements and, by doing so, eliminate portions of the statutes which must be given effect.

Although the decision of the federal circuit court in *Adams v. Department of Homeland Security*, 3 F.4th 1375 (Fed. Cir. 2021) does contain language indicating that the plaintiff need not show that their military service was "a substantial or motivating factor" in the discriminatory denial of benefits in cases involving benefits which are only available to members of the military. That language is dicta under the facts and circumstances of *Adams*. In fact, the analysis in *Adams* leads to the same result that The Adjutant General supports in this case. *Adams* was a federal, but nonmilitary, employee and a member of the National Guard when he was called to AGR status. Because he was not placed on Title 10 duties, the plain reading of the law (32 U.S.C. § 709(g)(2)) resulted in the denial of his application for benefits while on AGR status.

Adams, Butterbaugh v. Department of Justice, 336 F.3d 1332 (Fed. Cir. 2003), and other cases relied on by Appellants simply eliminate or "write out" the discriminatory requirement for a threshold USERRA claim. This involves judicial modification of a

statute, whose reading and meaning is plain. Adopting the Appellants position would negate the plain and clearly stated purpose of USERRA.

As the Circuit Court in this case noted, this should be viewed as simply a dispute over whether benefits should be paid or denied. Other avenues are available for individuals such as Appellants. For example, The Department of the Military and/or each state's National Guard has a grievance procedure where pay disputes may be filed and resolved. In some states (but, as pointed out by Appellants, not in cases involving "state employees"), such disputes may be brought before the Merit Systems Protection Board (MSPB). There is no need to rewrite the USERRA statutes by eliminating the discrimination requirement in order to give Appellants and others similarly situated the benefits which they may or may not be entitled to.

Rejecting the Circuit Court's sua sponte decision would be to negate the stated purpose of USERRA. *New York State Dep't of Soc. Servs. v. Dublino, supra.* This Court should not perpetuate this nullification of the plain language of 38 U.S.C. § 4311. The Circuit Court should, therefore, be affirmed.

II. THE CONTINUING STATUS OF APPELLANTS' AGR ORDERS BARS THEM FROM RECEIVING THE ADDITIONAL BENEFITS THEY CLAIM.

All the Appellants received and accepted initial AGR Orders. Those Orders placed them on Active Guard Reserve status. Those AGR Orders were never rescinded, revoked, or terminated, and there has been a continuation of service without any break in regard to all of the Appellants other than Hendrickson and Donelan whose status terminated upon their resignation.

It is due to this that the prohibition for military leave under 32 U.S.C. § 709(g)(2) DOES indeed apply to these Appellants. Appellants do not deny and the record is clear that Federal Technician military leave is not available while on AGR duty. It is this AGR duty that disrupted their civilian careers and nothing else. In this case, the Court should not be concerned about Appellants' perceived disadvantage to their civilian careers because the disputed "disadvantage" for which Appellants seek remedy is simply not available for AGR duty. *See again* 32 U.S.C. § 709(g)(2). The fact that such undisputed and continuing AGR duty included a short period, or periods, of Title 10 duty does not eliminate the ultimate fact that it is the same undisputed and continuing AGR duty that is the cause of the disruption of Appellants' civilian Federal Technician careers. Any period of Title 10 service did not disrupt their Federal Technician career nor affect any benefit they were entitled to as a result of that career.

Appellants would have this Court ignore that EVERY order Appellants received stated either "TYPE OF DUTY/AUTHORITY: ACTIVE GUARD RESERVE INITIAL TOUR (TITLE 32) 32 USC 328 & 502(f) & ANGI 36-101" (see, in general, Exhibits); or "TYPE OF DUTY/AUTHORITY: ACTIVE GUARD RESERVE CONTINUATION TOUR (TITLE 32) 32 USC 328 & 502(f) & ANGI 36-101" (see, in general, Exhibits; or "TYPE OF DUTY/AUTHORITY: FULL TIME NATIONAL GUARD DUTY – ACTIVE GUARD RESERVE – CONTINUATION TOUR 32 USC 502(f)(1) & 32 USC 328" (see, in general, Exhibits). All of which, by a plain reading, prohibit the accrual and use of military leave by these Appellants. *See again* 32 U.S.C. § 709(g)(2).

Appellants would also have this Court ignore that the original AGR Orders are clearly specified as AGR Orders, and the continuation Orders which mention Title 10

duty are all labeled "Type of Duty: AGR Continuation Tour". Again, all of which, by a plain reading, prohibit the accrual and use of military leave by these Appellants. *See again* 32 U.S.C. § 709(g)(2).

The fact that these AGR Orders included Title 10 duty does not negate the fact that these Appellants were on AGR duty before, and were restored to AGR duty after, such included Title 10 duty. This is the exact sequence of events that USERRA fully contemplates. And, again, it is this undisputed original and continuing AGR duty that disrupted Appellants' civilian Federal Technician careers. A disruption, that by statute, prohibits the accrual and use of military leave. *See again* 32 U.S.C. § 709(g)(2).

AGR status continued for each Appellant, and that continuation was recognized by ¶ 6 in each of the original Orders which states, in part: "This AGR Order will be amended to include any Title 10 duty for 30 or more consecutive days and reflect the Title 10 authority, Title 10 duty inclusive dates, named mission, and GMAJCOM being supported."

The definition of "include" contained in the *American Heritage Dictionary of the English Language* (5th Ed. 2011) – the same authority relied on by the Appellants in their interpretation of language contained in the Orders – provides as follows:

> 1. To contain or take in as a part, element, or member.
> 2. To consider as part of or allow into a group or class: *thanked the host for including us. ...*
>
> ***Synonyms:*** **include, comprise, comprehend, embrace, encompass**

The term "include", according to the *Merriam-Webster Dictionary* means to take in or comprise as a part of a whole or group.

Both definitions are consistent and supportive of General Bartunek's testimony and support only the conclusion that Title 10 Orders do not stand alone but are comprised within the continuously existing AGR Orders. The Orders for all Appellants are identical or substantially similar. In the case of Appellant Christiansen, *see* ¶ 6 of his original Order and ¶ 6 of the Continuation Tour Order dated June 19, 2018, which states that the original AGR Order is "modified to include" certain Title 10 service.

The parties' stipulation of facts (R. 80) and the Circuit Court's Findings of Fact – which were not disputed – both confirm that:

> All Orders issued to the Plaintiffs in this case are incorporated into Exhibit 1 and are described further in the "Joint Stipulation of Facts" which was admitted into evidence at or prior to trial.

All of the Orders contained in Exhibit 1 involve an original AGR Order, a modification of the original Order to include a period of Title 10 (T10) duty, and a second modification to establish the final date of the T10 period. When the period of Title 10 service terminated, Appellants were then restored to AGR status. As noted above, the language in the original AGR Order reflects that it includes any Title 10 duty for 30 or more consecutive days. The modifications all include reference to "Type of Duty: AGR Continuation Tour," with the purpose of "full-time duty (AGR Tours only)", and then the modification Orders state the T10 dates included in the AGR Order itself.

When 32 U.S.C. § 709(g)(2) was amended by the National Defense Authorization Act of 2017, it was in response to the circumstances which led up to the decision in *United States of America v. Missouri*, 67 F. Supp. 3d 1047 (D.W.D. Mo. 2014). If a dual status technician's employment was interrupted by that technician being taken out of his

or her job by a separate T10 Order, their civilian employment benefits should be and would be protected.

The important thing and a very significant factor here is that the Appellants were all dual status technicians. They all received and accepted AGR Orders. Those AGR Orders continued uninterrupted and controlled their status. Therefore, the prohibition contained in 32 U.S.C. § 709(g)(2) should apply.

The undisputed sequence of events is critical in the analysis of the Appellants' argument. They all were employed as civilians in a dual status technician job. As such, they had certain benefits. Those benefits would have been restored had they terminated their AGR service or refused to accept the AGR Orders. However, none did so. The Appellants left their technician status when they received and accepted those AGR Orders. As an AGR soldier, they were not entitled to accrue or utilize certain benefits – which they now claim. Their AGR service encompassed or "included" periods of Title 10 service. Had the Appellants remained on AGR status without Title 10 service, they would not have received any of the benefits to which they now claim entitlement. Therefore, they lost absolutely nothing due to their Title 10 service. This is contrary to the plain meaning and application of USERRA. As noted above, 38 U.S.C. § 4301(a) states that the purposes of USERRA are:

> (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.

If the Court accepts Appellants' contention that AGR service ended when Title 10 service began, and conversely that AGR service resumed once Title 10 service ended, it would simply mean that they changed from one military status (AGR) to another (Title 10). It is undisputed that the AGR Orders took them out of their federal technician job, and, therefore, it would be unfair and unintended, as well as contrary to the wording and spirit of USERRA, to grant Appellants benefits to which they would otherwise not have been entitled.

Had the Appellants been taken away from their civilian technicians job as a result of direct Title 10 orders, the situation and the analysis would be different. General Bartunek recognized this in her testimony. When asked if the Appellants could have been returned directly to their job as a federal technician, she answered in the affirmative and indicated there was a standard form to do just that. *See* R 349, 350. She noted, however, that this did not happen with any of the Appellants. R 350.

The Title 10 duty which occurred during the course of the AGR Orders did not reinvest any right to accrual or utilization of military leave since the AGR Orders were still active and controlling. Since Title 10 took the Appellants out of AGR status – where they were not entitled to the benefits they claim – they lost nothing to which they had been entitled.

The USERRA Overview on osc.gov states:

> The Uniformed Services Employment and Reemployment Rights Act (USERRA) is a federal law, passed in 1994, that protects military service members and veterans from employment discrimination on the basis of their service, and allows them to regain their civilian jobs following a period of uniformed service.

The same section on osc.gov further states:

> USERRA applies to members of the Armed Forces, Reserves, National Guard, and other "Uniformed Services" (including the National Disaster Medical System and the Commissioned Corps of the Public Health Service). The law ensures that service members:
>
> 1. Are not disadvantaged in their civilian careers because of their military service;
>
> 2. Are promptly re-employed in their civilian jobs upon return from duty;
>
> 3. Are not discriminated against by employers because of past, present, or future military service.
>
> USERRA applies to both public and private employers. The Office of Special Counsel, in conjunction with the Department of Labor, investigates and enforces USERRA claims involving federal government employers. The Department of Labor and the Department of Justice handle USERRA claims involving private employers as well as state and local governments.

In the present case, Appellants were not disadvantaged in their civilian careers because of their military service. Appellants are not entitled to military leave as Federal Technicians, by statute, when they accept orders for AGR status. This AGR status continues to this day, only converted to include Title 10 status, but then promptly returned to AGR status. This AGR status is the sole break in Appellants' Federal Technician status. It is clear Appellants have not been disadvantaged as contemplated by USERRA. No other Federal Technician that has accepted AGR orders has gotten paid military leave. Appellants have not been treated differently than those in their position.

Appellants have not been promptly re-employed in their Federal Technician status, as their AGR status has not ended. However, Appellants did promptly return to their AGR status when their included Title 10 duty ended.

As the trial court correctly concluded, Appellants were not discriminated against because of past, present, or future military service. A dispute over statutory interpretation is not discriminatory.

CONCLUSION

The Circuit Court's decision, which gives full effect to the USERRA statutes and the requirement that a threshold showing of discrimination must be made, should be affirmed. In the alternative, The Adjutant General's position as to the application of 32 U.S.C. § 709(g)(2) which would deny Appellants the benefits they seek should be affirmed. In the alternative, the case should be remanded to the Circuit Court for further proceedings including additional legal argument and the taking of additional appropriate evidence.

REQUEST FOR ORAL ARGUMENT

The Adjutant General respectfully requests that this Court grant oral argument.

Dated this 27th day of August, 2024.

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CERTIFICATE OF SERVICE

Robert B. Anderson, of May, Adam, Gerdes & Thompson LLP, hereby certifies that on the 27 day of August, 2024, he electronically filed and served one true and correct copy of the Appellee's Brief in the above-entitled action via the Odyssey File & Serve system to the following counsel of record at their last known electronic mailing address, to-wit:

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He further certifies that one (1) copy of the Appellees' Brief in the above-entitled action were hand-delivered to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, South Dakota 57501.

Robert B. Anderson

ROBERT B. ANDERSON

CERTIFICATE OF COMPLIANCE

Robert B. Anderson, attorney for Appellee, hereby certifies that the foregoing Appellees' Brief complies with the type volume limitation imposed by the Court by Order dated March 15, 1999. Proportionally spaced typeface Times New Roman has been used. Appellees' Brief contains 6,968 words and does not exceed 32 pages. Microsoft Word processing software has been used.

Dated this 27 day of August, 2024.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30670

TYLER CHRISTIANSEN; TREVOR DIETRICH; SHAUN DONELAN; MATTHEW HENDRICKSON; KELSEY LAMBERT; ETHAN MAY; and CHRISTOPHER THACKER;

Plaintiffs,

v.

MAJOR GENERAL MARK MORRELL, ADJUTANT GENERAL OF THE SOUTH DAKOTA DEPARTMENT OF THE MILITARY,

Defendant.

APPEAL FROM THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE DOUGLAS HOFFMAN
CIRCUIT COURT JUDGE

APPENDIX TO APPELLEE'S BRIEF

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NOTICE OF APPEAL FILED March 29, 2024

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STATE OF SOUTH DAKOTA)SS COUNTY OF MINNEHAHA	)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT

TYLER CHRISTIANSEN, TREVOR DIETRICH, SHAUN DONELAN, MATTHEW HENDRICKSON, KELSEY LAMBERT, ETHAN MAY, AND CHRISTOPHER THACKER, Plaintiffs, v. MAJOR GENERAL MARK MORRELL, ADJUTANT GENERAL OF THE SOUTH DAKOTA DEPARTMENT OF THE MILITARY, Defendant.	49CIV19-001915 **JUDGMENT OF DISMISSAL**

A trial to the Court was held before the Honorable Douglas E. Hoffman, Circuit Court Judge, sitting without a jury on December 1, 2023, beginning at 9:00 o'clock a.m. CST in Courtroom 5A of the Minnehaha County Courthouse in Sioux Falls, South Dakota.

Plaintiffs appeared personally and through their attorneys Brian Lawler, Pilot Law, P.C., of San Diego, California, and Robert Vorhoff, of New Orleans, Louisiana. Pamela Reiter of Reiter Law, LLC, Sioux Falls, SD was the Plaintiffs' local counsel. The Defendant appeared through Brigadier General Deborah Bartunek and the Defendant's attorneys Lieutenant Colonel Jason Campbell, of Rapid City, South Dakota, and Robert B. Anderson, of Pierre, South Dakota.

After hearing all the evidence, reviewing the exhibits which were offered and accepted into evidence, either prior to the hearing or during the hearing, and having considered the written and oral arguments of the parties, and their stipulations, the Court entered a written Memorandum Opinion in the form of an email dated December 5, 2023. Plaintiffs' Motion for

New Trial and Reconsideration of Memorandum Decision was denied via an email dated March 11, 2024, and the Court's written Findings of Fact and Conclusions of Law were entered on March 14, 2024, all of which are incorporated herein by reference. Upon the foregoing, and good cause appearing therefore, it is hereby

ORDERED, ADJUDGED, AND DECREED that this action be dismissed upon its merits and with prejudice.

Dated this 14 day of March, 2024.

BY THE COURT:

Honorable Douglas Hoffman
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, CLERK OF COURTS
BY: _____, DEPUTY
(SEAL)

UNIFIED JUDICIAL SYSTEM JUSTICE STATE OF SOUTH DAKOTA

FILED
MAR 14 2024
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA))SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
TYLER CHRISTIANSEN, TREVOR DIETRICH, SHAUN DONELAN, MATTHEW HENDRICKSON, KELSEY LAMBERT, ETHAN MAY, AND CHRISTOPHER THACKER, Plaintiffs, v. MAJOR GENERAL MARK MORRELL, ADJUTANT GENERAL OF THE SOUTH DAKOTA DEPARTMENT OF THE MILITARY, Defendant.	49CIV19-001915 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

A trial to the Court was held before the Honorable Douglas E. Hoffman, Circuit Court Judge, sitting without a jury, beginning at 9:00 am on December 1, 2023, CST in Courtroom 5A of the Minnehaha County Courthouse in Sioux Falls, South Dakota.

Plaintiffs appeared personally and through their attorneys Brian Lawler, Pilot Law, P.C., of San Diego, California, and Robert Vorhoff, of New Orleans, Louisiana. Their local counsel is Pamela Reiter of Reiter Law Firm, LLC in Sioux Falls, SD. The Defendant appeared through Brigadier General Deborah Bartunek and the Defendant's attorneys- Lieutenant Colonel Jason Campbell, of Rapid City, South Dakota, and Robert B. Anderson, of Pierre, South Dakota.

After hearing all the evidence, reviewing the exhibits which were offered and accepted into evidence either prior to the hearing or during the hearing, and having considered the written and oral arguments of the parties and their stipulations of fact, the Court entered a written Memorandum Opinion in the form of an email dated December 5, 2023. Said Opinion is

attached hereto, labeled as Exhibit A, and incorporated herein by reference. The Court then denied Plaintiffs' Motion for New Trial and Reconsideration of Memorandum Decision by way of email dated March 11, 2024, which is attached and incorporated hereto as Exhibit B. The Court now makes and enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Plaintiffs in this case were all, at one time, dual-status technicians serving as civilian employees of Defendant or his predecessor, and hired pursuant to the authority of 32 U.S.C. § 709.

2. At some point, all Plaintiffs received and accepted Active Guard Reserve (AGR) orders. *See Stipulation and Trial Exhibit 1.*

3. Upon receipt and acceptance of the AGR orders, the Plaintiffs entered active duty with the South Dakota Air National Guard. Once each of the Plaintiffs received and accepted AGR orders, they remained on AGR orders continuously.

4. All Plaintiffs, except for Donelan and Hendrickson, remain on Active-Duty status due to the AGR orders. Donelan resigned in March of 2022 from the South Dakota Air National Guard, and Hendrickson resigned in June of 2021.

5. At no time did any of the Plaintiffs in this action return to their prior civilian technician jobs after they received AGR orders.

6. All orders issued to the Plaintiffs in this case are incorporated into Exhibit 1 and are described further in the "Joint Stipulation of Facts" which was admitted into evidence at or prior to trial.

7. Once AGR orders were issued and accepted, none of the Plaintiffs requested to return to their prior civilian technician jobs.

8. The dispute at issue in this case came to light in approximately 2017/2018 when Plaintiffs requested the use and/or accrual of military leave in connection with their civilian jobs after they received and accepted AGR orders. The Plaintiffs claimed entitlement to such leave, and the Defendant determined that, under the applicable federal law, the Plaintiffs were not entitled to the same, and denied their claims in this regard. Plaintiffs then brought this action seeking relief under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301, *et seq.* (USERRA).

9. Brigadier General Deborah Bartunek, who testified live at trial and who the Court had an opportunity to observe during such testimony, served in a variety of capacities for the South Dakota Army and Air National Guard including, at one time, head of human resources.

General Bartunek was the decision maker in this case. This Court finds General Bartunek's testimony, that the decision to deny the benefits to which the Plaintiffs claim entitlement herein was motivated solely by the National Guard's good faith interpretation of federal statutes that control such determination, to be credible and unchallenged. The Court finds that Defendant's decision to deny accrual and/or use of military leave to Plaintiffs as a benefit of their civilian jobs, as testified to by witness Bartunek, was motivated solely by an attempt by Defendants to correctly interpret and apply controlling federal statutes.

10. The Defendant's determination on the benefit issue relating to whether Plaintiffs could accrue and/or use military leave as a benefit of their civilian jobs after receipt and acceptance of their AGR orders was made in good faith.

11. The Defendant's determination to deny certain benefits to Plaintiffs in this case was not motivated in any way by any discriminatory animus or hostility towards the Plaintiffs' membership, performance, or obligation to the military, and the same was not a motivating factor in the Defendant's denial of the benefits sought by Plaintiffs.

12. At no time did Defendant employer, nor any of his agents, act out of any hostility toward the Plaintiffs or their military service or duties.

13. There was no discriminatory intent on the part of the Defendant or his agents or predecessors when the Plaintiffs' requests for use and/or accrual of military leave was denied.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties.

2. This Court has jurisdiction over the subject matter of this action.

3. USERRA was enacted to prohibit discrimination against military personnel serving in the uniformed services by their civilian employers, and to prevent retaliation and acts of reprisal against them on the basis of their membership, performance, or obligation in or to the military.

4. The terminology "on the basis of" as it relates to USERRA requires that the Plaintiffs' military membership, service, or obligation be a "motivating factor" in the civilian employer's discriminatory or retaliatory actions.

5. In order to show an actionable USERRA claim, Plaintiffs must prove that a motivating factor of their employer's decision to deny them a benefit of employment arises from hostility to the employee's membership in or obligation to a uniformed service. This translates into "an anti-military animus".

6. Plaintiffs were not the target of discriminatory or retaliatory actions at all, whether resulting from anti- military discrimination, hostility or animus, or any other reason.

Therefore, neither the Defendant nor his agents violated USERRA in denying Plaintiffs' requests for use and/or accrual of military leave after issuance and acceptance of the AGR orders.

7. There is a paucity of legal authority interpreting the relevant federal benefit statutes presented in this action, and reasonable minds can differ as to their interpretation. But it is clear that no decision in this case, whether correct or incorrect, was made by the Defendant with regard to the applicability of said benefits to the Plaintiffs' status, based upon discriminatory motive, military animus, hostility toward the Plaintiffs' service obligations, or any reason other than a good faith attempt to follow the applicable benefit laws. Thus, as a matter of law, there is no USERRA violation here, even if the Defendants misinterpreted the applicable law, which is an issue this Court does not reach. Accordingly, this case will be dismissed upon its merits.

Dated this 14 day of March, 2024.

BY THE COURT:

Honorable Douglas Hoffman
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, CLERK OF COURTS
BY: ,DEPUTY

FILED
MAR 14 2024
Minnehaha County, S.D.
Clerk Circuit Court

Robert Anderson

From:	Hoffman, Judge Doug <Doug.Hoffman@ujs.state.sd.us>
Sent:	Tuesday, December 5, 2023 3:41 PM
To:	Kummer, Bryce; Pamela Reiter; Russell, Lisa
Cc:	Robert Anderson; Brian Lawler; Robert Vorhoff
Subject:	RE: Christiansen v. Morrell (previously Marlette) , CIV 19-001915

Dear Counsel,

I have reviewed the pleadings and briefs in the case and have come to a decision.

38 USC § 4301 sets forth the purposes of USERRA, which are to minimize disadvantages to the civilian careers of part-time military personnel and to prohibit discrimination against them by their civilian employers. Specifically, 38 USC § 4311, entitled "Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited," forbids denial of any employment benefit by an employer against a member of, or person who performs services for, the uniformed services "*on the basis of* that membership,... performance,... or obligation." (Emphasis added.) *Id.* at § 4311(a).

"On the basis of" is more particularly defined as requiring that the plaintiff's military membership, service or obligation be a "motivating factor" in the employer's action. *Id.* at § 4311(c)(1). To sustain a cause of action for a USERRA violation, as the United States Supreme Court has unanimously stated, the Plaintiffs must show that a motivating factor of their civilian employer's decision to deny them some benefit of employment was "hostility to the employee's membership in or obligation to a uniformed service," in other words, "antimilitary animus." *Staub v. Proctor Hosp.*, 562 US 411, 418, 422 (2011) ("If a supervisor performs an act motivated by anti-military animus that is intended by the supervisor to cause an adverse employment action... then the employer is liable under USERRA.") This is consistent with the overarching understanding that USERRA is an ant-discrimination law, akin to Title VII. *Id.* at 418.

Indeed, in *Ayoub v. Bd. of Cty. Commrs.*, 964 F. Supp. 2d 1288 (D. NM 2013) the court, relying upon *Staub*, held that there was no anti-military animus shown under the facts of the case, particularly in lieu of the fact that most of the targeted decision-makers in the matter were either military members or veterans, and thus denied the claims. *Id.* at 1298-1300 ("Plaintiff must show evidence which infers treatment resulting from anti-military motivation.")

In the case at bar, the defendant is the Adjutant General of the South Dakota Department of the Military, who is, as pleaded in the Complaint, the "head of the Department of the Military and the Commanding General for both the South Dakota Air and Army National Guard." There isn't even an allegation, let alone any evidence in the mostly stipulated case, that the Defendant, or any of his agents, acted out of anti-military animus in this case. The only live witness in this matter, Brigadier General Deborah Bartunek, who formerly was head of Human Resources for the entire South Dakota Department of the Military, testified that her decision to deny the benefits to which plaintiffs claim entitlement was motivated solely by her interpretation of the federal statutes that control that determination. Plaintiffs did not even attempt to impeach the authenticity of that testimony. Rather, their entire case is predicated upon their legal opinion that the General has misinterpreted the governing legislation. So, this case, in essence, is entirely one of statutory interpretation, and that is certainly why all the salient facts could be stipulated by the parties.

Having now studied the statutes in question, and considered the context in which they exist, I conclude that the statutes are ambiguous and there is a paucity of authority interpreting them in this context. Clearly, reasonable minds can differ as to whether the Plaintiffs' or the Defendant's interpretation is correct, and it isn't necessary for this Court to make that determination at this time.

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My primary finding of fact in this case is that the Defendant's determination on the benefit issue in this case was made upon a good faith attempt to interpret complex federal statutes and was not motivated in any way upon illegal military animus. Consequently, as a matter of law, there is no USERRA violation in this matter, and the case shall be dismissed upon the merits.

This Court does not have jurisdiction to determine whether the benefits sought by Plaintiffs are owing outside the context of a valid USERRA claim. That is entirely a matter of federal law which the Congress has not delegated authority to state courts to determine. Rather, it is a matter to be addressed within the federal system. Accordingly, this Court does not reach that issue, as it is moot given my opinion that, regardless of that determination, there is no USERRA violation in this case.

Counsel for the Defendant is directed to please prepare, file and serve proposed findings of fact and conclusions of law consistent with this opinion in accordance with the applicable rules of civil procedure, to which the Plaintiffs may object and propose alternatives. Thereafter a final Judgment will be entered herein.

Thank you for the opportunity to consider this most interesting case. I have copied, and am directing, Clerk Lisa Russell to file a copy of this email for the record.

Douglas E. Hoffman
Circuit Court Judge
Second Judicial Circuit
Sioux Falls, South Dakota

Hoffman, Judge Doug

From: Hoffman, Judge Doug
Sent: Monday, March 11, 2024 5:18 PM
To: Brian Lawler; Robert Anderson; Russell, Lisa
Cc: Pamela Reiter; Natalie Perry; rvorhoff@vorhoff-legal.com
Subject: RE: [EXT] CHRISTIANSEN, ET AL. v. MORRELL - 49CIV19-001915 - MAGT File: 7595

Dear Counsel,

I have reviewed the Plaintiffs' Motion for New trial and Reconsideration of Memorandum Decision, and all the points and authorities submitted by both sides in relation thereto. I am denying the motion. In my view these cases are all inapposite. In all but one, the defendant was a federal agency rather than a military entity. In *Faris v. Department of the Air Force*, 2022 WL 4376408 at *2 (Fed. Cir. 9/22/2022), the Plaintiff was a civilian employee of the Air Force, but his claim was denied because there was no USERRA violation. Therefore, the quote from *Adams v. Dep't of Homeland Sec.*, 3 F4th 1375, 1377 (Fed. Cir.) cert den. 142 SCT 2835 (2022) was merely preliminary *obiter dicta* and not actually germane to the analysis of the case or its holding. I believe that the reasoning set forth in my Memorandum Decision herein is the correct application of the USERRA law to the particular facts of this case and I shall adhere to it.

I will have Clerk Lisa Russell file this email for the record and direct Mr. Anderson to submit an Order for my signature consistent with this ruling. I will now turn my attention to finalizing the Findings of Fact, Conclusions of Law, and Judgment of Dismissal. Thank you,

Douglas E. Hoffman
Circuit Court Judge
Second Judicial Circuit
425 N. Dakota Ave.
Sioux Falls, SD
doug.hoffman@ujs.state.sd.us

From: Brian Lawler <blawler@pilotlawcorp.com>
Sent: Friday, March 8, 2024 4:33 PM
To: Hoffman, Judge Doug <Doug.Hoffman@ujs.state.sd.us>; Robert Anderson <rba@mayadam.net>
Cc: Pamela Reiter <pamela@reiterlawfirmsd.com>; Natalie Perry <natalie@reiterlawfirmsd.com>; Kummer, Bryce <bryce.kummer@ujs.state.sd.us>; Kanuch, Julia <julia.kanuch@ujs.state.sd.us>; rvorhoff@vorhoff-legal.com
Subject: RE: [EXT] CHRISTIANSEN, ET AL. v. MORRELL - 49CIV19-001915 - MAGT File: 7595

Judge Hoffman,

My apologies for the oversight, the Plaintiffs will not be filing a Reply Brief. Sorry for the inconvenience.

V/R,
Brian

Brian J. Lawler, Esq.

STATE OF SOUTH DAKOTA) COPY IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

****

TYLER CHRISTIANSEN, TREVOR DIETRICH, SHAUN DONELAN, MATTHEW HENDRICKSON, KELSEY LAMBERT, ETHAN MAY, CHRISTOPHER THACKER, AND MICHAEL ROLLAG,
Plaintiffs,

49CIV19-001915

COURT TRIAL

-vs-

MAJOR GENERAL JEFFREY P. MARLETTE, ADJUTANT GENERAL OF THE SOUTH DAKOTA DEPARTMENT OF THE MILITARY,
Defendant.

****

BEFORE: The Honorable **Douglas E. Hoffman**
Circuit Court Judge
Second Judicial Circuit
Sioux Falls, South Dakota,
on December 1, 2023

APPEARANCES: Mr. Brian J. Lawler
Attorney at Law
Pro hac vice
850 Beech Street
San Diego, California 92101

Mr. Robert T. Vorhoff
Attorney at Law
201 St. Charles Avenue, Suite 114-321
New Orleans, LA 70170

For the Plaintiffs;

Mr. Robert Anderson
Attorney at Law
P.O. Box 160
Pierre, South Dakota 57501

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Mr. Jason Campbell
Attorney at Law
2823 West Main Street
Rapid City, South Dakota 57702

For the Defendants.

Roxane R. Osborn
605-782-3032
Sioux Falls, South Dakota

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WITNESSES:	Direct	Cross	Re-D	Re-C
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EXHIBITS:	MARKED	OFFERED	RECEIVED
A - AGR order for Tyler			
B - continuation order for Tyler			
C -			
D -			
E - continuation order for Tyler			

MOTIONS AND STIPULATIONS	MADE ON	RULED ON

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Q What capacity and what branch?
A I'm the Director of the Joint Staff for the South Dakota National Guard.
Q Okay. What does that entail?
A Several entities that report through me, both Army and Air direct reports for me. I work with State Domestic Affairs, ah, Human Resources, Public Affairs. Various, various offices work for me.
Q How long have you been in the military?
A Over 40 years.
Q Okay. And how long have you worked in the military in this area?
A I've worked full time for the National Guard for 36 years.
Q As part of that period of time, were you HR, I'll say HR Officer, if I use terms that are incorrect, you'll let me know?
A Yeah.
Q Okay.
A Yes. From, ah, 1993 to 2010, I worked in the Human Resource Office in varying capacities, and then it culminated as the Deputy HRO in 2010. And then again in 2020 I spent two years working as, I was the director of Human Resources for the South Dakota National Guard.
Q And even though you are in the Army, during that period

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of service were you're dealing with both the Army National Guard and the air, Air National Guard?

A I was.

Q And at present does the do -- the HR people at the Air National Guard report to you?

A The Human Resources Office.

Q I mean Human Resources, I'm sorry.

A They do. There's Army and Air within the Human Resource Office, and, ah, they report to the Human Resource Director, who is a direct report to me.

Q Okay. This, this is a generalization, but, ah, the events leading to this case began in about late 2016 when some of these people got AGR orders and developed over time. Are you familiar in general with this dispute?

A I am.

Q And were you familiar with it back when you were the HR Officer?

A I was.

Q It, it, it involves a denial of military leave once they went on AGR orders; is that a fair summary?

A It is fair.

Q And you're aware of this lawsuit?

A I am.

Q Have you reviewed, well. the judge has --

MR. ANDERSON: Can I approach the bench or the witness,

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Your Honor?

THE COURT: Yes.

Q Ah, the, this is a copy of the stipulation. General, are you aware and have you reviewed the stipulation and the various documents that are attached to it?

A Yes. I have had a chance to review this.

Q Including all those documents, some of which are, maybe all of which are orders?

A Yes, I have.

Q And you're familiar with the, the form and type of documents you're looking at?

A Yes, I am.

Q Okay. Familiar with the terminology which I'm not?

A I am.

Q Okay. Let's kind of talk about the, the background here. The plaintiffs were all at one time what's called dual status technicians; is that right?

A That's correct.

Q And that means they were treated, they were civilian employees of the government, went to work wearing uniforms?

A Yes. Military services stipulation condition of employment for dual status military technicians.

Q And they were in the Air National Guard?

A Yes.

Q And they worked at a, at the, what you guys call the Air

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Wing area?
A Yes.
Q You just have to wait till I, if there was a court reporter here she would, he or she would probably tell you slow down just a little bit.
THE COURT: We call it tailgating in the business.
MR. ANDERSON: Yeah, right.
Q So, they worked at the Air Wing here in Sioux Falls?
A Yes.
Q As dual status technicians were they, where were they required to be members of the South Dakota Air National Guard?
A Yes. Military membership in the National Guard is a condition of employment for dual status military technicians.
Q Which is why you're a dual status, you're a member of the guard, but you're a civilian employee?
A Yes.
Q At some point all the plaintiffs in this case received AGR orders, which stands for Active Guard Reserve orders; is that right?
A That's correct.
Q And I, the, the exhibits speak for themselves, but as I recall the, the first of such orders were issued in December of 2016, correct?
A Correct. That that was the date the order was

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published. The actual duty, report to duty date, if I remember correctly, it was 7 -- in January of '17.

Q The effect of these order, the AGR orders was among other things to place these people on active military duty?

A Yes.

Q Okay. And these orders are all attached to the stipulations, correct?

A They are.

Q Once the plaintiffs received AGR orders and accepted them and met, that term was used in the stipulation. Is it true that they could have rejected them?

A Yes.

Q And what would, I mean you get an AGR order, and you're a dual status technician and you reject the order, what, what's the result of that?

A You remain in your dual status technician position.

Q But you don't go on active duty?

A No.

Q Okay. So, basically you're rejecting the opportunity, if you want to call it that, to go on active duty?

A Correct.

Q Okay. But that is, that is -- was the right of all these plaintiffs?

A Correct.

Q Did any of them reject if you know?

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A No. Not to my knowledge, they did not.
Q They, they all accepted these orders. So, during after they, after these orders were effective and accepted, did the plaintiffs have the opportunity of returning to their tech job just like they could have rejected it?
A Absolutely. Reemployment rights.
Q And what would have happened had they chosen to go back to their dual status job?
A Their AGR orders would have been terminated.
Q Basically, the, would you treat that as a resignation from active duty and a return to the dual status?
A It's a return to duty as a military technician civil service employee.
Q Did any of them do that?
A They did not.
Q Okay. Is, is AGR status something that people can apply for or request?
A Yeah. It's, it's a, it's a, ah, a career path that is something that we advertise positions for. You can apply for an AGR position.
Q Once, once you go on the AGR status, you receive orders and accept them, how long do they last? How long does that status last?
A If the position is a funded position, funded AGR position, the organization can cut an order for an initial

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tour, ah, and then from there they can do a continuation tour as long as the, ah, the soldier airmen is in good standing with the, the military organization and the fund, the position is funded. So, it can be an indefinite.

Q You've already said that the AGR active-duty status can end if, if a person resigns?

A Yes.

Q Or if a person or goes back to their dual status job, correct?

A Correct.

Q In this case, ah, and can they also be continued?

A The AGR order?

Q Yeah.

A Yes. AGR order can be a continuation.

Q Okay. I want to talk about that in a minute, but most of these initial orders had under the itinerary, itinerary section had what I would call definite periods of service; is that correct?

A That's correct.

Q Like it would say you're going to go on AGR orders from January 1 of this year to December 31 of the following year?

A Correct.

Q Ah, if continued, can they be continued immediately following the expiration of that initial term?

A Yes. There'd be no break in service.

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Q Is that what happened to all these plaintiffs?
A It is.
Q They were all, they all went on initial AGR orders?
A Yes.
Q And they were all continued without a break in service?
A That's correct.
Q Those AGR orders?
A Yes.
Q Until -- are some of them still on AGR orders today?
A To the best of my knowledge, yes.
Q Are some not?
A I believe one of them is transferred out of state and is now working for the Idaho National Guard, I believe.
Q I want, I want to, ah, go through with you just maybe explain to all of us what some of these, how to read some of these orders that are attached. I'm going to refer to it, to the Tyler Christiansen orders just to illustrate. Okay.
MR. ANDERSON: I'm going to give her a copy of those.
THE COURT: Okay.
MR. ANDERSON: These are exhibits, Your Honor. The stipulation. These are Exhibits A through G.
(Off-the-record discussion was had.)
MR. ANDERSON: If, if you look, ah, did I give you a copy of these? I did? You have a copy in front of you?
THE COURT: I do.

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MR. ANDERSON: Okay.

Q If you, if you look at the document marked Exhibit A is that the first, ah, AGR order for Tyler Christiansen?

A To my knowledge, yes.

Q Okay. Dated December 20 of 2016, correct?

A Yes.

Q And kind of take us through these various paragraphs and tell us as those of us who are layman what they mean?

A Do you want me to go through the paragraph by paragraph?

Q Yeah. Paragraph one.

A Sure.

Q Type of duty, authority. What, what, and what does that say and what does it mean?

A That's the title that they'll fall under in, in this case for Title 32 AGR, that's under state control. And for number two, that is, that's an AGR tour full-time, meaning they're an active member of the military.

Q And paragraph three identifies the, the airmen in this case involved, correct?

A Correct.

Q Paragraph four, itinerary describes that first term which goes from January 4 of 2017 to January 3, 2018, correct?

A Yes, that's an initial duty. Initial tour.

Q Number of these paragraphs are not relevant. How about

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paragraph six. Tell us what paragraph, what, what paragraph six is there for?

A Paragraph six is saying that this AGR order will convert to a Title 10, which is a federal status, if they're called to active duty with federal mission. It also states that this order would be amended to include any Title 10 duty and, ah, they would revert to their original title, Title 32 once that order is done. So, this isn't a revocation of an order. This says that under the AGR order they will all encompass the Title 10 duties they would be assigned to, and then go back to the Title 32, but it does not dispute the order.

Q When you say it doesn't dispute the order, what are you saying about the AGR order? Does that continue in effect?

A It is still, this is the order would, would cover them with either AGR Title 32 or Title 10 duty. This is the order.

Q If Title 10 duty were assigned to them, would the AGR orders continue in force?

A Yes. It's, it's included under the same order. So, there's no break in service.

Q Then if, if you look at Exhibit B, oh, excuse me, what, ah, yeah, Exhibit B. In paragraph one, that states that's a continuation order?

A Correct.

Q And what does that mean?

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Q Service?
A No, no, break in service, yes.
Q Okay. So, assuming, I think he did serve through September '22, ah, he would have been on AGR orders from January of '17 through September of '22?
A Yes.
Q Correct, without a break in service?
A Correct.
Q Okay. I think that's -- well, you've looked at all the orders for the other plaintiffs as well?
A I have.
Q Correct?
A I have.
Q Are they all similar to this in terms of what they do and the terminology employed?
A They are the same. The dates are just different.
Q Okay. Having looked at all those records, were any of the plaintiffs AGR, any of the individual plaintiffs AGR orders ever terminated?
A No.
Q You've already told us none of them asked to get their dual status job back?
A Correct. No, there were no requests to return to their civil service position to return to duty.
Q And they were all continued for various periods of time,

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correct?
A Correct.
Q I believe the, I believe this is right, although I'm sure the plaintiffs can correct us if it's not. Did the records reflect that Mr. Hendrickson resigned in June of 2021?
A I, I believe it was, yes.
Q Okay. And Mr. Donelan in March of 2022?
A Correct.
Q The others are, as far as you know, are still in service?
A As far as I know, yes.
Q Are they still under AGR orders?
A Yes. And I think I believe the resignation was from the civil service position.
Q Oh, okay.
A It was not from AGR. It was from the civil service position.
Q So, we're clear, when you say the resignation was from the civil service position, you're saying they resigned from the federal dual or from the dual status technician position?
A Correct.
Q Yeah, okay. Okay. Did any of these plaintiffs ever return to duty as a technician?
A There's no documentation showing that they asked to

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purpose of when someone is called up, and typically for an annual training period maybe 14 days and here and there, it keeps you in a double pay status. And what that does essentially for that technician or civil service employee is that it keeps their benefits from going in arrears. So, that they continue to get that pay to continue to keep their health benefits up to date for payments and their life insurance up to date for payments. You do get two paychecks out of it, but if they didn't have the military leave they would have to come back and then pay in arrears to keep their benefits up to date.

Q And if the plaintiffs' position were correct, would they be getting benefits that other people on AGR orders wouldn't get?

A If they were to get military leave, AGRs are not permitted military leave as a technician, yes.

Q Okay. I think that I didn't ask it very well, but I think you answered the question I meant to ask. Okay. Ah, when -- among the orders that were included in the stipulation are various orders referring to the potential conversion to Title 10 status?

A Correct.

Q Correct. If and when that happened, and I think all these plaintiffs were converted on one or more occasions to Title 10 status. Did that have the effect of terminating

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the type -- the AGR status?
A It did not.
Q AGR status continued?
A It did.
Q And the Title 10 conversion was within the scope of the AGR order?
A It's within the AGR order, yes.
Q The, I'm just trying to think what it, would it have been possible for the Air National Guard or the Army National Guard, I assume the Army has dual status technicians as well, correct?
A They do.
Q Okay. Would it be possible for the, either of those guards to return one of these people on AGR orders to, to his or her technician status, and then to place that person on Title 10 status without AGR orders? It's confusing, yet, do you understand that?
A I believe so. If they were returned to the title, the Title 32 dual status technician position that would terminate the AGR order. They could then be put on a separate Title 10 order as a drilling -- drill status member basically.
Q And if that happens they would not be on AGR orders?
A No. If they returned as a dual status technician that would terminate their AGR order.
Q And the statutory prohibition against utilizing military

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return to duty or were placed in a return to duty status.
Q Can that happen?
A Absolutely.
Q And I, I, I think the Army is like the federal government, they have a form for everything, right?
A Yes, Sir.
Q Is there a form for that if that, in fact, occurs?
A Yes. The Standard Form 50 is the document that would return someone to duty as a federal technician, and that would be they would be able to do that within the five-year USERRA period.
Q Okay. But as, from your review, this did not happen with any of the plaintiffs?
A No. There's no documentation showing that.
Q Ah, can you, we, we talked about what the nature of the dispute here is. I'm not asking you to tell us who's right and who's wrong, but can you describe the nature of the dispute for us, and that aren't familiar with it in layman's terms?
A Yes. Ah, the dispute is my understanding is that they were requested to use military leave while they were on Title 10 status. There is a law that says if in an AGR status you're not, if you're a dual status technician on an AGR tour, you're not allowed to take military leave. Military leave for dual status technician is, basically is for the

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benefits would not apply because they weren't on AGR orders, correct?

A Correct.

MR. ANDERSON: Can I confer with miss -- with Colonel Campbell just for a minute out in the hallway?

THE COURT: Sure, yeah.

MR. ANDERSON: I mean this isn't going to delay much.

THE COURT: No, no, I'll just check my email.

MR. ANDERSON: Thank you.

(Recess at 9:35.)

(Proceedings resumed at 9:36 a.m.)

MR. ANDERSON: Thank you.

Q I'll summarize what I think you've said really quickly and, ah, all the plaintiffs got AGR orders?

A Correct.

Q They were all continued?

A Yes.

Q I think all of them received Title 10 orders during that period of time, correct?

A They were on Title 10 duty during that time.

Q Yep. So, what was it, what event was it that kept them away from their federal technician job? Was it the AGR order?

A It was accepting an AGR tour.

Q Once they accepted the AGR order, their employment as

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a civilian dual status technician terminated?

A Did not terminate, it suspended.

Q Oh, okay, yeah.

A Because they had, they had the five-year USERRA Reemployment Rights.

Q Because as you said they could have chosen to go back?

A Correct.

Q But what kept them away from their dual status job was the AGR order?

A Correct.

Q Okay.

MR. ANDERSON: I think that's all I have, Your Honor.

THE COURT: Okay. Let's see if there's some cross-examination.

CROSS-EXAMINATION

Q (BY MR. VORHOFF) Good morning, General.

A Good morning.

Q As I mentioned earlier, my name is Robert Vorhoff. I represent the plaintiffs. Um, just a few, just a few follow-up questions I'd like to ask you. Ah, first, in your position, or in your past positions, have you, ah, are you familiar with the Uniformed Services Employment Reemployment Rights Act, USERRA?

A I am.

Q And generally speaking, well, not generally speaking,

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but are National Guard Technicians protected by USERRA?
A They are.
Q And do reemployment rights, um, and other rights under USERRA matter for a National Guard Technician if they receive active-duty orders that are either voluntary or involuntary?
A USERRA covers both.
Q And when a National Guard Technician receives orders to Title 10 duty, do they approve military leave under Title 5, the Uniformed, ah, or U.S. Code 6323?
A You're asking if the dual status military technician accrues?
Q Correct.
A The military leave?
Q Correct.
A It's, it's, ah, granted on the first of the fiscal year every year as long as they are on a duty status as a technician.
Q And are they able to, to use that leave, and I believe you testified to this, correct? Maybe I'm asking the question a different way. They will use that leave while they're on active duty in a Title 10 status?
A If they are still in a technician status, yes.
Q So, a benefit of employment to, to rephrase benefit employment of a dual status National Guard Technician is the additional military leave under 5 USC 6323 while they're

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30670

TYLER CHRISTIANSEN; TREVOR DIETRICH; SHAUN DONELAN; MATTHEW HENDRICKSON; KELSEY LAMBERT; ETHAN MAY; and CHRISTOPHER THACKER,

Plaintiffs,

VS.

MAJOR GENERAL MARK MORRELL, ADJUTANT GENERAL OF THE SOUTH DAKOTA DEPARTMENT OF THE MILITARY,

Defendant.

APPEAL FROM THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE DOUGLAS HOFFMAN
CIRCUIT COURT JUDGE

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REPLY ARGUMENT

I. BECAUSE NATIONAL GUARD TECHICIANS ASSIGNED TO AGR DUTY ARE ENTITLED TO MILITARY LEAVE WHEN ON ACTIVE DUTY UNDER TITLE 10, JUST LIKE ANY OTHER DEPLOYED NATIONAL GUARD MEMBER, THE DEFENDANT VIOLATED USERRA IN DENYING THAT LEAVE.

Appellants respectfully submit their reply to the arguments raised in opposition to their USERRA claims. Although the Appellee decided to address the issues raised in Appellant's brief in reverse order, this reply will address them as originally framed.

A. Appellee has not offered any alternative textual analysis of section 709(g)(2) or section 101(d)(6).

In seeking to deny the plaintiff technicians' entitlement to guaranteed paid leave under 5 U.S.C. § 6323(a)(1), the Appellee brief does not address the textual scope of the carve-out from such benefits imposed under 32 U.S.C. § 709(g)(2). To refresh, that statute creates an exception to the guaranteed fifteen days of annual paid leave to which all federal employees serving in the uniformed services, including civil technicians, are entitled as a matter of law. The exception is limited to those "performing active Guard and Reserve [AGR] *duty (as that term is defined in section 101(d)(6) of title 10).*" 32 U.S.C. § 709(g)(2) (emphasis supplied).

Section 101(d)(6), in turn, defines "active Guard and Reserve duty" as "active duty performed by a member of a reserve component of the Army, Navy, Air Force, or Marine Corps, or full-time National Guard duty performed by a member of the National Guard pursuant to an order to full-

time National Guard duty, *for a period of 180 consecutive days or more for the purpose of organizing, administering, recruiting, instructing, or training the reserve components.*" 10 U.S.C. § 101(d)(6)(A) (emphasis supplied).

Thus, to qualify as performing AGR duty as defined in section 101(d)(6)(A) for purposes of the carve-out, a civil technician must: (1) be a National Guard Member performing full-time National Guard duty; (2) for a period of 180 consecutive days or more; (3) for the purpose of organizing, administering, recruiting, instructing, or training the reserve component." 10 U.S.C. § 101(d)(6)(A). Active duty that does not meet those requirements renders the carve-out inapplicable and therefore inoperative.

The Appellee brief does not dispute this construction of the relevant statutes, nor does it offer any alternative construction, presumably because there is no disagreement that it is correct based on the plain and ordinary meaning of the statutory text. Appellee also does not appear to dispute that performance of active duty under Title 10 status for the purpose of "supporting Active Duty requirements for operations/missions/exercises," or performance of any duty for less than 180 consecutive days, does not meet the statutory definition for the carve-out, nor does it dispute that the plaintiffs were performing such active duty requirements. Indeed, it cannot do so because those are the true and stipulated facts. (R. 81-86).

Because the pro-veteran canon embodies a longstanding judicial presumption about how Congress understands its own enactments in the

context of military service, moreover, statutory provisions related to benefits available to service members should, where possible, be read in a veteran's favor. Even if there were any doubt about the meaning of the governing statutes in this case, the well-established pro-veteran canon requires any such ambiguity to be resolved in favor of the military members who sacrifice and risk so much in service of their country and fellow citizens. *See, e.g., Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis*, 431 U.S. 581, 584-85 (1977); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 n.9 (1991); *Henderson v. Shinseki*, 562 U.S. 428, 440-41 (2011) (reaffirming and applying "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor").

B. Public policy reasons for denying plaintiffs their statutorily mandated paid military leave do not provide a basis for circumventing the statutes.

As a substitute for textual analysis, the Appellee brief appears to offer public policy reasons for why, *despite* the statutory text, this Court should still apply the carve-out to the civilian technicians here to deny them benefits of employment to which they are entitled as a matter of statutory law. Essentially, Appellee argues that the carve-out ought to apply because plaintiffs' originating orders were AGR orders and "[t]he fact that such undisputed and continuing AGR duty included a short period, or periods, of Title 10 duty does not eliminate the ultimate fact that it is the same

undisputed and continuing AGR duty *that is the cause of the disruption of Appellants' civilian Federal Technician careers*." (Brief at 19) (italics supplied).

But applicability of the carve-out from federally guaranteed paid military leave does not turn on what is deemed to be "the cause of the disruption" of a civilian technician's "career." Rather, it turns on the express language enacted by Congress. Appellee's policy arguments based on the root causes of career disruption are better directed to Congress, which has authority to change federal law, than to judicial branches of state governments, which lack such authority.

In the same vein, Appellee argues that "[t]he fact that these AGR Orders included Title 10 duty does not negate the fact that these Appellants were on AGR duty before, and were restored to AGR duty after, such included Title 10 duty." (Brief at 20-22). In other words, Appellee suggests that it should be deemed of no consequence that the plaintiffs converted to Title 10 duty to support active duty requirements for operations, missions, and exercises, as opposed to serving in an AGR capacity "for the purpose of organizing, administering, recruiting, instructing, or training the reserve component." 10 U.S.C. § 101(d)(6)(A). But that assertion ignores the statutory text of the carve-out from guaranteed paid leave, which the Appellee brief takes care not to examine or discuss.

The Appellee brief additionally invokes a hypothetical as a means to encourage this Court to disregard the statutory text of the carve-out in 32 U.S.C. § 709(g)(2) in order to vindicate the purpose of USERRA, 38 U.S.C. § 4301(a). (Brief at 22-23). That invitation is difficult to accept. Although USERRA certainly provides a *remedy* for the wrongful denial of employment benefits based on one's performance of military service—including denial of paid military leave guaranteed for active duty under 5 U.S.C. § 6323(a)(1) and not otherwise subject to the singular carve-out established by 32 U.S.C. § 709(g)(2)—USERRA has nothing to do with how unrelated statutes establishing the *right* to paid military leave should be construed.

Even so, the stated purposes of USERRA, which include minimizing disruption to the lives of those dedicating themselves to uniformed service, are entirely consistent with ensuring that the plaintiff technicians here receive the fifteen days of annual paid military leave to which they are entitled under the law for serving on active duty in support of operations, missions, and exercises in the National Guard. 38 U.S.C. § 4301(a)(2). The Appellee brief's reliance on statements on the internet from websites for the U.S. Office of Special Counsel, moreover, does nothing to undermine that conclusion. (Brief at 23-24).

Finally, the Appellee brief reasserts its contention that the plaintiff technicians "were not disadvantaged in their civilian careers because of their military service." (Brief at 24). Without citation to anything in the record or

otherwise, it further asserts that "[n]o other Federal Technician that has accepted AGR orders has gotten paid military leave. Appellants have not been treated differently than those in their position." (Brief at 24). Quite to the contrary, *all* federal employees who, like plaintiffs, serve on active duty in support of operations, missions, and exercises in the National Guard are entitled to such guaranteed paid leave "for active duty" as a matter of law. 5 U.S.C. § 6323(a)(1). Denying that same leave to civilian technicians serving on active duty in the absence of any valid legal or statutory basis for doing so treats plaintiffs differently from other federal employees serving active duty as a matter of uncontestable fact.

That is the heart of the matter. As civil technicians serving on active duty in support of missions, operations, and exercises, the plaintiffs were denied that benefit of federal employment "on the basis of" their particular "performance of service," 38 U.S.C. 4311(a), that the Adjutant General incorrectly deemed disqualifying under a carve-out from federally guaranteed benefits that simply does not apply in these circumstances.

C. In cases involving denial of employment benefits available only to members of the military, USERRA does not require a prevailing plaintiff to establish anti-military bias or animus.

Which leads to the question on which the lower court resolved the case. Is an employer's denial of employment benefits available only to members of the military protected by USERRA, or must an employer "hate the military" or otherwise act with anti-military bias to trigger USERRA's protections?

Before the circuit court announced its *sua sponte* decision, no court had ever held that USERRA's protections do not extend to denial of federally guaranteed paid military leave that is, by definition, available only to military members. And no court had ever held that an employer must have acted with anti-military bias for USERRA to provide a remedy for the denial of leave available only to military members.

Rather, every court to examine that specific issue has held that anti-military animus is not an essential element of a USERRA claim involving the denial of benefits available only to members of the military. *See, e.g., Belaustegui v. Int'l Longshore & Warehouse Union*, 36 F.4th 919, 925-29 (9th Cir. 2022); *Adams v. Department of Homeland Security*, 3 F.4th 1375, 1377-78 (Fed. Cir. 2021); *Tierney v. Department of Justice*, 717 F.3d 1374, 1377 (Fed. Cir. 2013); *Maiers v. Dep't of Health & Hum. Servs.*, 524 F.App'x 618, 623 (Fed. Cir. 2013); *Duncan v. Department of the Air Force*, 674 F.3d 1359, 1363 (Fed. Cir. 2012); *Butterbaugh v. Department of Justice*, 336 F.3d 1332, 1336 (Fed. Cir. 2003); *Potts v. City of Binghamton*, 2022 WL 4448226 *7 (N.D.N.Y. September 23, 2022); *United States v. Missouri*, 67 F.Supp.3d 1047, 1050-53 (W.D.Mo. 2014); *Jopson v. Maguire*, 810 N.Y.S.2d 302, 304 (N.Y. Sup. Ct. 2006); *see also The USERRA Manual*, §§ 3:5, 7:8.

The circuit court's rationale for dismissing the plaintiff technicians' claims is not just unprecedented, however, it is legally incorrect. Both the lower court and Appellee brief appear to get tripped up by focusing on

USERRA's applicability to a denial of benefits on the basis of one's "membership" in the military, which typically would be an expression of anti-military bias. But the statute's protections are broader than just that.

Under USERRA, a person "who is a member of, . . . performs, has performed, . . . or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or *any benefit of employment by an employer* on the basis of that membership, . . . *performance of service*, . . . or obligation." 38 U.S.C. § 4311(a) (emphasis supplied). The statute's legal protections thus may be invoked whenever a person's "performance of service" is a motivating factor, *i.e.* taken into account or considered, in the employer's action. 38 U.S.C. § 4311(c); *Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1234 (11th Cir. 2005). Plaintiffs' performance of service in the form of active duty under Title 10—having been converted to that duty after originally being issued AGR orders—plainly was a motivating factor in the denial of employment benefits because it necessarily was considered and taken into account by the Adjutant General when denying them paid military leave.

As the Appellee brief candidly admits, moreover, *Kelly v. Omaha Pub. Power Dist.*, 75 F.4th 877 (8th Cir. 2022), the sole case to which it cites on this issue, is inapposite "because it does not resolve the issue in question here[.]" (Brief at 16). In *Kelly*, the Eighth Circuit reviewed summary judgment on a USERRA claim entered in favor of a private employer, the

Omaha Public Power District, which had denied private tuition assistance under the company's Employee Education Program to its employee, a retired Navy veteran. *See id.* at 880.

The Eighth Circuit affirmed because there was no dispute that the employer would have denied tuition assistance to the employee irrespective of his past military service, because the employee was already receiving tuition assistance under the G.I Bill that completely paid for his educational expenses and none of its employees already receiving full tuition assistance from another source were eligible for the company's tuition assistance program. *See id.* at 879-84 ("Thus, a policy like OPPD's that conditions an employee's eligibility for an employment benefit on whether the employee is receiving similar benefits from another source—including the military—is not necessarily tantamount to one that impermissibly discriminates against employees who have served in the military").

As the Appellee brief appears to recognize and concede, that situation is simply not analogous to the present denial of paid military leave to the plaintiffs on the basis of having converted to active duty under Title 10 after initially receiving AGR orders. The *Kelly* decision thus lends no support to the Appellee brief's theory of the case.

CONCLUSION

Plaintiffs Tyler Christiansen, Trevor Dietrich, Shaun Donelan, Matthew Hendrickson, Kelsey Lambert, Ethan May, and Christopher

Thacker respectfully request that this Honorable Court reverse the lower court's Judgment of Dismissal (R. 255; App. 1) and Order Denying Plaintiffs' Motion for New Trial and Reconsideration of Memorandum Decision (R. 257; App. 10), and remand to the circuit court with instructions to grant them their requested relief on their USERRA claims, including their reasonable attorney fees and litigation expenses under 38 U.S.C. § 4323(h)(2).

In addition, plaintiffs are filing a separate motion with this Court under SDCL 15-26A-87.3 to respectfully request their reasonable appellate attorney fees and the return of their filing fees in accordance with 38 U.S.C. § 4323(h)(1) & (2).

Respectfully submitted this 8th day of October, 2024.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 2,313 words, excluding the table of contents, table of cases, jurisdictional statement, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

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CERTIFICATE OF SERVICE

The undersigned hereby certify that a true and correct copy of the foregoing REPLY BRIEF OF APPELLANTS was served via Odyssey File and Serve upon the following:

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