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The Beginning of the End: Implications of Violating USERRA

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I. Introduction

"Every year, more than a thousand National Guard, reserve and active-duty troops coming back from Iraq, Afghanistan or other military duties complain of being denied jobs or otherwise being penalized by employers because of their military obligations. The biggest offender: the federal government."[1] In fiscal year 2011, "More than 18 percent of the 1,548 complaints of violations of [the Uniformed Services Employment and Reemployment Rights Act] involved federal agencies, according to figures obtained under the Freedom of Information Act."[2] These violations are not exclusive to federal agencies; some are privately owned companies.[3]

Kevin Ziober was a member of the United States Navy Reserve.[4] His full-time civilian employer was BLB Resources, Inc., a real estate marketing and managing firm.[5] Approximately six months after he was hired, Mr. Zoiber signed a bilateral arbitration agreement.[6] After that, Mr. Zoiber was called to serve his country in a deployment to Afghanistan.[7] Mr. Zoiber provided notice to his employer that he would be taking leave to serve his country; on his last day with the company, he was told he would not have a job at BLB Resources, Inc. after he returned from his deployment.[8]

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[1] Steve Vogel, *Returning Military Members Allege Job Discrimination-by Federal Government*, WASH. POST, Feb. 19 2012, https://www.washingtonpost.com/world/national-security/returning-military-members-allege-job-discrimination--by-federal-government/2012/01/31/gIQAXvYvNR_story.html.
[2] *Id.*
[3] *See* Ziober v. BLB Res., Inc., 839 F.3d 814 (9th Cir. Cal. 2016).
[4] *Id.* at 815-816.
[5] *Id.* at 816.
[6] *Id.*
[7] *Id.*
[8] *Id.*

In April 2014, after returning from Afghanistan, Mr. Zoiber sued his former employer for "violating USERRA's provisions protecting service members against discrimination and establishing reemployment rights."[9] The employer moved to have the arbitration agreement enforced, and the district court obliged.[10] Mr. Zoiber appealed, claiming that the "plain text and history of USERRA [Uniformed Services Employment and Reemployment Rights Act] reveal that Congress intended to preclude the compelled arbitration of claims arising under its provisions."[11]

The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") has three stated purposes: (1) to encourage service in the National Guard and Reserve by minimizing the disruption to service member's civilian employment due to military service; (2) to minimize disruption to the service member's employers, family, community and coworkers by providing for prompt reemployment upon return; and (3) to prohibit discrimination in employment and reemployment against National Guard and Reserve members due to their military service.[12] Section 4302 of USERRA speaks of USERRA's relation to other law and plans or agreements:

> (a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter. (b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.[13]

[9] *Id.*
[10] *Id.*
[11] *Id.* at 817.
[12] 38 U.S.C., § 4301 (2012).
[13] 38 U.S.C. § 4302 (2012).

The Federal Arbitration Act ("FAA") was first enacted in 1925. It codifies the federal policy of enforcing arbitration agreements.[14] The FAA's "primary purpose . . . was to make arbitration agreements enforceable in federal court." [15] This article will address how these two federal statutes are incompatible, as well as the negative implications of violating USERRA.

This article will address the history, background, and purpose of USERRA, as well as the legislative history of the Federal Arbitration Act ("FAA"). These two federal statutes are in conflict when employers contractually obligate their service members to arbitration in violation of their USERRA rights. Specifically, USERRA's non-waiver provision and the FAA are incompatible. The Eleventh Circuit Court in *Bodine v. Cook's Pest Control* addressed this issue head on. [16] This article's position is that the dissent in *Bodine* applied the proper legal analysis.

Next, this article will review the legislative histories of Title VII of the Civil Rights Act of 1964 and the U.S. Equal Employment Opportunity Commission ("EEOC"). USERRA's anti-discrimination provisions are similar to the EEOC legislation and lends itself to a comparison. Finally, this article will discuss the negative implications of violating USERRA and the proposed changes in order to negate these issues.

II. Background

This section will review both USERRA and the FAA. The history of USERRA will be discussed, including the purpose of USERRA and how the statute operates. Then, an in-depth analysis of the legislative history of the FAA will be discussed.

A. USERRA

[14] Asa Lopatin, *What Constitutes Arbitration for Federal Arbitration Act Purposes?*, ABA: ALTERNATIVE DISPUTE RESOLUTION (June 16, 2014), http://apps.americanbar.org/litigation/committees/adr/articles/spring2014-0614-federal-arbitration-act.html.
[15] Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 106 (2002).
[16] Bodine v. Cook's Pest Control Inc., 830 F.3d 1320 (11th Cir. 2016).

Protecting civilian employment started with the Selective Service Training Act of 1940 ("SSTA"). The SSTA was amended over 25 times and the Supreme Court has interpreted it in 18 cases – yet SSTA's fundamental premise has remained constant: protect our national security and ensure that people who serve are not disadvantaged by serving.[16] With every major conflict, the SSTA has been changed.[17] Further, after the first Gulf War, the SSTA was completely revamped with the passage of new legislation — USERRA.[18] USERRA was passed in response to reports of firings, layoffs, and other adverse employment actions taken against deployed National Guard and Reserve component members from the first Gulf War.[19] USERRA is the most comprehensive legislation yet aimed at protecting citizen-soldiers, and it is more effective in this regard than any of its predecessors.[20] USERRA expanded upon previous laws to provide anti-discrimination protection, reemployment rights, and protections for National Guard and Reserve members.[21]

Regulations provided by USERRA are fundamental to ensure the protection of citizen-soldiers.[22] Historically, the military has relied on citizen-soldiers to supplement the active-duty troops to ensure that the U.S. military is appropriately armed.[23] Today, every branch of the military has a Reserve component.[24] The purpose of each Reserve component is to "provide trained units and qualified persons available for active duty in the armed forces, in time of war or

[16] THE AMERICAN BAR ASSOCIATION, LEGAL GUIDE FOR MILITARY FAMILIES (2013).
[17] *Id.*
[18] *Id.*
[19] BRIAN CLAUSS & STACEY RAE SIMCOX, SERVICEMEMBER AND VETERANS RIGHTS, (Lexis Nexis 2014).
[20] *Id.*
[21] *Id.*
[22] THE AMERICAN BAR ASSOCIATION, LEGAL GUIDE FOR MILITARY FAMILIES, 257 (2013).
[23] David Segal & Mady Wechsler Segal, Population Reference Bureau, *U.S. Military's Reliance on the Reserves*, (March 2005), http://www.prb.org/Publications/Articles/2005/USMilitarysRelianceontheReserves.aspx.
[24] National Center for PTSD, *Active Duty vs. Reserve or National Guard*, Apr. 6, 2012, http://www.va.gov/vetsinworkplace/docs/em_activeReserve.html.

national emergency, and at such other times as the national security may require, to fill the needs of the armed forces whenever more units and persons are needed than are in the regular components."[25] As part of the Reserve component, the National Guard performs a unique role in military readiness-states forces that can also be called to federal military service.[26] The Reserve component members include Air and Army National Guard and reserves from each of the five branches of the armed forces; these individuals are part time civilians, part time soldiers.[27] These reserve forces are critical to the military's total forces."[28] While the National Guard and Reserve components have historically been criticized for being "part-time, volunteers who are poorly trained, poorly funded and under equipped,"[29] the end of the 20th and beginning of the 21st centuries saw the National Guard become an operational reserve, and both the National Guard and the Reserve components have been deployed in record numbers.[30] The Reserve components are a critical aspect of national security.[31] "Whether flying supply and logistics support missions, acting as the federal government's first response force at home, or supporting active-duty forces during combat engagements overseas, these components have enabled and enhanced the U.S. Military's overall capabilities and capacities."[32] Hundreds of thousands of National Guard and Reserve component members have been activated since 9/11.[33]

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[25] 10 U.S.C § 10102 (2004).
[26] THE AMERICAN BAR ASSOCIATION, LEGAL GUIDE FOR MILITARY FAMILIES, 257 (2013).
[27] David Segal & Mady Wechsler Segal, Population Reference Bureau, *U.S. Military's Reliance on the Reserves*, (March 2005), http://www.prb.org/Publications/Articles/2005/USMilitarysRelianceonthe Reserves.aspx.
[28] Patty Ritchie, *Military Reserves Critical to Our Nation's Defense* (June 27, 2011), https://www.nysenate.gov/newsroom/articles/patty-ritchie/military-reserves-critical-our-nations-defense.
[29] Brain Clauss, *Protecting Civilian Employment Providing Healthcare to the Citizen Soldier in the National Guard and Reserve Components*, 45 U. MEM. L. REV. 915, 917 (2015).
[30] *Id.* at 927; *See* Ryan Wedlund, *Citizen Soldiers Fighting Terrorism: Reservists' Reemployment Rights*, 30 WM. MITCHELL L. REV. 797, 801 (2004).
[31] Col. Richard J. Dunn III, *America's Reserve and National Guard Components: Key Contributors to U.S. Military Strength*, THE HERITAGE FOUNDATION (2016).
[32] *Id.*
[33] *See* Michele A. Forte, *Reemployment Rights for the Guard and Reserve: Will Civilian Employers Pay the Price for National Defense?*, 59 A.F.L. REV. 287, 289 (2007) (discussing that from September 11, 2001, to 2007,

Studies have found a correlation between mental health issues, the number of times deployed, and the length of time deployed in war zones.[34] National Guard and Reserve component members returning from deployment experience mental health issues at a rate more than 50% higher than their active duty counterparts.[35] Although suicide rates among active duty members have lessened, those rates have increased among National Guard and Reserve component members.[36]

Both the National Guard and the Reserves are critical operational reserves and will continue to be used by the Department of Defense.[37] General Jack Stultz, former Chief of the Army Reserve, testified to Congress that the Army "has to have an operational reserve[s][.] Just in raw numbers, 75 percent of your engineering capabilities[,] 80 percent of your logistics capability[,] 75 percent of your medical capability[,] 85 percent of your civil affairs capability, which is in high demand, is in the reserve or the Guard." [38] General Harry Wyatt, former Director of the Air National Guard, also testified, "The Air National Guard provides about 34 percent of the total capability of the Air Force on about 7 percent of the budget . . . That's probably the most cost-effective arm of the Air Force that we have."[39] With the current political climate focused on cutting the defense budget, the Guard and Reserve components will allow for a lower

"approximately 517,000 Reserve component members of the United States military ha[d] been mobilized in support of Operations Noble Easle, Enduring Freedom and Iraqi Freedom").

[34] Olumpia Duhart, *Soldiers Suicides and Outcrit Jurisprudence: An Anti-Subordination Analysis*, 44 CREIGHTON L. REV. 883, 889-91 (2011).

[35] Lauren Everitt et al., *Efforts Lag to Improve Care for National Guard*, WASH. POST, Feb. 14, 2012, https://www.washingtonpost.com/national/national-security/efforts-lag-to-improve-care-for-national-guard/2012/02/04/gIQAymEWER_story.html?utm_term=.ad0574ed1ab3.

[36] *Id.*

[37] John A. Nagl & Travis Sharp, *Operational for What' The Future of the Guard and Reserves*, Sept. 28, 2010, https://www.army.mil/article/45819/operational_for_what_the_future_of_the_guard_and_reserves (last visited 16 Nov 17)

[38]Sgt. John Orrell, Nat. Guard Bureau, *Guard Leaders or House Subcommittee: National Guard should Remain Operational Reserve*, (Apr. 7, 2011), http://www.nationalguard.mil/News/ArticleView/Article/60128 9/guard-leaders-to-house-subcommittee-national-guard-should-remain-operational-re/.

[39] *Id.*

defense budget, without limiting the capability of our armed forces.[40] With the increase role of the citizen-soldier in operational readiness, the role of USERRA cannot be overstated.[41]

Unlike other employment laws that are "justified under the commerce clause, USERRA was enacted pursuant to the War Powers Clause of the U.S. Constitution."[42] It also distinguishes the federal government because of its special role in employing citizen-soldiers.[43] 38 U.S.C. Section 4302(b) states "the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter."[44]

USERRA accomplishes these purposes by providing protection in two ways: (1) anti-discrimination; (2) and reemployment rights.[45] The anti-discrimination provisions of 18 U.S.C. § 4311prohibit discrimination in employment based on prior military service or obligations.[46] The reemployment provisions of 38 U.S.C. § 4312 address the return-to-work rights of service members who performed military service in the National Guard and Reserve component.[47]

USERRA covers virtually all U.S. employers, including private employers, regardless of size, as well as federal, state, and municipal governments, for-profit, non-profits, and general contractors and their sub-contractors.[48] The anti-discrimination protection applies to "any person employed by an employer: who voluntarily or involuntarily 'is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service

[40] John A. Nagl & Travis Sharp, *Operational for What' The Future of the Guard and Reserves*, Sept. 28, 2010, https://www.army.mil/article/45819/operational_for_what_the_future_of_the_guard_and_reserves.
[41] Charles Lathrop, *The Army's Unsung Heroes: Full-Time Support to the Army National Guard*, Association of the US Army (July 3, 2000), https://www.ausa.org/publications/army%E2%80%99s-unsung-heroes-full-time-support-army-national-guard-and-army-reserve.
[42] *See* U.S. CONST. art 1, § 8, cl 11.
[43] *Id.*
[44] 38 U.S.C. § 4301(b) (2000).
[45] 38 U.S.C. § 4311-4312 (2012).
[46] Coffman v. Chugach Support Servs., 411 F.3d 1231, 1234 (11th Cir. 2005).
[47] Leib v. Georgia-Pacific Corp., 925 F.2d 240, 242 (8th Cir. 1991).
[48] 38 U.S.C § 4303(4) (2012). There are certain exemptions for certain federal agencies that work on national defense. *See* 20 C.F.R. §1002.34 (2006).

in a uniformed service.'"[49] However, USERRA does not supersede any law, regulation, or collective bargaining agreement that provides for greater rights than those granted by USERRA.[50] Conversely, USERRA *does* supersede any state statute, regulation, or collective bargaining agreement that restricts USERRA rights or places additional requirements upon the service member.[51] In addition to the widespread protection provided, enforcing those rights also comes with no statute of limitations for USERRA claims.[52]

USERRA prevents employment discrimination against an individual based on service in the Reserve or Guard.[53] Section 4311 states, in pertinent part, that:

> (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.[54]

In essence, this means that an individual is qualified under this statute if s/he is a member of the armed forces.[55] Said individual cannot be denied employment, promotions, or any benefit of employment due to their service:[56]

> (b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter.[57]

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[49] 38 U.S.C. § 4303(3) (2012).
[50] 38 U.S.C. § 4302(a) (2012).
[51] 38 U.S.C. § 4302(b) (2012).
[52] 38 U.S.C. § 4327(d) (2012).
[53] THE AMERICAN BAR ASSOCIATION, LEGAL GUIDE FOR MILITARY FAMILIES, 258 (2013).
[54] 38 U.S.C. § 4311(a) (2002).
[55] *See* Montoya v. Orange County Sheriff's Dep't, 987 F. Supp. 2d 981, 1008 (C.D. Cal. 2013).
[56] *Id.*
[57] 38 U.S.C. § 4311(b) (2002).

This section means that an employer cannot discriminate against an individual if said individual takes any action to enforce their rights under this statute.[58] Under USERRA, an employer is defined as "any person, institution or organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities."[59] The broad definition also includes any entity that has been "delegated the performance of employment-related responsibilities" such as a successor in interest, regardless of whether the successor knew of the possible USERRA claim at the time of the merger or acquisition.[60] This also includes government contractors[61] and union hiring halls.[62] Section (c)(1) of USERRA provides that

> (c) 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; or[63]

Section (c), subsection (1) means that an employer cannot use an individual's service in the armed forces as a motivating factor in the employer's decision to fire an individual.[64] The only exception to this is if the employer can prove that, regardless of the individual's service, the same action would have occurred:[65] Section (c)(2) states that

> if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this

[58] See Francis v. Booz, Allen & Hamilton, Inc., 452 F.3d 299, 302 (4th Cir. Va. 2006).
[59] 38 U.S.C. § 4303(4)(a) (2002).
[60] 20 C.F.R. §1002.36 (2006).
[61] 20 C.F.R. §1002.37 (2006).
[62] 20 C.F.R. §1002.38 (2006).
[63] 38 U.S.C. § 4311 (2002).
[64] *See Montoya*, 987 F. Supp. 2d 981, 1008 (C.D. Cal. 2013).
[65] *See. Id.*

> chapter, 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 person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.[66]

Section (c), subsection (2) means that if an individual in the Armed Forces takes any action to utilize this statute, the employer cannot use it as a motivating factor in the employer's action unless the employer can prove that this action would have been taken regardless.[67]

An employer cannot discriminate in initial employment, reemployment after service, retention in employment, promotion or any benefit of work.[68] Section 4311(c) was enacted in response to the Supreme Court's ruling in *Monroe v. Standard Oil Co*.[69] *Monroe* held that "38 U.S.C.S. § 2021(b)(3) did not require an employer to provide preferential scheduling of work hours for an employee who was absent from work to fulfill his military reserve obligations."[70] USERRA "liberalized this requirement by providing that a violation could be established if the individual's military service was a 'motivating factor' in the discriminatory action, even if it was not the only factor."[71] In 2011, USERRA was amended to include protection against hostile work environments on the basis of military status.[72] The phrase Congress added — "terms, conditions, or privileges of employment" — directly mirrors the language under Title VII of the Civil

[66] 38 U.S.C. § 4311 (2002).
[67] *See Francis*, 452 F.3d at 302.
[68] THE AMERICAN BAR ASSOCIATION, LEGAL GUIDE FOR MILITARY FAMILIES, 258 (2013).
[69] *Monroe*, 452 U.S. at 559 (held that under the VRRA, allegations of discrimination in employment based upon military service could be proven only if the employee could establish that the discrimination was motivated solely by reserve status).
[70] *Monroe*, 452 U.S. at 551.
[71] Sheehan v. Dep't of Navy, 240 F.3d 1009, 1012-13 (Fed. Cir. 2001); Woodard v. N.Y. Health & Hosps. Corp., 554 F. Supp. 2d 329, 348 (E.D.N.Y. 2008).
[72] Veterans' Benefit Act of 2010, Pub. L. No. 112-56, § 251.

Rights Act of 1964.[73] In 1986, the Supreme Court found that "this language permitted a plaintiff to assert a hostile work environment claim in a Title VII case."[74] Because Congress is "presumed to understand the legal import of words it uses in light of existing case law," the Court found that, "by adding this particular phrase Congress intended to ensure that plaintiffs are able to bring hostile work environment claims under USERRA."[75]

Further, an employer is prohibited from retaliating against a member of the armed services for bringing enforcement action under the USERRA.[76] Otherwise stated, an employee cannot be subjected to an adverse employment action because the employee acted to bring a claim for USERRA protection, has assisted an investigation of a USERRA matter, or exercised a USERRA right.[77] USERRA "requires the complaining soldier or veteran to demonstrate *only* that his or her military service was a *motivating factor* in an adverse employment action."[78] (emphasis added.) Once the plaintiff has discharged his initial burden of establishing a prima facie case of discrimination, the burden shifts to "the employer . . . to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the adverse action anyway, for a valid reason."[79] This means that an employee who makes a

[73] *See* Montoya v. Orange County Sheriff's Dep't, 987 F. Supp. 2d 981, 1012 (C.D. Cal. 2013); *see* 42 U.S.C. § 2000e-2 (1991) (stating that it is unlawful to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin).
[74] *Montoya*, 987 F. Supp. 2d at 1012-12; s*ee* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) ("[T]he phrase terms, conditions, or privileges of employment in Title VII is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.").
[75] *Montoya*, 987 F. Supp. 2d at 1013.
[76] 38 U.S.C. § 4311 (2012).
[77] Escher v. BWXT Y-12, 627 F.3d 1020 (6th Cir. 2010).
[78] *See* 38 U.S.C. § 4311(c)(1) (2012); Hance v. Norfolk S. Ry., 571 F.3d 511, 518 (6th Cir. 2009).
[79] Sheehan v. Dep't of Navy, 240 F.3d 1009, 1013 (Fed. Cir. 2001).

discrimination claim under USERRA bears the initial burden of showing, by a preponderance of the evidence, that his military service was a substantial or motivating factor in the adverse employment action.[80] If the employee makes that prima facie showing, the employer can avoid liability by demonstrating, as an affirmative defense, that it would have taken the same action without regard to the employee's military service.[81] Therefore, an employer violates Section 4311 if it would not have taken the adverse employment action but for the employee's military service or obligation.[82]

B. FAA

Arbitration is a "creature of contract between parties who have willingly agreed to resolve their disputes outside the courts. It is encouraged by the legal system as a fast, cheap, and informal alternative to litigation."[83] In enacting § 2 of the FAA, Congress declared a "national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[84] The FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[85]

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[80] Erickson v. U.S. Postal Serv., 571 F.3d 1364, 1368 (Fed. Cir. 2009).
[81] *Erickson*, 571 F.3d at 1368; Velazquez-Garcia v. Horizon Lines Of Puerto Rico, Inc., 473 F.3d 11, 17 (1st Cir. 2007).
[82] *See Erickson*, 571 F.3d at 1368 (citing H.R. REP. NO. 103-65, at 24 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2457).
[83] Aaron Bayer, *Arbitration Appeals*, NAT'L L. J. (June 28, 2004), http://www.wiggin.com/4801; *see e.g.* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 632 (1985).
[84] Southland Corp. v. Keating, 465 U.S. 1, 10 (U.S. 1984).
[85] 9 U.S.C. § 2 (2015).

Congress enacted the FAA, which was then called the Unites States Arbitration Act, in 1925.[86] The Act was a result of years of drafting and lobbying by business groups and the ABA.[87] The ABA Committee on Commerce, Trade, and Commercial Law "prepared the original draft of the bill, and Congress enacted it into law with only minor amendments."[88] At the time the FAA was enacted, *Swift v. Tyson*, which held that federal diversity actions were free to ignore the common law of the state that resulted in forum shopping, was still good law.[89] At this point in time, "rules governing the enforcement of arbitration agreements were seen as procedural, not substantive, and so were governed by the law of the forum."[90] It wasn't until after the Supreme Court's 1956 decision in *Bernhardt v. Polygraphic Co.*, that the Court recognized the enforceability of agreements to arbitrate as a substantive matter to be governed by state law in federal diversity cases that go beyond the scope of the FAA.[91]

The primary purpose of the FAA was to "make arbitration agreements enforceable in federal courts."[92] Congress intended "more comprehensive objectives" than adopting rules applicable only in federal court: "The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be the subject of litigation in the federal courts."[93] The "principle purpose" of the FAA was to "require courts to enforce privately negotiated

[86] Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 125 (2002).
[87] 3 Ian R. Macneil et al., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, & REMEDIES UNDER FEDERAL ACT, 84-101 (1994).
[88] *Id.* at 84-91.
[89] Swift v. Tyson,41 U.S. 1 (1842).
[90] Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 126 (2002).
[91] Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 203-04 (1956).
[92]Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 105 (2002).
[93] Southland Corp. v. Keating, 465 U.S. 1, 12 (1984).

agreements to arbitration, like other contracts, in accordance with their terms."[94] Form contracts, otherwise known as "contracts of adhesion," consist of one party who offers terms on a non-negotiated, "take-it-or-leave-it" basis.[95] These contracts are contrary to the intended purpose of the FAA.[96] In fact, the legislative history of the FAA reveals that Congress intended it to target commercial parties of generally comparable bargaining power rather than consumers or, by extension, investors.[97] As Representative William Graham noted in the debate on the House floor in 1924, "This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts — an agreement to arbitrate, when voluntarily placed in the document by the parties to it." [98] Legislative history reveals that Congress intended the FAA to cover disputes between merchants of approximately equal strength[99] but not those involving disputes with workers[100] or disputes where the arbitration agreement could be considered an adhesion contract.[101]

[94] Volt Info. Scis., Inc. v. Bd. Of Trs. of Leland Stanford Junior U., 489 U.S. 468, 478 (1989).
[95] *The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?: Hearing on S. 878 Before the S. Comm. On the Judiciary*, 113th Cong. (2013) (statement of Mike Rothman, Comm'r Minn. Dep't Com.), http://www.nasaa.org/28459/federal-arbitration-act-access-justice-will-recent-supreme-court-decisions-undermine-rights-consumers-workers-small-businesses/.
[96] *Id.*
[97] *Id.*
[98] 68 CONG. REC. 1931 (1924).
[99] *Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary*, 68th Cong. 10 (1924).
[100] *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9, 14 (1923).
[101] H.R. REP. NO. 111-712, at 128. (1924).

To the detriment of the consumer, the Supreme Court has expanded the reach of the FAA over the past 20 years to apply in contracts between parties of unequal bargaining power.[102] Congress discussed this expansion during their 2009-2010 session.[103]

> Although arbitration was initially conceived as a privately-run, voluntary process for resolving disputes, mainly between businesses, written and oral testimony from Congressional hearings during the 110th Congress indicated that the use of arbitration had expanded in the last twenty years. Many businesses are now requiring arbitration of disputes in their consumer, employment, and franchise relationships. Ironically, during the passage of the Federal Arbitration Act, Congress did not intend to allow binding arbitration agreements on individuals if the contracts were between parties of unequal bargaining power. The secret nature of arbitration, the ability of the drafter to dictate the terms of the arbitration process, and the apparent loss of civil protections when compared to a court proceeding have created controversy among consumer and employee advocates and small business owners.[104]

Because arbitration "avoids the public court system in favor of a private industry of arbitration groups, individuals lose some of the benefits and rights associated with traditional litigation."[105] These benefits and rights include "lower initial financial hurdles, pretrial discovery, formal civil procedure rules, proximity to the resolution forum, access to counsel, class action options, and fairness."[106] Arbitration clauses may even "negate the protection of some federal statutes. Several recent developments necessitated the [Subcommittee on Commercial and Administrative Law] to hold hearings generally on arbitration." [107] While there is a clear federal policy favoring arbitration,[108] the original intent of the FAA and how it is currently being enforced are at odds.

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[102] *The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?: Hearing on S. 878 Before the S. Comm. On the Judiciary*, 113th Cong. (2013) (statement of Mike Rothman, Comm'r Minn. Dep't Com.), http://www.nasaa.org/28459/federal-arbitration-act-access-justice-will-recent-supreme-court-decisions-undermine-rights-consumers-workers-small-businesses/.
[103] H.R. REP. NO. 111-712, at 126.
[104] *Id.* at 55-56.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

III. Issue

This section of the article will discuss how USERRA and the FAA are incompatible. In particular, USERRA's non-waiver provision is incompatible as applied to arbitration agreements with USERRA offending terms. The article will then discuss the *Bodine* case, which is a particularly applicable case in regards to this issue. [113] This article contends that the dissent in the *Bodine* case was correct in its analysis.

Next, the article will examine Title VII of the Civil Rights Act of 1964 and the EEOC, paying particular attention to the statute's legislative history. USERRA is often analyzed through the employment law lens used in EEOC cases. Therefore, USERRA and the EEOC lend themselves to comparison.

A. USERRA's Non Waiver Provision and the FAA are Incompatible as Applied to Arbitration Agreements with USERRA Offending Terms.

USERRA was drafted to supersede any contracts that reduce, limit, or eliminate any rights under USERRA.[109] The statute specifically "supersedes any State law . . . , contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit."[110]Arbitration agreements are contracts, and the FAA placed "arbitration agreements on an even footing with all other contracts."[111] Accordingly, USERRA "supersedes any arbitration agreements that abrogate *in any manner* the rights provided by the USERRA as described in the text of the

[113] Bodine v. Cook's Pest Control Inc., 830 F.3d 1320 (11th Cir. 2016).
[109] 38 U.S.C. § 4302(b) (2015).
[110] *Id.*
[111] Anders v. Hometown Mortg. Servs., 346 F.3d 1024, 1032 (11th Cir. 2003).

statute."[112] The Supreme Court has held that by entering into an arbitration agreement "covering statutory claims, a party does not relinquish his or her substantive rights provided by the statute. Instead, the party simply submits the determination of those rights to an arbitral rather than a judicial forum."[113]

The House Report on Section 4302(a) of the USERRA states that Section 4302(b) would "reaffirm a general preemption as to State and local laws and ordinances, as well as to employer practices and agreements, which provide fewer rights or otherwise limit rights provided under amended chapter 43 or put additional conditions on those rights."[114] Furthermore, this section would reaffirm that utilizing tools such as grievance procedures or arbitration or similar administrative appeals is not required.[115] It is the "Committee's intent that, even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law."[116] The Committee further stressed that rights under chapter 43 "belong to the claimant, and he or she may waive those rights, either explicitly or impliedly, through conduct. Because of the remedial purposes of chapter 43, any waiver must, however, be clear, convincing, specific, unequivocal, and not under duress."[117] Additionally, "Only known rights which are already in existence may be waived. An express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, would be contrary to the public policy embodied in the Committee bill and would be void."[118] Thus, the Congressional intent behind "the USERRA is clear: Section 4302(b) was intended to preempt employer-

[112] Breletic v. CACI, Inc., 413 F. Supp. 2d 1329, 1334 (N.D. Ga. 2006).
[113] *Id.* at 1336; *see* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).
[114] H.R. REP. NO. 103-65 (1994), *as reprinted in* U.S.C.C.A.N. 2453.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] H.R. REP. NO. 103-65 (1994), *as reprinted in* U.S.C.C.A.N. 2453.

employee agreements that limit rights provided under the USERRA or put additional conditions on those rights."[119]

The House Report demonstrates Congress's intent that an "arbitration decision would not be binding in this situation, even if a person covered by the USERRA resorted to arbitration."[120] Specifically, that subsection supersedes any agreement that imposes additional "prerequisites to the exercise of any . . . right or the receipt of any . . . benefit" provided by the act.[121] Thus, given the language of Section 4302(b) and the legislative history of USERRA, the Supreme Court has held that USERRA grants those "covered by it the right to pursue their claims in a judicial forum and that the USERRA preempts arbitration agreements purportedly covering claims arising under the USERRA."[122]

B. A Case Study- The Bodine Case.

In *Bodine*, Plaintiff-Appellant Rodney Bodine was an employee of Defendant-Appellee Cook's Pest Control from 2012 to 2014, during "which time he also served in the United States Army Reserve."[129] Bodine's "commitment to the armed forces required him to periodically take leave from work to attend drills and training."[123] Bodine alleged that his supervisor, Max Fant, "repeatedly discriminated against him on the basis of his military service by making negative comments about his military obligations, encouraging him to leave the Army Reserve, taking work away from him while he was at drills and training, and eventually firing him in retaliation for continued military

[119] Breletic v. CACI, Inc., 413 F. Supp. 2d 1329, 1336 (N.D. Ga. 2006).
[120] *Id*.
[121] 38 U.S.C. § 4302(b) (1994).
[122] *Breletic*, 413 F. Supp. 2d at 1337.
[129] Bodine v. Cook's Pest Control Inc., 830 F.3d 1320, 1323 (11th Cir. 2016).
[123] *Id*.

service."[124] The case required the Court to "interpret the non-waiver provision of USERRA as it relates to the FAA and enforcement of an arbitration agreement with terms purportedly in conflict with USERRA."[125]

Bodine argued that the arbitration agreement was "unenforceable because the arbitration agreement *itself* contained two terms that violated USERRA: (1) the limitation on the employee's arbitration costs, with opportunity for the arbitrator to re-apportion costs and attorney's fees in the arbitrator's final order (fee term); and (2) the six-month statute of limitations (statute of limitations term)."[126] USERRA states that there is "no statute of limitations for bringing a USERRA claim and no imposition of court costs or fees may be charged to a USERRA plaintiff."[127] Cook's conceded that these two terms "ran afoul of USERRA, but argued that the Contract's severability clause could be used to remove the invalid terms from the arbitration agreement while retaining and enforcing the remainder, pursuant to the FAA."[128] Bodine responded that USERRA's non-waiver provision, 38 U.S.C. § 4302(b), "precluded enforcement of the arbitration agreement, despite the FAA, because the plain language of § 4302(b) prevents enforcement of any agreement that contains terms that reduce substantive USERRA rights, and the fee term and statute of limitations term reduced Bodine's substantive USERRA rights."[129] The district court ruled in favor of Cook's, severing the violating terms of the arbitration agreement while enforcing the remainder pursuant to the FAA.[130] However, the district

[124] *Id*.
[125] *Id*. at 1322.
[126] *Id*. at 1323.
[127] *Id*.; *see* 38 U.S.C. § 4323(H)(l), § 4327(b) (2008).
[128] *Bodine*, 830 F.3d at 1323.
[129] *Id*.
[130] *Id*. at 1323 -1324.

court did not address the role or scope of USERRA's non-waiver provision or its relationship to the FAA.[131]

On appeal, Bodine renewed the same argument, contending that the district court erred by "failing to apply the plain language of USERRA's non-waiver provision."[132] Bodine argued that the "arbitration agreement would be unenforceable, as a whole, because the plain language of that subsection states that USERRA 'supersedes' any 'agreement' that 'limit[s], reduce[s], or eliminate[s]' any rights protected under USERRA, and the arbitration agreement contains USERRA-offensive terms."[133] The United States Court of Appeals for the Eleventh Circuit held that the "[c]ontract's arguable delegation clause — which would require that the arbitrator, rather than the court, determine whether the arbitration agreement is enforceable — does not control this appeal."[134] In determining whether the arbitration agreement is enforceable, The Eleventh Circuit concluded that "§ 4302(b) is not in conflict with the FAA and the district court properly determined the arbitration agreement is enforceable."[135]

This article's position is that the majority was incorrect in its analysis and that the dissent, written by Circuit Judge Martin, was correct in its analysis.[136] The majority was wrong two ways. First, "the majority interpret[ed] 38 U.S.C. § 4302(b) in a way that is not consistent with the statute's plain text. Second, the majority [gave] the defendants more than they asked for — a second chance to apply contract terms that admittedly

[131] *Id.* at 1324.
[132] *Id.*
[133] *Id.; see* 38 U.S.C. § 4302(b) (1994).
[134] *Bodine*, 830 F.3d at 1324.
[135] *Id.*
[136] *Id.*at 1328.

violate USERRA. In both ways, the majority weaken[ed] the rights of veterans based on a statute intended to give them strength."[137]

The majority interpreted § 4302(b) as "invalidating only the pieces of an agreement that violate USERRA, rather than the whole agreement."[138] However, as the dissent points out, when the text of the statute is not ambiguous, "[courts] have no call to substitute what [they] think might be a more reasonable reading of a statute — rather, '[they] must apply the statute according to its terms.'"[139]

Section 4302(b) reads, "This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit." [140] In light of its plain language, the dissent argued that the "statute supersedes 'any . . . contract [or] agreement,' not merely the illegal pieces of a contract or agreement,"[141] and that nowhere "does the statute include the limitation found by the majority."[142] Everything listed in §4302(b) ("law . . . , contract, agreement, policy, plan, practice or other matter") is a "whole, not a piece of a larger whole (for example, 'contract provision' or 'term of agreement').[143] Despite knowing "how to limit the scope of a non-waiver provision, Congress chose not to in USERRA, and [courts]

[137] *Id.*
[138] *Id.*
[139] *Id.* at 1329 (citing Carcieri v. Salazar, 555 U.S. 379, 387 (2009)).
[140] 38 U.S.C. § 4302(b) (2015).
[141] *Bodine*, 830 F.3d at 1329.
[142] *Id.*
[143] *Id.*

should understand that choice as *deliberate*."[144] Congress plainly said the statute supersedes "contract[s]" and "agreements[s]" that reduce USERRA rights.[145]

It would seem that USERRA's purpose to "vigorously protect veterans" rights would be better served by superseding more than just the illegal terms (though not any "more beneficial" terms) because doing so deters employer overreaching."[146] Under the majority's interpretation of § 4302(b), "employers will have nothing to lose by including illegal terms in their contracts — even if a legally learned veteran does recognize the illegal terms as such (hardly a foregone conclusion), the worst that can happen to the employer is delicate removal of only the illegal terms."[147] In *Bodine*, this meant that the defendants were still able to "arbitrate Mr. Bodine's case even though they drafted an arbitration agreement that infringed on his USERRA rights. The employer suffers no penalty for its bad drafting."[148] Under the majority's interpretation, "even when employers don't get the unfair benefit of their illegal terms because employees like Mr. Bodine recognize the terms' illegality, USERRA will do nothing to dissuade employers from continuing to use those illegal terms in the future. This result surely does not 'provide the greatest benefit to our servicemen and women.'"[149]

The majority in *Bodine* further eroded veterans' rights by giving the defendants more than they asked for.[150] The defendants "acknowledge[d] that certain provisions of the arbitration agreement violate USERRA."[151] Yet, the majority opinion gave them an

[144] *Id.* at 1329; *see* U. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).
[145] *Bodine*, 830 F.3d at 1329.
[146] *Id.* at 1331.
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.* at 1331-32.
[151] *Id.* at 1332.

"unrequested second change to apply these admitted illegal contract terms."[152] This specifically refers to the "fee term" and the "statute of limitations term," both of which explicitly violate USERRA.[153] The majority opinion "reache[d] out and t[ook] away not just the federal courts' ability to supersede illegal 'contract[s]' or 'agreement[s]' (as the statute says), but the courts' ability to supersede even *the clearly illegal pieces of those contracts."*[154]

Veterans' rights statutes "preceding USERRA stretch back to World War II and 'provide[ ] the mechanism for manning the Armed Forces of the United States.'"[155] Veterans' rights statutes "thus occupy a domain of special national importance, and our courts should not lightly be stripped of the power to enforce them."[156] Under the majority's decision in *Bodine*, the "worst to happen to overreaching employers will be a delicate removal of just their illegal terms. Veterans, on the other hand, may lose their USERRA rights without redress."[157] In the case of a fee term like the one found in Bodine, "A veteran might be forced to pay mandatory mediation and arbitration fees before she can prove (and if she can prove) to an arbitrator that USERRA has been violated."[158] In addition to the majority's "narrow, extra-textual interpretation of § 4302(b), its decision to undo the District Court's severance of the clearly illegal terms walks back veterans' rights rather than protecting them."[159]

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[152] *Id.*
[153] *Id.*; *see* 38 U.S.C. § 4323(h)(l) (stating that "no fees or court costs may be charged or taxed against any person claiming rights under [USERRA]."); *see also* 38 U.S.C. § 4327(b) (stating that "inapplicability of statutes of limitations. If any person seeks to file a complaint or claim . . . alleging a violation of [USERRA], there shall be no limit on the period for filing the complaint of claim.").
[154] *Bodine*, 830 F.3d at 1332.
[155] *Id.* at 1333 (citing Ala. Power Co. v. Davis, 431 U.S. 581, 583 (1977)).
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*

C. Title VII of the Civil Rights Act of 1964's in comparison to USERRA.

This section will examine Title VII of the Civil Rights Act of 1964 ("Title VII") and the EEOC, looking specifically at the legislative history of Title VII. EEOC complaints and USERRA violations are analyzed through the same employment lens. The second part of this section will compare the two.

i. Title VII of the Civil Rights Act of 1964 and the EEOC-a legislative history.

Title VII makes it unlawful to "discriminate against someone on the basis of race, color, national origin, sex or religion. The Act also makes it unlawful to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit."[160] Title VII "prohibits not only intentional discrimination, but also practices that have the effect of discriminating against individuals because of their race, color, national origin, religion, or sex."[161]

Under Title VII, it is unlawful to discriminate in any aspect of employment, including: "hiring and firing; compensation, assignment, or classification of employees; transfer, promotion, layoff, or recall; job advertisements and recruitment; testing; use of company facilities; training and apprenticeship programs; retirement plans, leave and benefits; or other terms and conditions of employment."[162]

Title VII is not limited to the above list; there are other "discriminatory practices" that are also illegal.[163] Those practices include:

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[160] U.S. DEP'T JUST., *Laws Enforced by the Employment Litigation Section*, (Aug. 7, 2015) https://www.justice.gov /crt/laws-enforced-employment-litgation-section; *see* Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (2015).
[161] *Id.*; *see* Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241.
[162] U.S. DEP'T JUST., *Laws Enforced by the Employment Litigation Section*, (Aug. 7, 2015) https://www.justice.gov /crt/laws-enforced-employment-litgation-section; *see* Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (2015).
[163] *Id*.

> harassment on the basis of race, color, national origin, sex or religion; refusal or failure to reasonably accommodate an individual's sincerely held religious observances or practices, unless doing so would impose an undue hardship on the operation of the employer's business; employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain race, color, national origin, sex or religion; and denial of employment opportunities to an individual because of marriage to, or association with, an individual of a particular race, color, national origin, sex or religion.[164]

Complaints under Title VII are filed with the EEOC. Under Title VII, the Department of Justice ("DOJ") has "authority to prosecute enforcement actions against state and local government employers upon referral by the EEOC of complaints arising under the Act."[165] The DOJ also has "authority to initiate investigations and prosecute enforcement actions against state and local government employers where it has reason to believe that a 'pattern or practice' of employment discrimination exists."[166]

The EEOC is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.[167]

EEOC's purpose is to address societal wrongs and to combat discrimination.[168] Although the EEOC was created by Title VII, its mission "has been shaped by more than this one single piece of legislation."[169] In general, the EEOC is "responsible for enforcing federal laws that

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[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Overview*, https://www.eeoc.gov/eeoc/index.cfm.
[168] *See* PAUL BURSTEIN, DISCRIMINATION, JOBS, AND POLITICS: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES SINCE THE NEW DEAL (U. of Chi. Press 1998).
[169] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *The Law*, https://www.eeoc.gov/eeoc/history/35th/thelaw/.

make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information."[170] Many laws and amendments, as well as a handful of executive orders, have "expanded, limited or directed the Commission's responsibilities and authority."[171]

In June 1941, President Franklin D. Roosevelt signed Executive Order 8802, "prohibiting government contractors from engaging in employment discrimination based on race, color or national origin."[172] This is the first presidential action ever taken to "prevent employment discrimination by private employers holding government contracts."[173] The order states that it applies to "all defense contractors, but contains no enforcement authority."[174] President Roosevelt signed Executive Order 0082 mainly to "ensure that there are no strikes or demonstrations disrupting the manufacture of military supplies as the country prepares for War."[175]

Another example of presidential action to end discrimination occurred in July 1948, when President Harry S. Truman ordered the desegregation of the armed forces by Executive Order 9981.[176] The order requires that there be "equality of treatment and opportunity for all persons in

[170] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Overview*, https://www.eeoc.gov/eeoc/.
[171] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *The Law*, https://www.eeoc.gov/eeoc/history/35th/thelaw/.
[172] *Id.*; *see* Exec. Order No. 8802, 3 C.F.R. § 957 (1938-1943), https://www.eeoc.gov/eeoc/history/35th/thelaw/eo-8802.html.
[173] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *The Law*, https://www.eeoc.gov/eeoc/history/35th/thelaw/.
[174] *Id.*
[175] *Id.*
[176] *Id. See* Exec. Order No. 9981, 13 Fed. Reg. 4313 (1948) (revoked by Exec. Order 11051, 27 Fed. Reg. 9863 (1962)).

the armed services without regard to race, color, religion or national origin."[177] However, U.S. armed forces were not actually integrated until the Korean War began in 1952.[178]

Further, in March 1961, President John F. Kennedy signed Executive Order 10925, which prohibits "federal government contractors from discriminating on account of race and establishing the President's Committee on Equal Employment Opportunity."[179] Departing from previous presidential directives, this order grants the Committee, initially chaired by Vice President Lyndon B. Johnson, authority to "impose sanctions for violations of the Executive Order."[180] President Kennedy stated that enforcement authority provided by the order signaled a new "determination to end job discrimination once and for all."[181]

Two years later, The Equal Pay Act of 1963 (EPA) was passed.[182] The EPA was enacted to "protect men and women who 'perform substantially equal work in the same establishment from sex-based wage discrimination.'"[183] The EPA was an amendment to the Fair Labor Standards Act.[184] The EPA is the first national civil rights legislation focusing on employment discrimination.[185]

The following year, The Civil Rights Act of 1964 was enacted.[186] It prohibits "discrimination in a broad array of private conduct including public accommodations, governmental services and education."[187] Title VII of the Civil Rights Act of 1964 also created

[177] *Id.*
[178] *Id.*
[179] Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961) (revoked by Exec. Order 11246, 30 Fed. Reg. 12319).
[180] *Id.*
[181] *Id.*
[182] Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1963).
[183] *Id.*
[184] *See* 29 U.S.C. § 206 (1963).
[185] *Id.*
[186] *See* The Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1964).
[187] *Id.*

the EEOC, a "five-member, bipartisan commission whose mission is to eliminate unlawful employment discrimination."[188] Title VII provides that, "Commissioners, no more than three of whom may be from the same political party, are appointed to five-year terms by the President and confirmed by the Senate."[189] The Chairman of the agency "appoints the General Counsel. EEOC is to open its doors for business on July 2, 1965 — one year after Title VII's enactment into law."[190]

ii. EEOC in Comparison to USERRA.

USERRA's anti-discrimination provisions are similar to those enforced by the EEOC.[191] Courts tend to follow an employment law analysis in USERRA anti-discrimination cases.[192] In *Staub v. Proctor Hospital*,[193] Mr. Staub was a member of the Army Reserves and was employed by Proctor Hospital.[194] After he was fired by Proctor Hospital, Mr. Staub alleged that the reason he was fired was due to his immediate supervisor's disdain for his military status.[195] His supervisor claimed that Mr. Staub violated an order, but Mr. Staub claimed that it was made up due to his military service.[196] At trial, the jury found for Mr. Staub; however, the hospital appealed, arguing there was an improper jury instruction on the "cat's paw" theory of employer liability for discrimination.[197] An employer "may be liable for discrimination in an adverse employment decision against an employee where the ultimate decision maker is unbiased and

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[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *See* Michele A. Forte, *Reemployment Rights for the Guard and Reserve: Will Civilian Employers Pay the Price for National Defense?*, 59 A.F.L. REV. 287, 294 (2007).
[192] *See* Staub v. Proctor Hosp., 562 U.S. 411 (2011) (applying an employment law analysis on the employer liability issue in the only USERRA case before the United States Supreme Court.)
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *See* Staub v. Proctor Hosp., 562 U.S. 411, 415 (2011) ("meaning that he sought to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision").

has no discriminatory motives."[198] Under this theory, the "discriminatory motive of a non-decision maker is imputed to the decision maker, and employer, where the discriminator has some significant influence that leads to the adverse employment action."[199] The Seventh Circuit held that this theory did not apply, because the person who ultimately fired Mr. Staub made the decision based on more than just the immediate supervisor.[200] The Supreme Court reversed, holding that the "cat's paw" theory of employer liability applied and that, under it, the employer was responsible because it relied on the supervisor's recommendation, which was motivated by anti-military spirit.[201]

USERRA's re-employment provisions are designed to ensure the service member returns from their duty to their previous employment.[202] Importantly, this provision is to ensure the service member returns to the position they would have held if they never left.[203] The EEOC investigates workplace discrimination complaints under several anti-discrimination statutes.[204]

Congress "did not intend to limit the sweep of Section 4302(b) to substantive rights and benefits."[205] Specifically, that subsection supersedes any agreement that imposes additional "prerequisites to the exercise of any . . . right or the receipt of any . . . benefit" provided by the USERRA.[206] Any contract or agreement does just that.[207] It mandates that, before "exercising her

[198] Cole, Scott & Kissane, P.A., *"Cat's Paw" Theory of Liability*, https://www.csklegal.com/news/cats-paw-theory-of-liability/.
[199] *Id.*
[200] *Id.* at 416.
[201] *Id.* at 423.
[202] BRIAN CLAUSS & STACEY RAE SIMCOX, SERVICEMEMBER AND VETERANS RIGHTS, (Lexis Nexis 2014).
[203] 32 C.F.R. § 104.3 (2014); *see* Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946) (stating that the Selective Training and Service Act of 1940 "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need . . . [B]y these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible").
[204] *See* U.S. EQUAL EMP. OPP. COMM'N, *Laws Enforced by EEOC,* http://www.eeoc.gov/laws/statutes/index.cfm (last visited Nov. 17, 2016).
[205] Lopez v. Dillard's, Inc., 382 F. Supp. 2d 1245, 1248 (D. Kan. 2005).
[206] 38 U.S.C. § 4302(b) (2015).
[207] *Lopez*, at 1248.

rights under USERRA and obtaining the relief to which she is entitled thereunder, plaintiff must participate in an arbitration proceeding."[208] Nowhere in the USERRA did "Congress provide for arbitration as a means to obtain the rights granted in the [USERRA]."[209] Instead, Congress stated that a "person aggrieved under the [USERRA] can, but need not, seek assistance from the Secretary of Labor and the United States Attorney General in resolving the dispute."[210] In addition to, or as "an alternative to, those avenues of relief, an aggrieved person is authorized to bring a civil action in an appropriate United States District Court."[211]

An arbitration agreement mandates that plaintiff seek relief in an arbitral forum.[212] Because that type of proceeding was not addressed in the USERRA, it stands as an "additional prerequisite to the exercise of plaintiff's rights and the receipt of any benefits to which she might be entitled under the act."[213] Hence, the plain language of 38 U.S.C. § 4302(b) requires that the arbitration agreement be superseded by the USERRA.[214]

In *Lopez v. Dillard's*, defendant argued against this conclusion, citing to examples of federal employment statutes that "*are* subject to legitimate arbitration agreements."[215] However, in ruling against the defendant, the court in *Lopez* stated that it could find "no provisions in those acts, nor has the court found any, that make such sweeping statements about superseding any laws or agreements that undermine the goals of the enactments[216]. . . . Indeed, none of these acts

[208] *Id.*
[209] *Id.*
[210] *Id.; See* 38 U.S.C. § 4322, §4323(a) (1991).
[211] *Lopez*, 382 F. Supp. 2d at 1248; *see* 38 U.S.C. § 4323(b) (1991).
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *See e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. § 218 (2016) (discussing the construction of the act with state and federal laws); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633 (2016) (discussing the construction of the act with state and federal laws); Family and Medical Leave Act of 1993, 29 U.S.C. § 2651 (2016) (discussing the construction of the act with state and federal laws); Civil Rights Act of 1964, 42 U.S.C.

contain any statement that remotely approaches the sweep of 38 U.S.C. § 4302(b), with its focus on not only trampling any state law, contract, or agreement that diminishes any rights or benefits protected by the USERRA, but with the additional emphasis on striking down any 'prerequisites' to the exercise of those protected rights."[217]

Additional commentary on the legislative intent of USERRA is available in a committee report from the House of Representatives' comments on the interpretation of Section 4302(b). The report states that, "Section 4302(b) would reaffirm a general preemption as to state and local laws and ordinances, as well as to employer practices and agreements, which provide fewer rights or otherwise limit rights provided under amended chapter 43 or put additional conditions on those rights."[218] Moreover, this section would reaffirm that "*additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required*."[219]

Although the hostile workplace provision is a well-established cause of action under Title VII and has recently been applied under the Americans with Disabilities Act (ADA), the question remains whether it is cognizable under USERRA.[220] In *Carder v. Continental Airlines,* the Fifth Circuit held that USERRA legislation did not provide a cause of action for hostile work environment claims based upon an employee's military service. [227] The *Carder* Court noted that USERRA was passed after both Title VII and the ADA and did not include language suggesting

2000h-4 (2016) (discussing construction of the act, including Title VII, with state laws); Americans with Disabilities Act of 1990, 42 U.S.C. § 12201 (2016) (discussing construction of the act with state and federal laws).
[217] Lopez v. Dillard's, Inc., 382 F. Supp. 2d 1245, 1249 (D. Kan. 2005).
[218] H.R. REP. NO. 103-65, at 20 (1993).
[219] *Id.*
[220] Konrad S. Lee, *When Johnny Comes Marching Home Again Will He Be Welcome at Work?*, 35 PEPP. L. REV. 247, 251 (2008) (citing 42 U.S.C. § 2000e-2(a) (2006)); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986).
[227] Carder v. Cont'l Airlines Inc., 636 F.3d 172 (5th Cir. 2011), *superseded by statute*, Pub. L. No. 112-56, 125 Stat. 711(codified as amended at 38 U.S.C. § 4303(2)).

that hostile work environment based upon military services was a cause of action.[228] Soon after the *Carder* decision, in 2011, Congress passed the bipartisan VOW to Hire Heroes Act, which included a provision that amended USERRA to include hostile work environment claims based on military status.[221] Because USERRA includes anti-discriminatory language, courts may be susceptible to automatically reliance upon Title VII's severe or pervasive test.[222] Title VII was enacted for the purpose of remedying past wrongs and removing barriers experienced by historically disadvantaged groups, whereas USERRA was intended to provide protections for the purpose of *encouraging military recruitment*.[223] This difference is likely to become even more crucial in the current political environment.[224]

IV. Solution

This section of the article will discuss the negative consequences of violating USERRA. Each subsection will address a specific result of USERRA violations and a proposed change to avoid it. The broader method to avoid many of these negative implications is to amend USERRA.

A. Negative Implications of Violating USERRA.

Subsection (i) will discuss how violating USERRA hurts national security. Subsection (ii) will discuss how rural service members are especially disadvantaged due to limited access to attorneys and the justice system. Lastly, subsection (iii) will discuss the narrow scope of appeal ability under the FAA and how this fails USERRA's purpose.

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[228] *Id*.
[221] H.R. 674, 112th Cong. (2011).
[222] Konrad S. Lee, *When Johnny Comes Marching Home Again Will He Be Welcome at Work?*, 35 PEPP. L. REV. 247, 251 (2008) (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986).
[223] *Id.; see* EEOC v. Arabian American Oil Co., 499 U.S. 244 (U.S. 1991).
[224] Konrad S. Lee, *When Johnny Comes Marching Home Again Will He Be Welcome at Work?*, 35 PEPP. L. REV. 247, 251 (2008) (citing Robert Burns, *Army Likely to Miss Year's Recruiting Goal; It Would Be the First Time Since 1999*, PHILA. INQUIRER, June 9, 2005, at A17).

i. Violating USERRA Hurts National Security.

Due to an increased reliance on the Reserve/National Guard in a post 9/11 world, any violation of USERRA ultimately hurts national security.[225] Since the end of the 20th and beginning of the21st centuries, the National Guard and Reserve have been deployed at record numbers.[226] In 1903, Congress created the modern National Guard when it passed the Militia Act of 1903.The modern National Guard serves a unique role, answering to both the state for state-specific functions and the federal government when the National Guard is "federalized" under Army command.[227]

During World War I, the National Guard provided the largest number of combat divisions to the American Expeditionary Force units stationed in France.[228] In World War II, the National Guard doubled the size of the regular Army, and National Guard units were the first units to see combat after the attack on Pearl Harbor.[229] The National Guard has been involved in Korea, Vietnam, the first Gulf War, Haiti, and Bosnia.[230] Additionally, the National Guard were involved with the invasion of Afghanistan and were a large percentage of the forces in Iraq.[231]

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[225] Konrad S. Lee, *When Johnny Comes Marching Home Again Will He Be Welcome at Work?*, 35 PEPP. L. REV. 247, 251 (2008) (citing 42 U.S.C. § 2000e-2(a) (2006)); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986).
[226] *See* Ryan Wedlund, *Citizen Soldiers Fighting Terrorism: Reservists' Reemployment Rights*, 30 WM. MITCHELL L. REV. 797, 801 (2004) ("Today's Reserve Components . . . are an integral part of the defense strategy and day-to-day operations of the U.S. Military." quoting Donald Rumsfeld, *Sizing and Selectively Modernizing Forces for an Era of Uncertainty*, SEC'Y OF DEF. ANN REP. 63 (2002)).
[227] *Compare* 10 U.S.C. § 332 (2012) (activation by the President), *with* 32 U.S.C. § 907 (2012) (activation by the state for state-specific missions).
[228] NAT'L GUARD, *About the National Guard: Army National Guard*, http://www.nationalguard.mil/AbouttheGuard/ArmyNationalGuard.aspx.
[229] *See e.g.*, MICH. DEP'T MIL. & VETERANS AFF., *Michigan National Guard in World War II*, http://www.michigan.gov/dmva/0,4569,7-126-2360_3003_3009-26798--,00.html.
[230] LAWRENCE KAPP & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., CRS RL30802, RESERVE COMPONENT PERSONAL ISSUES: QUESTIONS AND ANSWERS 8 (2014); *see* NAT'L GUARD, *About the National Guard: Army National Guard*, http://www.nationalguard.mil/AbouttheGuard/ArmyNationalGuard.aspx.
[231] NAT'L GUARD, *About the National Guard: Army National Guard*, http://www.nationalguard.mil/AbouttheGuard/ArmyNationalGuard.aspx.

Every branch of the Armed Forces also has a reserve component of part-time soldiers.[232] The Army Reserve was created in 1908.[233] The Navy and Marine Reserves were created after the outbreak of World War I and prior to United States entry into the conflict in 1917.[234] The Air Force and Air Force Reserve were created after World War II.[235] The Coast Guard and Coast Guard Reserve became a part of the Department of Homeland Security following 9/11.[236] Unlike the National Guard, the Reserves do not answer to both the state and the federal government.[237] Reserve units or individual members can be called to active duty.[238]

Since 9/11, hundreds of thousands of Guard and Reserve members have been activated.[239] In September 2013, there were 1.1 million Reserve component members.[240] National Guard and Reserve members are civilians first.[241] They are not "full-time soldiers and usually leave civilian employment when deployed."[242] They are being deployed more frequently and for longer periods, and these deployments put a strain on their civilian employers while they

[232] *See Active Duty vs. Reserve or National Guard,* VETERANS EMPLOYMENT TOOLKIT HANDOUT, https://www.va.gov/vetsinworkplace/docs/em_activeReserve.html.
[233] *Id.*
[234] *Navy Timeline,* AMERICA'S NAVY, https://www.navy.com/about/history.html; *Marine Corps Reserve History: 1916-2006,* U.S. MARINE CORP., http://www.marforres.marines.mil/USMCR100/History/ (2006).
[235] *See* National Security Act of 1947, Pub. L. No. 253, § 207-08, 61 Stat. 495, 502-03 (1947).
[236] *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 888, 116 Stat. 2135 (stating that the Coast Guard is considered a military service because the President can transfer Coast Guard assets to the Department of the Navy).
[237] LAWRENCE KAPP & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., CRS RL30802, RESERVE COMPONENT PERSONAL ISSUES: QUESTIONS AND ANSWERS 8 (2014); *see* NAT'L GUARD, *About the National Guard: Army National Guard,* http://www.nationalguard.mil/AbouttheGuard/ArmyNationalGuard.aspx.
[238] 10 U.S.C. §§ 12303-12304 (2012).
[239] *See* Michele A. Forte, *Reemployment Rights for the Guard and Reserve: Will Civilian Employers Pay the Price for National Defense?*,59 A.F.L. REV. 287, 289 (2007).
[240] LAWRENCE KAPP & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., CRS RL30802, RESERVE COMPONENT PERSONAL ISSUES: QUESTIONS AND ANSWERS 4 (2014); *see* NAT'L GUARD, *About the National Guard: Army National Guard,* http://www.nationalguard.mil/AbouttheGuard/ArmyNationalGuard.aspx.
[241] Brain Clauss, *Protecting Civilian Employment Providing Healthcare to the Citizen Soldier in the National Guard and Reserve Components,* 45 U. MEM. L. REV. 915, 917 (2015).
[242] *Id.*

are gone.[243] As the General Accounting Office Report 02-608 noted, "At every focus group in every unit [GAO] visited, some reservists had complaints about their employers. Some said that their supervisors were hostile toward their reserve duty and had actively encouraged them to leave the reserves."[244]

Current National Guard and Reserve component members have been deployed for longer periods of time and with less time between deployments than previous members.[245] National Guard and Reserve component members returning from deployment experience mental health issues at a rate more than fifty percent higher than their active duty counterparts.[246] The unemployment rate for veterans of Iraq and Afghanistan is high, with a large number of those members being Guard and Reservists.[247] Many Guard and Reservists have deployed multiple times since 9/11 only to return to find that a recession has eliminated their job.[248] As a country, we depend on the National Guard and Reservists as a part of our national security. It follows, then, that as a country we should strive to remove as many of these negative qualities that currently flow from being a member of the Guard or Reserves.[249]

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[243] U.S. GOV'T ACCOUNTABILITY OFF., GAO 02-608, *Actions Needed to Better Manage Relations Between Reservists and their Employers* (2002) (stating that increased tempo and duration of deployment among reservists is 4.5 times longer than previously).
[244] *Id.* at 16.
[245] Sharon M. Erwin, *When the Troops Come Home: Returning Reservists, Employers and the Law*, HEALTH LAW. 1, 3 (2007).
[246] Lauren Everitt et al., *Efforts Lag to Improve Care for National Guard*, WASH. POST, Feb. 14, 2012, http://www.washingtonpost.com/national/national-security/efforts-lag-to-improve-care-for-national-guard/2012/02/04/gIQAymEWER_story.html (discussing Armed Forces Health Surveillance Center statistics).
[247] *See* Assoc. Press, *Unemployment Rate for Young Veterans Hits 21.1 Percent*, WASH. POST, Mar. 13, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/03/12/AR2010031204123.html.
[248] *See* Samuel F. Wright & Greg T. Rinckey, *Welcome Home, You're Fired*, THE FREE LIBRARY, Apr. 1, 2008, https://www.thefreelibrary.com/%27Welcome+home%2c+you%27re+fired%27%3a+a+harsh+reality+awaits+many+returning...-a0178218681 (stating that "Hundreds of thousands of American troops are deployed overseas, and when they return home to find their jobs off limits to them, they need diligent, competent counsel.").
[249] Konrad S. Lee, *When Johnny Comes Marching Home Again Will He Be Welcome at Work?*, 35 PEPP. L. REV. 247, 277 (2008).

ii. Rural Service Members with Limited Access to Attorney's and Court Systems will also be Negatively Affected by this due to Long Commute Times and the Cost Prohibitive Nature.

Rural America is disproportionately represented among National Guard and Reserve members.[250] Pentagon figures show that more than 44% of military recruits come from rural areas, as compared to 14% form major cities.[251] Many reasons are offered for the large numbers of young people from rural communities who join the military.[252] When young people have "few options — little chance for employment and no easy route to higher education — they are more likely to join the military."[253] A bad economy is good for military recruitment, especially in rural communities, where jobs are scarce.[254] These service members particularly rely on their employment in the Guard of Reserve.[255] They are being deployed "more frequently and for longer periods, and these deployments put a strain on their civilian employers while they are gone."[256] The official unemployment rates for Reserve component members are unreliable or nonexistent, but the lower estimates place the unemployment rate at over twice the national average.[257] Anecdotal evidence suggests that the rate is much higher.[258] Veterans returning to

[250] Alexandra Zavis, *National Guard Soldiers and Airmen Face Unemployment Crisis*, L.A. TIMES, Nov. 23, 2012, http://articles.latimes.com/2012/nov/23/local/la-me-national-guard-employment-20121124.
[251] *See* Tim Murphy & Bill Bishop, *Largest Share of Army Recruits Come from Rural/Exurban America*, DAILY YONDER, Mar. 2, 2009, http://www.dailyyonder.com/largest-share-army-recruits-come-ruralexurban-america/2009/03/02/1962.
[252] *Id*.
[253] *Id*.
[254] *Id*.
[255] *Id*.
[256] U.S. GOV'T ACCOUNTABILITY OFF., GAO 02-608, *Actions Needed to Better Manage Relations Between Reservists and their Employers* (2002) (stating that increased tempo and duration of deployment among reservists is 4.5 times longer than previously).
[257] Alexandra Zavis, *National Guard Soldiers and Airmen Face Unemployment Crisis*, L.A. TIMES, Nov. 23, 2012, http://articles.latimes.com/2012/nov/23/local/la-me-national-guard-employment-20121124.
[258] *See* Ted Daywalt, *The Real Veteran Unemployment Problem*, HUFFINGTON POST, Apr. 3, 2013, http://www.huffingtonpost.com/ted-daywalt/veteran-unemployment_b_3003103.html (stating that the unemployment rate of the National Guard was estimated to be twenty-eight percent, and "USERRA … complaints skyrocketed" since the 2007 call-up policy change.).

rural America are likely to find a worse employment situation than veterans returning to urban America.[259] Non-urban Americans earn substantially less than urban workers because of lower percentages of high-skill employment opportunities.[260]

Furthermore, jobs in rural America will not grow at the same rate as in urban America.[261] One reason is that "rural Americans are not attaining the same level of education as their urban counterparts."[262] Although closing the gap in high school completion, the college completion gap between urban and rural Americans is increasing.[263] The more highly educated worker will generally have higher earnings and a reduced chance of unemployment.[264] Not only is this a force readiness issue, but it also presents problems if returning veterans need to file a USERRA case.[265]

Rural Americans do not have ready access to attorneys like urban Americans do.[266] Nearly "20 percent of Americans live in rural areas, but the New York Times says just 2 percent of small law practices are in those areas."[267] Without an attorney nearby, "rural residents may have to drive 100 miles or more to take care of routine matters."[268] For people of limited means,

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[259] Brian Clauss, *Protecting Civilian Employment and Providing Healthcare to Citizen Soldier in the National Guard and Reserve Components*, 45 U. MEM. L. REV. 915, 934 (2015).
[260] *See* U.S. DEP'T AGRIC., RURAL AMERICA AT A GLANCE (3d ed. 2013).
[261] *See* U.S. DEP'T AGRIC., *Employment & Education*, http://www.ers.usda.gov/topics/rural-economy-population/emp loyment-education.aspx.
[262] Brian Clauss, *Protecting Civilian Employment and Providing Healthcare to Citizen Soldier in the National Guard and Reserve Components*, 45 U. MEM. L. REV. 915, 935 (2015).
[263] *See* U.S. DEP'T AGRIC., *Employment & Education*, http://www.ers.usda.gov/topics/rural-economy-population/emp loyment-education.aspx.
[264] *See Earnings and Unemployment Rates by Educational Attainment*, U.S. DEP'T LABOR, http://www.bls.gov/emp/ep_chart_001.htm (last visited Dec. 9, 2016).
[265] Alexandra Zavis, *National Guard Soldiers and Airmen Face Unemployment Crisis*, L.A. TIMES, Nov. 23, 2012, http://articles.latimes.com/2012/nov/23/local/la-me-national-guard-employment-20121124; *see also* Ted Daywalt, *The Real Veteran Unemployment Problem*, HUFFINGTON POST, Apr. 3, 2013, http://www.huffingtonpost.com/ted-daywalt/veteran-unemployment_b_3003103.html.
[266] Lorelei Laird, *In rural America, there are job opportunities and a need for lawyers*, ABA J., (2014), http://www.abajournal.com/magazine/article/too_many_lawyers_not_here._in_rural_america_lawyers_are_few_and far_between.
[267] *Id.*
[268] *Id.*

a "long drive is a logistical hardship, requiring gas, a day away from work and sometimes an overnight stay. And census information shows that rural communities are disproportionately poor."[269] The Legal Services Corporation says one legal aid attorney is available for every 6,415 low-income Americans, which means that as many as four out of five of those people's civil legal problems are not addressed.[270] Judge Gail Hagerty of the North Dakota Supreme Court says, "in some cases, people just don't get the legal services they need."[271]

Pat Goetzinger, the 2011-2012 president of the State Bar of South Dakota, adds that "the strain on local budgets as a result of not having local lawyers is astronomical."[272] This because because local governments have to pay "judges, prosecutors and private defenders to drive in and handle local cases."[273] Goetzinger's native Bennett County was "forced to do this after its only attorney retired, leaving the closest lawyer more than 120 miles away."[274] In Georgia, "six of the state's 159 counties have no lawyers at all; another 40 have 10 attorneys or fewer."[275] With limited financial resources and scarce or non-existent attorneys, it is plain to see how violations of USERRA can disproportionately affect rural service members.[276]

iii. The Standard of Appeal in Arbitration Under the FAA is Extremely Narrow and in Contradiction to USERRA's Purpose.

FAA Section 10(a) provides four limited bases for the modification of the arbitrator's decision.[277] Section 10(a) states:

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[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *See generally* Brian Clauss, *Alone in the Country: National Guard and Reserve Component Service and the Increased Risk for Homelessness Among Rural Veterans,* 13 J. L. SOC'Y 405 (2012).
[277] 9 U.S.C. § 10 (2016).

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

These four exceptions were described by the Seventh Circuit, in *Eljer Mfg v. Kowin Dev. Corp.*, as "grudgingly narrow."[278] In *Eljer,* the Seventh Circuit also held that "in addition to the reasons set out in the statute, we will set aside an arbitrator's decision if in reaching his result, the arbitrator deliberately disregards what he knows to be the law." [279] This is known as a "manifest disregard of the law."[280] Arbitration awards cannot be overturned "merely because the arbitrators misunderstood or misapplied the law. Typically, courts hold that the governing law must be clearly established and that the arbitrators must be aware of the law, but nonetheless choose to disregard it."[281] However, courts are "quick to add that 'manifest disregard of law' as applied to review of an arbitral award is a 'severely limited' doctrine."[282] Furthermore, errors in the arbitrator's interpretation of law or findings of fact do not merit reversal under this standard.[283] Nor does an insufficiency of evidence supporting the decision permit us to disturb the arbitrator's

[278] Eljer Mfg v. Kowin Dev. Corp., 14 F.3d 1250, 1253 (7th Cir. 1994).
[279] *Id.*at 1253-54; *See* Health Servs. Mgmt. Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992).
[280] Goldman v. Architectural Iron Co., 306 F.3d 1214, 1216 (2d Cir. 2002) (quoting Dirussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 821 (2d Cir. 1997)).
[281] *E.g.* Montes v. Shearson Lehman Bros. Inc., 128 F.3d 1456, 1461 (11th Cir. 1997); Westerbeke Corp. v. Daihatsu Motor Co. Ltd., 304 F.3d 200 (2d Cir. 2002).
[282] *In re Arbitration No. AAA13-161-0511-85 under Grain Arbitration Rules*, 867 F.2d 130, 133 (2d Cir. 1989).
[283] Nat'l Wrecking Co. v. Int'l Brotherhood of Teamsters, Local 731, 990 F.2d 957 (7th Cir. 1993); Moseley, Hallgarten, Estabrook, & Weeden v. Ellis, 849 F.2d 264 (7th Cir. 1988).

order.[284] Arbitration does not provide a system of "junior varsity trial courts" offering the losing party complete and rigorous de novo review.[285] It is a private system of justice offering benefits of reduced delay and expense.[286]

It is incredibly unlikely that an arbitration award will be reversed, even if the arbitrator does not understand or apply USERRA correctly.[287] Furthermore, even if the arbitrator does not have enough evidence to support their decision against the veteran, it cannot be overturned.[288] This flies in the face of USERRA's purposes.[289] We cannot expect our veterans to be subject to a system that punishes them for serving their country.[290]

V. Conclusion

Mr. Zoiber lost his appeal, and the Ninth Circuit held that Mr. Zoiber "failed to establish that the legislative history evinces Congress's intent to prevent the enforcement of the arbitration agreement he signed."[291] In failing to uphold Mr. Zoiber's rights under USERRA, the Ninth Circuit joined the Eleventh Circuit in creating a dangerous precedent for service members.[292] In *Ziober*, the Ninth Circuit stated, "We acknowledge the possibility that Congress did not want "members of our armed forces to submit to binding, coercive arbitration agreements. "[293] That intention, however, is not expressed in the statute itself, or in the legislative history. We therefore

[284] *Eljer* 14 F. 3d at 1254.
[285] *National Wrecking*, 990 F.2d at 960.
[286] *Eljer* 14 F. 3d at 1254.
[287] *See generally*, National Wrecking Co. v. International Brotherhood of Teamsters, *Local 731*, 990 F.2d 957 (7th Cir. 1993).
[288] *Eljer*, 14 F. 3d at 1254.
[289] 38 U.S.C., § 4301 (2012).
[290] *See*, Adam Klein & Nantiya Ruan, *Getting Rid of Forced Arbitration for Servicemember Employees this Veterans Day*, AMERICAN CONST. SOC. (Nov. 11, 2015), http://www.acslaw.org/acsblog/getting-rid-of-forced-arbitration-for-servicemember-employees-this-veterans-day-1.
[291] Zoiber v. BLB Res, 839 F.3d 814 (9th Cir. 2016).
[292] *See. Id.*
[293] Landis v. Pinnacle Eye Care, LLC, 537 F.3d 559, 564 (6th Cir. 2008) (Cole, J., concurring).

affirm the district court's order compelling arbitration and dismissing Ziober's complaint.[294] The concurrence in *Zoiber* added that it would be imprudent to create a split in the circuit by disagreeing with the Eleventh Circuit, given how Congress can easily remedy this issue.[295] The concurrence stated that, if "we and other circuits have misinterpreted the scope of § 4302(b), Congress can amend the statute to make clear that it does render pre-dispute agreements to arbitrate USERRA claims unenforceable."[296]

Indeed, a proposed amendment 4180 to Senate Bill 2943 would do just that.[297] Proposed Amendment 4180 is entitled "Clarifications Regarding Scope of Employment and Reemployment Rights of Members of the Uniformed Services." [298] It reads, in pertinent part:

> (c)(1) Pursuant to this section and the procedural rights afforded by subchapter III of this chapter, any agreement to arbitrate a claim under this chapter is unenforceable, unless all parties consent to arbitration after a complaint on the specific claim has been filed in court or with the Merit Systems Protection Board and all parties knowingly and voluntarily consent to have that particular claim subjected to arbitration.
>
> (2) For purposes of this subsection, consent shall not be considered voluntary when a person is required to agree to arbitrate an action, complaint, or claim alleging a violation of this chapter as a condition of future or continued employment, advancement in employment, or receipt of any right or benefit of employment.[299]

On December 8, 2016, this bill was passed by both the House of Representatives and Congress.[300] On 23 December 2016, it was signed into law by President Obama.[301]

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[294] *Zoiber*, 839 F.3d 814.
[295] *Id*.
[296] *Id*.
[297] National Defense Authorization Act for Fiscal Year 2017, S. 2943, 114th Cong. (2006), https://www.govtrack.us/congress/bills/114/s2943.
[298] *Id*.
[299] *Id*.
[300] National Defense Authorization Act for Fiscal Year 2017, S. 2943, 114th Cong. (2006), https://www.govtrack.us/congress/bills/114/s2943.
[301] James Oxford, The American Legion, *NDAA for fiscal year 2017 signed into law*, Jan. 09, 2017, https://www.legion.org/dispatch/235527/ndaa-fiscal-year-2017-signed-law.

USERRA is of the utmost importance in order to retain service members of the National Guard and Reserves.[302] Without it, the country will not be able to run its military effectively.[303] By allowing violations of USERRA to stand, the rights of our service members are being denied and our national security is being compromised.[304]

[302] S. Lee, *When Johnny Comes Marching Home Again Will He Be Welcome at Work?*, 35 PEPP. L. REV. 247, 247 (2008).
[303] *See generally, Id.*
[304] *Id.*