APPENDIX

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ENTERED JUNE 17, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-2200(L)
(1:17-cv-00484-LO-JFA)

MAJOR GENERAL THOMAS P. HARWOOD, III,

Plaintiff - Appellant

v.

AMERICAN AIRLINES, INCORPORATED,

Defendant - Appellee.

No. 21-1137
(1:17-CV-00484-LO-JFA)

MAJOR GENERAL THOMAS P. HARWOOD, III,

Plaintiff - Appellant

v.

AMERICAN AIRLINES, INCORPORATED,

Defendant - Appellee.

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNER, CLERK

ENTERED JUNE 17, 2022

PUBLISHED

UNITED STATES COURT OF APPEALS
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No. 20-2200

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No. 21-1137

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Plaintiff - Appellant

v.

AMERICAN AIRLINES, INCORPORATED,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Liam O'Grady, Senior District Judge. (1:17-cv-00484-LO-JFA)

Argued: March 11, 2022

Decided: June 17, 2022

Before NIEMEYER and WYNN, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by published opinion. Judge Floyd wrote the opinion in which Judge Niemeyer and Judge Wynn joined.

ARGUED: Adam Augustine Carter, THE EMPLOYMENT LAW GROUP, PC, Washington, D.C., for Appellant. Jason Matthew Zarrow, O'MELVENY & MYERS LLP, Los Angeles, California, for Appellee. **ON BRIEF:** Andrew D. Howell, R. Scott Oswald, THE EMPLOYMENT LAW GROUP, PC, Washington, D.C., for Appellant. Anton Metlitsky, O'MELVENY & MYERS LLP, New York, New York, for Appellee.

FLOYD, Senior Circuit Judge:

This case is back before us following a limited remand for a recalculation of damages. We must now address Harwood's appeal of the district court's new orders on damages, attorneys' fees, and costs. Finding no abuse of discretion in the district court's new damages calculations and no clear error in the factual determinations on which it based those calculations, we affirm its judgment. Under our extremely deferential review of the district court's fees determination, we likewise affirm.

I.

As relevant to this opinion, Major General Thomas Harwood, an Air Force reserve service member and long-time American Airlines pilot, brought suit against American Airlines pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301-35. [1] Under USERRA, military members returning from service are entitled to reemployment in their civilian jobs if they meet certain criteria. § 4301. If entitled under § 4312, they are reemployed in accordance with stipulations set forth in § 4313. *See Butts v. Prince William Cnty. Sch. Bd.*, 844 F.3d 424, 430-31 (4th Cir. 2016). The default reemployment position, called the "escalator position," is "the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by [military]

[1] The full factual background for this case is set forth in our prior opinion. *Harwood v. Am. Airlines, Inc.*, 963 F.3d 408, 412-13 (4th Cir. 2020).

service." § 4313(a)(2)(A). If they incur a disability during their military service that would not allow them to assume the escalator position, the employer must make reasonable accommodations to help them qualify. § 4313(a)(3). Where such accommodations cannot be made, the employer must reemploy them to a position of similar status. *Id.*

In his initial Complaint, filed in April 2017, Harwood claimed that American Airlines violated USERRA, §§ 4312 and 4313, by delaying his reemployment and denying him a pilot position after a qualifying period of military leave from June 2013 to August 2015. During that tour, Harwood was diagnosed with a heart condition and upon his return experienced delays obtaining the necessary Federal Aviation Administration (FAA) medical certification to return to his pilot position operating out of La Guardia Airport in Queens, New York. Upon initial review at the beginning of September 2015, American Airlines acknowledged that Harwood met the § 4312 conditions for reemployment but also believed that it either needed to find another position for him under § 4313 or allow him to use military convalescence leave until he could receive FAA clearance to fly.

After communicating this understanding to Harwood, American Airlines requested that he advise them of a time to discuss reemployment options, but Harwood did not immediately respond. On October 1, 2015, Harwood's counsel requested reemployment and suggested four alternate, non-pilot positions, including three with American Airlines' Flight Department in Fort Worth, Texas. On October 22, 2015, American Airlines extended

two options to Harwood. First, because he was "currently unable to qualify for a [FAA] First Class Medical certificate," and therefore could not qualify to be a pilot, American Airlines offered to extend his military leave, giving him time to seek the necessary FAA medical clearance with "reasonable assistance" from American Airlines.[2] J.A. 367. Alternatively, American Airlines offered to "reemploy him in the Flight Technical Operations Group at the Flight Academy in [Dallas-Fort Worth], in a position appropriate for his status." J.A. 367. He would "be compensated at the same rate he would receive if actively flying." J.A. 367. Harwood declined both options but served several more terms of military duty during the following months.

Harwood ultimately agreed to accept the above offered American Airlines position in Fort Worth with a start date of January 25, 2016. However, on January 25, the FAA finally granted his medical certificate. Harwood informed American Airlines and they reinstated him as a pilot the next day. He went through his required pilot training, during which time he received full pay as an American Airlines employee.

Reviewing Harwood's initial complaint, the district court granted summary judgment to Harwood, reasoning that under § 4312, Harwood should have been reemployed on September 1 and that American Airlines' failure to do so also violated § 4313. *Harwood v. Am. Airlines, Inc.*, No. 1:17-cv-

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[2] Service members convalescing from a disability incurred during their service may receive additional leave of up to two years under § 4212(e). The leave allowance does not impact the damages calculation.

0484, 2018 WL 2375692, at *3-5 (E.D. Va. May 23, 2018). It granted summary judgment to American Airlines on Harwood's request for liquidated damages under USERRA, finding no evidence that American Airlines had acted unreasonably and in bad faith. *Id.* Hearing Harwood's motion for reconsideration on the liquidated damages ruling, the court again denied liquidated damages, but awarded back pay for September 1, 2015, to January 26, 2016, less Harwood's military pay during that time. *Harwood v. Am. Airlines, Inc.*, No. 1:17-cv-0484, 2018 WL 8803959, at *3 (E.D. Va. Aug. 20, 2018). The court found that American Airlines' October 22 job offer would not impact damages because it was a course-reversal that failed to cure already-occurred USERRA violations. *Id.* Damages totaled $50,184.75. *Id.* at *4. Harwood appealed, contending that the district court erred in determining that the airline's violations were not willful, in denying his request for injunctive relief, and in reducing the damage award by income he received for military service performed between September 1 and January 26. American Airlines cross-appealed, contending error in the district court's determination that it had not rehired Harwood promptly and, alternatively, challenging the determination as to the period of time for which damages in the form of backpay were owed.

On appeal, this panel affirmed the district court's holdings as to liability under USERRA but remanded for a recalculation of damages because American Airlines should not have been held responsible for the period between Harwood's rejection of the offered position and acceptance "unless the offered position was not equivalent under

[USERRA]." *Harwood v. Am. Airlines, Inc.*, 963 F.3d 408, 420 (4th Cir. 2020). On remand, the district court found that American Airlines offered Harwood an equivalent position on October 22 and reduced his back pay to $28,771.41, the amount due for the period from September 1—when Harwood should have been reemployed—up to when American Airlines offered him the equivalent position. *Harwood v. Am. Airlines, Inc.*, No. 1:17-CV-00484, 2020 WL 6580394, at *1-2 (E.D. Va. Oct. 6, 2020). Specifically, it determined that the Flight Technical Operations Group position offered to Harwood on October 22 was appropriate under § 4313(a)(3) because it "came with the same pay and benefits that the Plaintiff received as a pilot, plus equal status within the organization," thus satisfying § 4313(a)(3). *Id.* at *1.

Harwood has also twice sought awards for attorneys' fees and costs in the district court. On September 4, 2018, Harwood sought $149,131.55 in fees and costs. Mot. for Att'y Fees, *Harwood*, 2018 WL 8803959 (No. 1:17-cv-0484), ECF No. 70. And on September 20, 2018, he sought an additional $10,845.80 to account for the filing of a reply brief. Pl.'s Suppl. Fee Pet., *Harwood*, 2018 WL 8803959 (No. 1:17-cv-0484), ECF No. 86. The district court originally awarded $68,648.83 in fees to Harwood and $4,349.85 in costs. J.A. 823-24. After the remand from this Court, it ordered a briefing schedule on a supplemental petition for fees. Harwood filed a supplemental petition for fees and costs on November 9, 2020, seeking an additional award in the amount of $48,509.89. J.A. 838, 846. He then sought an additional $1,654.80 in fees to account for the filing of a reply brief. J.A. 914, 917. The district

court ultimately awarded Harwood an additional $13,352.58 in fees and an additional $5,820.09 in costs. J.A. 927. But it reduced its previous award of attorneys' fees and costs from $68,648.83 to $63,745.34. J.A. 927. These determinations led to combined fees and costs award of $87,267.86. J.A. 927.

Harwood now challenges the district court's determination as to the equivalence of the position as the basis for its reassessed damages as well as the methods by which the district court calculated the new costs and fees award. We consider each in turn.

II.

A.

We review the district court's findings of fact underlying the damages award for clear error. *U.S. Equal Emp. Opportunity Comm'n v. Consol. Energy, Inc.*, 860 F.3d 131, 148-49 (4th Cir. 2017).

In our prior remand, we instructed the district court to recalculate damages, withholding those awarded for the period between Harwood's rejection of the offered position and ultimate acceptance "unless the offered position was not equivalent under [USERRA]." *Harwood*, 963 F.3d at 420.

Thus, the sole factual determination before the district court on remand was whether the position American Airlines offered to Harwood on October 22 was equivalent to his escalator position as a line pilot. Section 4313(a)(3)(A) instructs that the alternative position must be one the individual is "qualified to perform" and which is "equivalent in

seniority, status, and pay." Evaluating those equivalencies involves determinations of fact. To make such a determination, courts consider "the totality of the circumstances." *Crawford v. Dep't of the Army*, 718 F.3d 1361, 1366 (Fed. Cir. 2013) (citation omitted). We review it for clear error.

As with any test that considers the totality of the circumstances, certain factors cannot be singled out as dispositive without first weighing all the other potentially competing factors. *Id.* In order to determine the appropriate reemployment position, "[t]he employer must determine the seniority rights, status, and rate of pay as though the employee had been continuously employed during the period of service." 20 C.F.R. § 1002.193(a). Additionally, "[t]he seniority rights, status, and pay of an employment position include those established (or changed) by a collective bargaining agreement, employer policy, or employment practice[,]" and "the employee's status in the reemployment position could include opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location." *Id.*

Harwood contends that the legislative history of USERRA supports his argument that "[a] reinstatement offer in another city is particularly violative of like status, as would be reinstatement in a position which does not allow for the use of specialized skills in a unique situation." H.R. Rep. No. 103-65, pt. 1, at 31 (1993), *as reprinted in* 1994 U.S.C.C.A.N. 2449, 2464. However, implementing regulations promulgated by the Department of Labor (DOL) specify that "[t]he reemployment position may involve transfer to another . . . location . . . ." 20

C.F.R. § 1002.194. Further, the district court's reasoning, citing this DOL guidance, indicates that it did in fact take the location change and Harwood's indicated willingness to accept a position in Dallas into account as part of a totality of the circumstances analysis. *See Harwood*, 2020 WL 6580394, at *1.

True, the district court appears to count our mention of the offered Flight Operations job as an "appropriate position" as definitive rather than a determination we explicitly instructed the district court to find for itself. *Id.* In its analysis, however, the district court does not rest on that seeming misunderstanding in light of our remand instructions. It goes on to state that the Flight Operations position "came with the same pay and benefits that the Plaintiff received as a pilot, plus equal status within the organization[,]" all of which is borne out in the record. *Id.* Harwood argues that American Airlines' offer of reemployment was vague, in that it only stated that the position was appropriate for his status and would be compensated at the same rate as he would be as a pilot but failed to outline specific benefits such as those that were negotiated under the collective bargaining agreement. But USERRA does not have a specificity requirement and, more notably, neither Harwood nor his counsel sought further specifics about the position prior to rejecting it. We will not now hold American Airlines accountable for their silence.

Harwood's other arguments are unpersuasive as they do not pertain to the narrow instructions we issued to the district court and, further, read in obligations well beyond those imposed by the language of USERRA itself. He argues that

American Airlines' failure to help accommodate and place him in the escalator pilot position is a basis for remand. But the previous deliberations in this case dispensed with that issue. *See Harwood v. Am. Airlines Inc.*, No. 1:17-cv-00484-GBL-JFA, 2017 WL 11318161, at *8-9 (E.D. Va. Aug. 9, 2017); *Harwood*, 963 F.3d at 417. On remand, we instructed the district court to focus solely on whether American Airlines placed Harwood in an equivalent position per § 4313(a)(3). The equivalence of the position, as it bore on the determination of damages, was the focus of the district court's deliberations on remand and constitutes the limits of this appeal.

In short, Harwood's arguments fail to convince us of the requisite clear error in the district court's determination as to the equivalence of the position American Airlines offered on October 22. The district court's determination stands.

B.

Harwood bases his challenge to the amount in damages award solely on the equivalence arguments addressed above. We review a damages award from a lower court under an abuse of discretion standard. *Barber v. Whirlpool Corp.*, 34 F.3d 1268, 1279 (4th Cir. 1994).

Having found that the district court did not clearly err in its determination that the position offered to Harwood on October 22 was equivalent under the terms of § 4313(a)(3)(A) and finding no other abuse of discretion in its calculation of the appropriate amount of damages—which reflect the amount due to Harwood for the period from

September 1 through October 22—we affirm the district court's damages award.

C.

Finally, Harwood challenges the district court's award of attorneys' fees and costs. Our abuse-of-discretion review of the district court's fees determination is "extremely deferential." *Grissom v. Mills Corp.*, 549 F.3d 313, 322 (4th Cir. 2008). "[B]ecause a district court has close and intimate knowledge of the efforts expended and the value of the services rendered, the fee award must not be overturned unless it is clearly wrong." *Plyler v. Evatt*, 902 F.2d 273, 278 (4th Cir. 1990) (cleaned up). The district court did not abuse its discretion in applying the various rates and reductions to calculate attorneys' fees and costs awarded to Harwood.

In its initial fee determination, the district court found that a reasonable rate for principals and of counsel was $450 per hour, which was a reduction from the amount Harwood requested. According to the court, it was a justified reduction, both because this case was not particularly "complex" and because there were "many instances in the billing records where principals billed for work that could have been done by a law clerk or a paralegal." J.A. 817. Noting a lack of adequate documentation, the court then applied deductions for the following categories of impermissible billing: clerical work, excessive pre-suit billing, excessive hours spent on the fee petition, travel time, and lack of success. J.A. 818-23.

The district court's total award of $77,097.92 in attorneys' fees based on these calculations does not constitute an abuse of discretion. The court employed the proper methodology: It calculated the lodestar by multiplying a reasonable hourly rate by the number of hours reasonably expended, appropriately considering the relevant factors as set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) and as noted above. J.A. 815-24, 918-26. Then it reduced the fee award for lack of success and impermissible billing. J.A. 815-24, 918-26; *see also McAfee v. Boczar*, 738 F.3d 81, 88 (4th Cir. 2013) (reductions for unsuccessful claims); *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 244 (4th Cir. 2009) (same).

Harwood's primary argument in opposition to this fee analysis is essentially that district courts should not be permitted to make across-the-board reductions and should instead make targeted reductions to directly address specific issues. While such a targeted approach, as a matter of policy, might provide a more nuanced fee award, case law places no such burden on the trial court. *See, e.g.*, *Fox v. Vice*, 563 U.S. 826, 838 (2011) ("The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may . . . use estimates in calculating and allocating an attorney's time."); *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983) (affirming a district court's discretion to "identify specific hours that should be eliminated, or . . . simply reduce the award to account for limited success"); *Doe v. Kidd*, 656 F. App'x 643, 655 (4th Cir. 2016) (affirming a "twenty-five percent reduction . . . for

excessiveness"); *Trimper v. City of Norfolk*, 58 F.3d 68, 77 (4th Cir. 1995) (affirming the district court's twenty percent across- the-board reduction where the plaintiff's counsel devoted excessive time to seeking attorney's fees and failed to make reasonable settlement offers).

Harwood's remaining arguments take issue with the particulars of the district court's awards, but these arguments fall within the heartland of district courts' broad discretion and cannot prevail. *See Trimper*, 58 F.3d at 74. Harwood contends that the district court should have increased his counsel's hourly rate to account for cost-of-living increases and inflation. But he never requested such an increase from the district court. *See* J.A. 848-60. In his second fee petition, he specifically requested the hourly rates the court awarded on his first fee petition. *See* J.A. 890-900. Although the higher amount he initially requested was within the applicable matrix for the Vienna, Virginia metro area, district courts are not required to follow any particular fee matrix. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 229 (4th Cir. 2009) (noting that the relevant matrix is a "useful starting point to determine fees, not a required referent" (citation omitted)). The district court appropriately assessed the complexity of the case, cases in which comparable rates were awarded, and declarations from local employment law attorneys. J.A. 816-17. Harwood identifies no error of law or clear factual error.

Harwood's argument that the court should reconceptualize what constitutes clerical time in light of modern law practice likewise falls short. As

the district court rightly noted, pre-suit time is recoverable when it was "reasonably expended on the litigation." J.A. 819 (quoting *Webb v. Cnty. Bd. of Educ. of Dyer Cnty.*, 471 U.S. 234, 242 (1985)). Compensable activities may include "attorney-client interviews, investigation of the facts of the case, research on the viability of potential legal claims, drafting of the complaint and accompanying documents, and preparation for dealing with expected preliminary motions and discovery requests." J.A. 819 (quoting *Page v. Va. State Bd. of Elections*, No. 3:13- cv-678, 2015 WL 11256614, at *11 (E.D. Va. Mar. 11, 2015)). But "it is difficult to treat time spent years before the complaint was filed as having been 'expended on the litigation[.]'" *Webb*, 471 U.S. at 242. The district court determined that the pre-suit entries, describing "case status meetings, correspondence, and settlement attempts," were not "the sorts of legitimate pre-suit actions described in the caselaw." J.A. 820. Harwood argues that the court's conclusion constitutes dangerous precedent by discouraging pre-suit investigation, but the district court based its reduction on non-investigative tasks. J.A. 819-20. While again, as Harwood argues, it may make policy sense to encourage pre-suit settlement negotiations by including them in calculations for attorneys' fees, the district court's decision not to do so does not amount to an abuse of its broad discretion.

Harwood's other arguments similarly fail. He does not present any evidence of the customary practice in Northern Virginia for full or partially reduced rates for travel time. And we will not second-guess the district court's decision, which falls within the band of reasonable outcomes. Further, he

does not ascribe particularized error to the district court's reduction of the overall fee for the excessiveness of time spent on preparing the fee petition, but yet again makes a policy argument about the complexities of modern law practice that cannot succeed under the deferential standard we apply here.

Ultimately, Harwood fails to demonstrate that any aspect of the district court's fee award determination constitutes an abuse of its broad discretion.

III.

For the foregoing reasons, we affirm the district court's award of $28,771.41 in damages and $87,267.86 for fees and costs. As long established, district courts are best positioned to make factual determinations concerning warranted damages and the need for costs and fees. In the case before us, we find no reversible error.

Accordingly, the judgment is

AFFIRMED.

ENTERED JANUARY 4, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MAJOR GENERAL THOMAS P. HARWOOD III, *Plaintiff,*	Case No. 1:17-cv-0484 Hon. Liam O'Grady
v.	
AMERICAN AIRLINES INC., *Defendant.*	

ORDER

This matter comes before the Court on Plaintiff's supplemental petition for award of fees and costs. Dkt. 115. For the following reasons, the supplemental petition is **GRANTED IN PART** and **DENIED IN PART.** The Court awards $13,352.58 in attorney's fees and $5,820.09 in costs, for a total award of $19,172.67.

I. BACKGROUND

The Court does not rule on a blank slate for purposes of this supplemental petition. On May 23, 2018, the Court granted Plaintiff summary judgment on Counts II and III, and granted Defendant summary judgment on Plaintiffs request for

liquidated damages. *See* Dkts. 53, 54. On August 20, 2018, the Court granted in part and denied in part Plaintiff's motion for damages and for reconsideration. Dkt. 66. It awarded $50,184.75 in compensatory damages but denied Plaintiffs request for injunctive relief. *See id.* The parties filed cross-appeals of the Court's Orders. *See* Dkts. 69, 81. In his appeal, Plaintiff sought reinstatement of Count I, liquidated damages, injunctive relief, and more compensatory damages. *See* Dkt. 69. Defendant, for its part, challenged the Court's grant of summary judgment to Plaintiff on Counts II and III, as well as the Court's calculation of backpay. *See* Dkt. 81.

On May 16, 2019, during the pendency of the parties' cross-appeals, the Court granted in part and denied in part Plaintiffs motion for attorney's fees based on the initial proceedings, awarding Plaintiff $72,998.68 in attorney's fees and costs. *See* Dkt. 93. The parties then filed a stipulated motion to stay the Court's award until the Fourth Circuit rendered its final decision on appeal. Dkt. 94. The Court granted this stipulated motion. Dkt. 95.

On July 6, 2020, the Fourth Circuit issued its decision, which affirmed the Court's judgment in virtually every respect except for the relevant damages period. *See* Dkt. 96. The Court's initial Order calculated backpay based on a period running from September 1, 2015 to January 25, 2016. The Fourth Circuit, by contrast, determined that Plaintiff was not entitled to backpay for the period following October 22, 2015, so long as Defendant had offered Plaintiff an "equivalent position in terms of seniority, status, and pay" on that date. *See Harwood v. American Airlines, Inc.*, 963 F.3d 408,

419-420 (4th Cir. 2020). The Fourth Circuit remanded the case for the Court to "make findings as to the appropriateness of the position offered" by Defendant to Plaintiff under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). On remand, the Court determined that Defendant had, in fact, offered Plaintiff an "appropriate position" on October 22, 2015 pursuant to USERRA. *See* Dkt. 108. The Court therefore found that Plaintiff was entitled to backpay only through that date, with his military earnings offset. *Id.* at 2-3. This ruling reduced Plaintiffs damages award from $50,184.75 to $28,771.41. *Id.* at 3.

On November 9, 2020, Plaintiff filed a supplemental petition for attorney's fees and costs, which sought additional amounts based on the proceedings on appeal and remand. Dkt. 115. Defendant filed an opposition on November 30, 2020 (Dkt. 119), and Plaintiff submitted a reply on December 7, 2020 (Dkt. 120). The supplemental petition is now ripe for review.

II. LEGAL STANDARD

USERRA provides that "the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses." 38 U.S.C. § 4323(h)(2). The Court has discretion in determining the appropriate amount to be awarded under this statutory scheme, *McDonnell v. Miller Oil Co.,* 134 F.3d 638, 640 (4th Cir. 1998), but "there must be evidence supporting the reasonableness of [the] fees." *See United Mktg. Solutions. Inc. v. Fowler*, 2011 WL837112, at *4 (E.D. Va. Mar. 2,

2011). The party requesting attorney's fees bears the burden of establishing the reasonableness of its fee request. *Plyler v. Evatt*, 902 F.2d 273, 277 (4th Cir. 1990); *Cook v. Andrews*, 7 F. Supp. 2d 733, 736 (E.D. Va. 1998). Reasonableness is established "both by showing the reasonableness of the rate claimed and the number of hours spent." *Rehab. Ass'n of Va., Inc. v. Metcalf*, 8 F. Supp. 2d 520, 527 (E.D. Va. I 998).

The Fourth Circuit has established a three-step process for determining the reasonableness of attorney's fees. *Smith v. Loudoun Cnty. Pub. Schs.,* 2017 WL176510, at * I (E.D. Va. Jan. 17, 2017).

First, the Court must "'determine the lodestar figure by multiplying the number of reasonable hours expended [by] a reasonable rate.'" *McAfee* v. *Boczar*, 738 F.3d 81, 88 (4th Cir. 2013) (quoting *Robinson v. Equifax Info. Servs. LLC*, 560 F.3d 235, 243 (4th Cir. 2009)). In deciding what constitutes reasonable hours expended and a reasonable rate, courts are guided by the following twelve factors:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation, and ability of the attorney;

> (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Robinson, 560 F.3d at 243-44 (citing *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 n.28 (4th Cir. 1978)). Courts need not address all twelve *Robinson* factors. *See Moore v. SouthTrust Corp.*, 392 F. Supp. 2d 724, 733 (E.D. Va. 2005). They "only need discuss in detail 'those factors that are relevant to its determination of the reasonable amount of attorney's fees to award in each particular case.'" *Kennedy v. A Touch of Patience Shared Housing Inc.*, 779 F. Supp. 2d 516, 526 (E.D. Va. 2011); *Dollar Tree Stores, Inc. v. Norcor Bolingbrook Assocs., LLC*, 699 F. Supp. 2d 766, 768 (E.D. Va. 2009). For example, a court has no obligation to consider factors that are "subsumed within the initial calculation of hours expended at a reasonable hourly rate." *Freeman v. Poller*, 2006 WL2631722, at *2 (W.D. Va. Sept. 13, 2006) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 (1983)); *see also McAfee*, 738 F.3d at 91 (observing that "[t]o the extent that any of the *[Robinson]* factors has already been incorporated into the lodestar analysis," such factors are not later considered a second time to make an upward or downward adjustment to the lodestar figure because doing so would "inappropriately weigh" them).

Second, after a Court determines the "lodestar figure," it must "subtract fees for hours spent on unsuccessful claims unrelated to successful ones."

Robinson, 560 F.3d at 244 (internal quotation marks and citation omitted).

Third, the Court awards "some percentage of the remaining amount, depending on the degree of success enjoyed by the plaintiff." *Robinson*, 560 F.3d at 244 (internal quotation marks and citation omitted). The Court determines this amount based on the individual facts and circumstances of each case. *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 628 (4th Cir. 1995).

III. DISCUSSION

This Order will focus primarily on the fees and costs sought by Plaintiff in connection with proceedings following the Court's entry of the stipulated stay on June 11, 2019. Dkts. 94, 95. It will only rehash the prior award of attorney's fees and costs (Dkt. 93) insofar as Defendant now claims that a further reduction of that award is warranted given the diminution of Plaintiffs damages on remand.

Beginning with Plaintiffs post-stay billing, Defendant does not object to the reasonableness of the charged rates. *See* 0kt. 119, at 5 ("American generally does not contest the reasonableness of the rates cited in Plaintiffs supplemental petition[.]"); *see also* Dkt. 120, at 1-2. Rather, Defendant takes issue with the fee request's failure to account for Plaintiffs partial "degree of success" on appeal and remand, along with the nature of some of the work for which Plaintiff billed.

The outcome of the litigation following the Court's initial summary judgment Order is undisputed. Plaintiffs appeal (Dkt. 69) was entirely

unsuccessful. Plaintiff's defense of Defendant's cross-appeal (Dkt. 81) was partially successful, as the Fourth Circuit sided with Plaintiff on every issue except the relevant period during which Plaintiff was entitled to backpay. *See Harwood*, 963 F.3d at 419-420. Plaintiffs defense of his initial damages award on remand was entirely unsuccessful; all ground that could have been ceded based on the Fourth Circuit's ruling was ceded. *See* Dkt. 108. In sum, all issues previously decided remain unsettled after appeal and remand, with the exception of the quantum of Plaintiffs damages.

Plaintiff acknowledges that he cannot recover attorney's fees for his failed appeal if that appeal can be distinguished entirely from his successful litigative efforts. *See* Dkt. 120, at 2 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983)). Plaintiff therefore argues that his failed appeal and his partially successful defense of Defendant's cross-appeal are inseverable, as they stem from the "same nucleus of operative facts." Dkt. 120, at 3.

When analyzing separate issues in petitions for attorney's fees, Courts have referenced the familiar "common core of operative fact' standard that Plaintiff invokes. *See, e.g., Hensley*, 461 U.S. at 435; *Brodziak v. Runyon*, 145 F.3d 194, 197 (4th Cir. 1998). Use of this standard makes perfect sense when a claim turns on facts. This occurs typically at the trial level. *See, e.g., Andrade v. Aerotek, Inc.*, 852 F. Supp. 2d 637, 640 (D. Md. 2012).

In this appeal, however, the parties primarily disputed legal issues. When legal issues are in contest, the relevant inquiry centers on their

relationship. See *Hensley*, 461 U.S. at 435 (discussing circumstances in which multiple claims "will involve a common core of facts *or* will be based on related legal theories") (emphasis added). A legal contention that USERRA benefits can be offset by military pay, for example, is "distinct in all respects" to a legal contention that USERRA requires an employer to rehire returning servicemembers as soon as the employer determines that USERRA's criteria are satisfied. *See Harwood*, 963 F.3d at 416.

In this case, the only dispositive factual issues decided by the Fourth Circuit pertained to Plaintiffs claims. *See, e.g., id* at 415-16 (upholding the Court's denial of Plaintiffs request for liquidated damages because "the complaint's factual allegations of discriminatory intent were far too attenuated to make them relevant to the airline's conduct in 2015"). Defendants' arguments, on the other hand, were strictly legal; they challenged the Court's statutory interpretation of USERRA. Defendants' legal arguments were also "'distinct in all respects" from Plaintiffs legal arguments, which focused on discrimination, liquidated damages, injunctive relief, and earnings offsets. *See generally id.* Accordingly, the Court finds that Plaintiffs partially successful defense of Defendant's cross appeal is "distinct in all respects" from Plaintiffs entirely unsuccessful appeal of the Court's summary judgment Order. *See Hensley*, 461 U.S. at 440. Fees associated with this appeal, like fees billed in connection with Plaintiffs failed efforts to defend his post-October 22, 2015 damages award on remand, are not compensable. *See Robinson*, 560 F.3d at 244 ("The court ... should subtract fees for hours spent on unsuccessful claims unrelated to successful ones.") (citing *Grissom v. The*

Mills Corp., 549 F.3d 313, 321 (4th Cir. 2008)) (citation marks omitted); *see e.g., Harper v. BP Exploration & Oil, Inc.*, 3 F. App'x 204, 208 (6th Cir. 2001); *Newhouse v. McCormick & Co.*, 130 F.3d 302, 304 (8th Cir. 1997); *Thompson v. Gomez*, 45 F.3d 1365, 1368-69 (9th Cir. 1995); *Evans v. City of Evanston*, 941 F.2d 473, 476 (7th Cir. 1991).

Accordingly, and consistent with the legal principles set forth in the prior Order (Dkt.93), the Court awards the following attorney's fees by category:

Category:	Billing Entries:	Total Fee Amount:	Rationale:
Attorney's fees attributable to Plaintiff's partially successful defense of the Defendant's cross-appeal of the Court's summary judgment Order	66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97	$4,700.00	All billable fees discounted by 25%[1] to account for the Fourth Circuit's decision, which credited Defendant's contention in its cross-appeal that no damages were recoverable after Defendant offered Plaintiff "an equivalent position in terms of seniority, status, and pay for purposes of § 4313(a)(2)." *See Harwood*, 963 F.3d at 420.
Attorney's Fees Attributable to Plaintiff's Unsuccessful Appeal of the Court's Summary Judgment	25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54,	$0.00	Plaintiff was entirely unsuccessful. *See, e.g., Robinson*, 560 F.3d at 244; *Harper*, 3 F. App'x at 208; *Newhouse*, 130 F.3d at 304; *Thompson*, 45 F.3d at 1368–69; *Evans*, 941 F.2d at 476.

[1] The Fourth Circuit rejected 75% of Defendant's primary contentions. First, it found that Defendant failed to reemploy Plaintiff "promptly" under the meaning of §§ 4312 and 4313 of USERRA. Harwood, 963 F.3d at 416-17. Second, it "agree[d] with the district court that the backpay period began September l." Id. at 419. Finally, it "reject[ed] American Airlines' argument that the period from September 4 to October 1 be excluded [from the backpay calculation] on the ground that Harwood failed to engage in the deliberative proceed." Id. Only with respect to the period after October 22, 2015, "when American Airlines extended Harwood an offer," did the Fourth Circuit side with Defendant. See id. at 419-20.

Order	55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 102, 103, 113, 114, 115, 116		
Attorney's fees connected to the parties' appeal, but untraceable to either Plaintiff's unsuccessful appeal or to Plaintiff's partially successful defense of Defendant's cross-appeal	4, 5, 6, 8, 10, 11, 12, 13, 14, 15, 16, 7, 19, 20, 21, 22, 23, 24, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 138, 139, 140, 141, 142, 143, 145, 146, 147, 149, 151	$6,383.00	All billable fees discounted by 62.5%. This discount reflects a complete loss on Plaintiff's unsuccessful appeal (50%), as well as Plaintiff's partial lack of success defending Defendant's cross-appeal (12.5%) (see footnote 1).
Attorney's Fees Incurred on Remand / Post-Appeal	148, 150, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 197, 205, 206	$0.00	Plaintiff was entirely unsuccessful. *See, e.g.*, *Robinson*, 560 F.3d at 244; *Harper*, 3 F. App'x at 208; *Newhouse*, 130 F.3d at 304; *Thompson*, 45 F.3d at 1368–69; *Evans*, 941 F.2d at 476.
Clerical Tasks	1, 2, 3, 7, 9, 18, 104, 105, 106, 107, 108, 109, 110, 111, 112, 144, 192	$0.00	The entries in this fee category are noncompensable. *See Two Men & A Truck Int'l, Inc. v. A Mover Inc.*, 128 F. Supp. 3d 191, 929–30 (E.D. Va. 2015); *Gregory v. Belfor USA Grp., Inc.*, 2014 WL 468923, at *6 (E.D. VA. Feb. 4, 2014).
Travel Time	136, 137	$500.00	The Court bases this total on its previously determined $100/hour rate. *See* Dkt. 93, at 8 (citing *Diaz v. Banh Cuon Saigon Rest., Inc.*, 2017 WL 3713469, at *8 (E.D. Va. July 20, 2017))
Fees on Fees	98, 99, 100, 101, 185, 186, 187, 188, 189, 190, 191, 193, 194, 195, 196, 198,	$1,769.00	Half the value of Plaintiff's initial entries associated with "fees." This discount is consistent with the Court's position with respect to "fees on fees" in prior opinions. *See Capital Hospice v. Global One Lending, LLC*, 2009 WL 10730781, at
	199, 200, 201, 202, 203, 204, 207, 208, 209, 210, 211, 212		*4 (E.D. Va. July 1, 2009) ("Here, 12.7 hours of an attorney's time preparing a fee petition seems excessive, particularly given that such work is relatively straightforward and much of it could have been delegated to staff. The Court therefore will cut the amount of hours spent preparing the fee petition in half, from 12.7 hours to 6.35 hours.").
Total: $13,352.58			

Defendant also asks the Court to reduce its prior fee award by an additional 20%, because Plaintiffs recovery was lessened from $50,184.75 to $28,771.41. *See* Dkt. 118, at 11; Dkt. 108. The Fourth Circuit, citing U.S. Supreme Court precedent, makes clear that, "in fixing fees, [a Court] is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Hetzel v. Cry. of Prince William*, 89 F.3d 169, 173 (4th Cir. 1996) (citing *Farrar v. Hobby*, 506 U.S. 103, 114 (1992)). At the same time, the Court is cognizant that draconian reductions to fee awards based on a partial lack of success may operate to undermine attorneys' incentives to litigate and, by extension, vindicate socially important civil rights. *See N*.C. *Dep't of Transp. v. Crest St. Council, Inc.*, 479 U.S. 6, 19 (1986) (Brennan, J., dissenting). With these countervailing interests in mind, the Court will reduce the initial fee award by an additional 5%, rather than the 20% requested by Defendant. *See* Dkt. 93, at 10; Dkt. 118, at 11. This reduces attorney's fees in the first Order from $68,648.83 to $63,745.34.

Finally, the Court will not disturb its prior award of $4,349.85 in costs to Plaintiff. *Id.* at 11. Though the Court will order reimbursement of Plaintiffs appellate filing fee, *see Davis v. Advocate Health Ctr. Patient Care Exp.*, 523 F.3d 681, 685 (7th Cir. 2008), it will award him the remaining $5,820.09 in costs sought in his supplemental petition because he remains a prevailing party under USERRA.

IV. CONCLUSION

For the reasons set forth above, Plaintiff's supplemental petition for award of attorney's fees and costs, Dkt. 115, is **GRANTED IN PART AND DENIED IN PART.** The Court awards $13,352.58 in attorney's fees and $5,820.09 in costs, for a total award of $19,172.67.

The Court also reduces the attorney' s fees it awarded in its prior Order (Dkt. 93) from $68,648.83 to $63,745.34. Combining the two petitions (Dkts. 70, 115), the Court awards $87,267.86 in attorney's fees and costs to Plaintiff. The Clerk's office is **DIRECTED** to reimburse Plaintiff's appellate filing fee of $505.00.

It is **SO ORDERED.**

/s/ Liam O'Grady
Liam O'Grady
United States District Judge

January 4, 2021
Alexandria, Virginia

ENTERED OCTOBER 6, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MAJOR GENERAL THOMAS P. HARWOOD III,	)	
Plaintiff,	)	Case No. 1:17-cv-0484
	)	Hon. Liam O'Grady
v.	)	
AMERICAN AIRLINES INC.,	)	
Defendant.	)	

ORDER

This case comes before the Court on remand from the Fourth Circuit Court of Appeals for recalculation of damages. After consideration of the parties' briefs on the issue, the Court finds that Plaintiff General Harwood is entitled to $28,771.41 in damages.

I. BACKGROUND

The Plaintiff is a pilot with Defendant American Airlines and a member of the Air Force Reserves. After a tour of duty which ended in the summer of 2015, the Plaintiff requested employment as the captain of a Boeing 737 airplane based in New York. However, the Plaintiff had been diagnosed with atrial fibrillation during his tour of duty and

could not gain medical clearance to resume work as a pilot at that time. The Defendant offered the Plaintiff alternate employment with its Flight Technical Operations Group, based in Dallas, Texas on October 22, 2015, and the Plaintiff accepted that position on January 25, 2016. On the same day, the Plaintiff received permission to fly, and the Defendant reassigned him to a pilot position the next day.

The Plaintiff brought this action against the Defendant in April 2017 under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The Plaintiff claimed that the Defendant failed to rehire him promptly, violating USERRA and causing him injury in the form of lost wages, and that the Defendant discriminated against him as a member of the military, also violation of USERRA. This Court dismissed the discrimination claim but awarded the Plaintiff over $50,000 in damages based on the Defendant's failure to rehire the Plaintiff promptly.

The Plaintiff appealed this Court's decision to the Fourth Circuit, which affirmed the decision in part and remanded it to this Court solely on the issue of the calculation of damages.

II. DISCUSSION

The Fourth Circuit instructed this Court to recalculate damages consistent with the following presumptions: that the Plaintiff is entitled to backpay damages for the period of time between September 1 and October 22; and that the Plaintiff is not entitled to backpay damages for the period of time between October 22 and January 25.

The Plaintiff has failed to sway the Court that he is not entitled to backpay for the period October 22 through January 25. The Defendant offered the Plaintiff employment in a specially created position in its Flight Technical Operations Group in Dallas on October 22; the Fourth Circuit referred to this as an "appropriate position." *Harwood v. American Airlines, Inc.*, 963 F.3d 408. 417 (4th Cir. 2020). The position came with the same pay and benefits that the Plaintiff received as a pilot, plus equal status within the organization. The Plaintiff eventually accepted the position on January 25. However, he argues in his brief on this issue that he accepted the position only because he required employment, not because it satisfied his expectations. Specifically, the Plaintiff was dissatisfied with the location of the position in Dallas, Texas.

The Plaintiff is estopped from claiming that the position in Dallas was unsatisfactory. He through counsel, communicated on October 1 a list of four positions in which he was interested, three of which were located in Dallas. Furthermore, USERRA does not require reemployment in the employee's preferred location or the location where he previously held a position. 20 C.F.R. § l002.194 ("The reemployment position may involve transfer to another. . . . location. . ."). Therefore the Plaintiff cannot overcome the presumption that he is not entitled to backpay after October 22, because the Defendant had made employment available to him which he did not accept.

The Defendant makes no effort in its brief to overcome the presumption that the Plaintiff is entitled to backpay for the period from September 1 to October 22, and the Court so finds.

The Court awards the Plaintiff damages of $28,771.41, which is the amount of backpay the Plaintiff is entitled to for the period from September l to October 22, 2015; this calculation includes interest and is offset by the Plaintiff's military earnings during this time period in accordance to this Court's prior ruling which was affirmed by the Fourth Circuit. *Harwood*, 963 ·F.3d at 41 9.

It is **SO ORDERED.**

/s/ Liam O'Grady
Liam O'Grady
United States District Judge

October 6, 2020
Alexandria, Virginia

ENTERED JULY 6, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2033 (L)
(1:17-cv-00484-LO-JFA)

MAJOR GENERAL THOMAS P. HARWOOD, III,

Plaintiff - Appellant

v.

AMERICAN AIRLINES, INC.,

Defendant - Appellee.

No. 18-2074
(1:17-cv-00484-LO-JFA)

MAJOR GENERAL THOMAS P. HARWOOD, III,

Plaintiff - Appellee

v.

AMERICAN AIRLINES, INC.,

Defendant - Appellant.

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed in part and vacated in part. This case is remanded to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

ENTERED JULY 6, 2020

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2033

MAJOR GENERAL THOMAS P. HARWOOD, III,

Plaintiff - Appellant,

v.

AMERICAN AIRLINES, INC.,

Defendant - Appellee.

No. 18-2074

MAJOR GENERAL THOMAS P. HARWOOD, III,

Plaintiff - Appellee,

v.

AMERICAN AIRLINES, INC.,

Defendant - Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Liam O'Grady, Senior District Judge. (1:17-cv-00484-LO-JFA)

Argued: January 31, 2020 Decided: July 6, 2020

Before NIEMEYER, WYNN, and FLOYD, Circuit Judges.

Affirmed in part, vacated in part, and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Judge Wynn and Judge Floyd joined.

ARGUED: Adam Augustine Carter, EMPLOYMENT LAW GROUP, PC, Washington, D.C., for Appellant/Cross-Appellee. Anton Melitsky, O'MELVENY & MYERS LLP, New York, New York, for Appellee/Cross-Appellant. **ON BRIEF:** Andrew D. Howell, R. Scott Oswald, Nicholas Woodfield, THE EMPLOYMENT LAW GROUP, PC, Washington, D.C., for Appellant/Cross-Appellee. Jason M. Zarrow, O'MELVENY & MYERS LLP, Washington, D.C., for Appellee/Cross-Appellant.

NIEMEYER, Circuit Judge:

In this case, a member of the uniformed services claims relief from his civilian employer for not rehiring him *promptly* after he completed a tour of duty, as required by the Uniformed Services Employment and Reemployment Rights Act ("USERRA").

As Major General Thomas P. Harwood neared completion of a tour of duty with the United States Air Force Reserve — which was scheduled to end on August 31, 2015 — he sought to return to his former employment as a pilot with American Airlines, Inc. In response to his request, American Airlines

confirmed that Harwood would be reemployed in his requested position as of September 1, 2015. But when Harwood thereafter disclosed that during his tour of duty he had been diagnosed with atrial fibrillation (a condition involving an irregular heartbeat) and therefore was unable to secure the required medical clearance from the Federal Aviation Administration ("FAA") to serve as a pilot, the airline told Harwood that it could not rehire him as a pilot but that it could "explore other paths." Following further communications between the parties, American Airlines offered Harwood an alternative position on October 22, 2015, which Harwood initially turned down. After several months, however, Harwood accepted the alternative position and was accordingly reemployed by the airline on January 25, 2016. On that day, Harwood also obtained a waiver from the FAA that entitled him to serve again as a pilot, and the next day, American Airlines reassigned him to a pilot position, which he continues to hold.

Harwood commenced this action in April 2017 under USERRA to recover damages he incurred from September 1, 2015, to January 25, 2016, due to the airline's failure to reemploy him *promptly*, as required by the Act. He also claimed that, during the rehiring process, the airline discriminated against him on the basis of his uniformed service, also in violation of the Act.

The district court dismissed Harwood's discrimination claim but granted him judgment on his claim that American Airlines failed to rehire him promptly and awarded him slightly more than $50,000 in damages. The court, however, rejected

both Harwood's claim that the airline's action was "willful," which would have entitled him to liquidated damages, and his request for injunctive relief.

Harwood filed this appeal, contending that the district court erred (1) in dismissing his discrimination claim; (2) in determining that the airline's violations were not willful; (3) in denying his request for injunctive relief; and (4) in reducing the damage award by income he received from the Air Force for service performed during the period of delay. American Airlines filed a cross-appeal, contending that the district court erred (1) in concluding that the airline did not rehire Harwood promptly; and (2) alternatively, in determining the period of time for which Harwood was entitled to damages in the form of backpay.

For the reasons that follow, we affirm on all issues of liability but vacate the damage award and remand for a recalculation of damages.

I

Harwood was first employed by American Airlines as a commercial pilot in 1992. During his employment he also served in the Air Force Reserve and, from time to time, took leave to fulfill his military commitment. From June 2013 to August 31, 2015, Harwood took leave to serve a tour of duty in Saudi Arabia, and before the end of that tour, on June 3, 2015, he contacted the New York Manager of Flight Crew Administration of American Airlines to inform the airline that he intended to return to work on completion of his tour. He requested that he be assigned as a domestic flight captain of a Boeing

737, based out of LaGuardia Airport in New York, his base before taking leave for his tour of duty. American Airlines responded on August 3, 2015, confirming that Harwood would be reemployed in the requested position on September 1, 2015, and informing him that his retraining would begin on September 5, 2015.

During this same period, Harwood began the process of obtaining a "first-class medical certificate," which was required by the FAA for commercial pilots. In late July or early August, however, he discovered that his ability to obtain the certificate was impeded by the fact that while he was on his tour of duty, he had been diagnosed with atrial fibrillation. In August 2015, Harwood requested that the FAA waive the certification requirement, and he sent the agency the necessary documentation for a waiver. He was not, however, cleared for flight at that time. With the start of his pilot retraining approaching, Harwood informed the airline about this problem on August 20, 2015. The airline's New York Manager of Flight Crew Administration responded, asking Harwood to "let [the airline] know as soon as possible if the medical is going to take some time so it [could] avoid setting up a training that [Harwood] [would] not be able to attend." The Manager then called Harwood on August 26 to discuss the situation further. During that conversation, Harwood said that he would like to be reemployed as a pilot notwithstanding his lack of a medical certificate and noted that he had a sick leave balance of 854 hours that he could use while he tried to obtain clearance to fly. The Manager informed Harwood, however, that the airline could

not reemploy him as a pilot without the medical certificate or a waiver.

On September 1, 2015, the day on which Harwood was scheduled to be reemployed, he emailed Scott Hansen, the airline's Director of Flight Operations, to obtain confirmation that his employment was beginning on that date. Hansen responded that Harwood could be returned to active employment, "presuming [he] meet[s] USERRA guidelines and company policy for reemployment. So long as you have a current and valid medical, and are available for training, you're good to go." Harwood wrote back by email that he did not yet have the certificate but that he had met all the conditions for reemployment set forth in USERRA. In response, on September 4, 2015, Hansen wrote:

> It looks like you meet the general requirements for reemployment under USERRA (qualifying discharge, timely return, etc.) and we're willing to put you back to work in a reasonable time.
>
> In my view, your situation isn't so much centered on § 4312, which deals with general reemployment. It's really more of a § 4313 issue involving your reemployment position. Assuming you're qualified to fly, we're fully committed to getting you back on the line with the same seniority etc. It seems to me, however, that you're telling us you're not medically qualified to fly which probably puts us under § 4313(a)(3) assuming you have a

> disability that was incurred in or aggravated while you were serving. If so, our first goal is to try to work with you to see if we can make any reasonable accommodations that will get you back to your position as a line pilot If there's nothing we can do to reasonably accommodate you so that you can return to flying status, then we can explore other paths. . . .
>
> Please let me know when you can have a meeting or a call to discuss our options. I'll include HR in the process. I look forward to talking to you.

After receiving Hansen's email, Harwood retained counsel who wrote the airline on October 1, 2015, stating that Harwood's goal was to be "reemployed as quickly as possible so that he [could] gain access to his 854 hours of sick leave." Counsel requested that Harwood be reemployed as a pilot or, if he were unable to obtain a medical clearance from the FAA, in a position of comparable status and pay in Operations Safety and Compliance or Flight Operations, located in Dallas, Texas. American Airlines responded on October 22, 2015, offering to extend Harwood's military leave while he continued to seek a waiver of the medical certificate requirement or alternatively to employ him in a custom-made position in the airline's Flight Technical Operations Group in the Flight Department in Dallas. The airline explained that this position would be "appropriate for his status" and be compensated "at the same rate he would

receive if actively flying." Harwood declined this offer, at least at that time.

During the next three months, Harwood spent time on active duty with the Air Force and received income and benefits from the military for doing so. On January 25, 2016, however, he accepted American Airlines' offer of reemployment in the custom-made position in Dallas. On that same day, Harwood also received a waiver of the medical certificate requirement from the FAA. Accordingly, the airline reassigned Harwood the next day to the position of a Boeing 737 domestic flight captain. Harwood has been employed as a pilot by the airline ever since that date and has taken and returned from additional military leave without incident.

Over a year later — in April 2017 — Harwood commenced this action under USERRA, alleging that the airline discriminated against him as a member of the uniformed services, in violation of 38 U.S.C. § 4311, and that it failed to reemploy him promptly following his tour of duty that ended August 31, 2015, in violation of §§ 4312 and 4313.

The district court granted the airline's motion to dismiss Harwood's discrimination claim brought under § 4311 on the ground that, under its interpretation, "§ 4311 protects veterans from discrimination *after* they have been reemployed following deployment, and [Harwood] has failed to plead any facts that demonstrate that [he] was discriminated against subsequent to his January 25, 2016 reemployment." And on the parties' cross-motions for summary judgment, the court (1) granted judgment to Harwood on his claims

under §§ 4312 and 4313, concluding that American Airlines failed to rehire him *promptly*; (2) rejected Harwood's claim for liquidated damages based on the airline's alleged willfulness in delaying rehire; (3) entered a money judgment in favor of Harwood in the amount of $50,184.75, representing his backpay with interest, less the amounts that Harwood received as income from the Air Force for his service during the period of delay; and (4) denied Harwood's motion for an injunction, based on its assessment that the airline's infraction was the result of a one-time misunderstanding by the airline and "nothing suggest[ed] that American [would] make the same mistake in the future."

From the district court's judgment dated August 21, 2018, Harwood filed this appeal, and American Airlines filed a cross-appeal.

II

Harwood contends first that the district court erred in dismissing his discrimination claim under 38 U.S.C. § 4311. The court did so, as it explained, on the ground that § 4311 "protects veterans from discrimination *after* they have been reemployed" and that Harwood "failed to plead any facts that demonstrate that [he] was discriminated against" after his reemployment. Harwood argues that § 4311's protections are broader than what the court held, covering also the airline's conduct *during* the reemployment process. As he alleged in his complaint, the airline "fail[ed] to treat him as if he had been continuously employed in lieu of his military service" by not reemploying him on September 1, 2015. And he asserted that this failure

was motivated by discriminatory animus reflected by comments made to him earlier in his career. According to his complaint, in the summer of 1997, an employee at the airline's Dallas Flight Office told Harwood that the airline would not permit him to take "so much military leave" and asked him to "decide if [he is] going to play soldier or be an airline pilot." In 1998, when Harwood was based in Los Angeles, he was "criticize[d]" by the airline "for his military service." And in that same year, the airline removed Harwood from its payroll for three weeks while he performed "alternative weeks of military service." That matter, however, was resolved internally when Harwood raised the issue with the Chief Pilot at Los Angeles International Airport.

American Airlines argues that the district court's ruling correctly followed our decisions in *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299 (4th Cir. 2006), and *Butts v. Prince William County School Board*, 844 F.3d 424 (4th Cir. 2016), which, in its view, limited § 4311's prohibition of discrimination to an employer's conduct *after* reemploying a servicemember. The airline also argues that reading the text of § 4311 to prohibit discriminatory conduct during the time of reemployment would render that provision surplusage, as such conduct is already regulated by §§ 4312 and 4313. In the alternative, the airline maintains that Harwood's complaint failed to "adequately plead that his military status (as opposed to his lack of FAA clearance) was a motivating factor in [its] decision not to reemploy him as a pilot."

At the outset, we note that USERRA "was enacted to protect the rights of veterans and members of the uniformed services" and therefore "must be broadly construed in favor of its military beneficiaries." *Francis*, 452 F.3d at 303 (cleaned up). In particular, § 4311 broadly prohibits discrimination in the hiring, rehiring, and retaining of servicemembers, providing:

> A person who . . . has performed . . . 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 . . . service . . . .

38 U.S.C. § 4311(a) (emphasis added). And subsection (c) explains that "[a]n employer shall be considered to have engaged in actions prohibited . . . under subsection (a), if the person's . . . service . . . in the uniformed services is a *motivating factor* in the employer's action." *Id.* § 4311(c)(1) (emphasis added). Thus, to succeed on a claim under § 4311(a), a servicemember must demonstrate (1) that his employer took an adverse employment action against him; (2) that he had performed, applied to perform, or had an obligation to perform as a member in a uniformed service; and (3) that the employer's adverse action was taken "on the basis of" that service, such that the service was "a motivating factor" in the action. *Id.* §§ 4311(a), (c)(1). The employer can avoid liability under this provision if it can demonstrate that it would have taken the adverse employment action regardless of whether the person had served in the uniformed services. *See*

id. § 4311(c)(1). The plain text thus reads more broadly than the interpretation given to it by the district court. While the district court appropriately acknowledged § 4311's protection against discriminatory action *after* the servicemember is reemployed, the provision is not so limited, as it also applies explicitly to "initial employment" and "reemployment." *Id*. § 4311(a).

While our decisions in *Francis* and *Butts* addressed post-hiring conduct — *see Francis*, 452 F.3d at 304 ("Section 4311 prohibits discrimination with respect to any benefit of employment against persons who serve in the armed services *after they return from a deployment and are reemployed*" (emphasis added)); *Butts*, 844 F.3d at 430 ("Section 4311 applies *after a veteran is reemployed* following deployment" (emphasis added) (citing *Francis*, 452 F.3d at 304)) — those cases did not purport to restrict § 4311's coverage to post-hiring conduct. Their discussion of § 4311's post-hiring protections served to contrast § 4311 with §§ 4312 and 4313, which apply only at the time of reemployment, and thus the cases must be understood as simply underscoring that § 4311 applies *even after* reemployment. But nothing in the language or reasoning of those two cases undermines the full scope of § 4311's text, which provides for the provision's application also to the "den[ial] [of] initial employment [and] reemployment." *Id*. § 4311(a).

The airline's argument that such a broad reading would render § 4311 as surplus to §§ 4312 and 4313, which also govern conduct during the rehiring of servicemembers, overlooks the differing criteria required for a discrimination claim under

§ 4311, on the one hand, and claims under §§ 4312 and 4313, on the other. Crucially, a plaintiff must prove that discrimination on the basis of service was a motivating factor in an employment action to recover under § 4311. By contrast, §§ 4312 and 4313 provide relief regardless of intent, but only if a servicemember has met other criteria such as, for example, not having taken leave from the employer for performance of uniformed service for more than five years cumulatively. *See id.* § 4312(a)(2).

Although we conclude that the district court read § 4311 too restrictively, we nonetheless affirm its decision to dismiss Harwood's § 4311 claim because the complaint's factual allegations of discriminatory intent were far too attenuated to make them relevant to the airline's conduct in 2015. To plead animus, Harwood's complaint recited a few scattered comments made by airline employees in Dallas and Los Angeles over 15 years prior to the allegedly discriminatory action. He does not, however, allege that those comments were made by anyone connected with the decisionmaking on his 2015 reemployment. Indeed, the complaint itself indicates that American Airlines failed to reemploy Harwood on September 1, 2015, because Harwood did not then possess a valid first-class medical certificate — a reason entirely unrelated to his service in the Air Force Reserve. Although discriminatory motivation under USERRA can be inferred by an employer's expressed hostility towards servicemembers protected by the Act, the discriminatory animus must nonetheless be connected in some way to the adverse employment action. *See* 38 U.S.C. § 4311(a) (prohibiting denial of reemployment "on the basis" of uniformed service).

But Harwood has not pleaded sufficient factual content to support a "reasonable inference" that his military service was a motivating factor in any of the airline's conduct about which he complains. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Accordingly, we affirm the district court's dismissal of Harwood's § 4311 claim.

III

American Airlines contends that the district court erred in finding it liable under §§ 4312 and 4313. The district court concluded that under the "plain language" of those provisions, American Airlines was required to reemploy Harwood promptly after it was shown that he satisfied the requirements for reemployment described in § 4312, and failing to do so constituted a violation, even if the appropriate reemployment position had not yet been determined. The court acknowledged that the airline was "entitled to engage in a § 4313 analysis upon learning that General Harwood [could] not fly airplanes because he lack[ed] a first-class medical certificate," but it held that the airline violated § 4312 in delaying his reemployment beyond September 1, 2015. The airline disagrees with the court's statutory interpretation and argues that it fully complied with the statutory scheme by first determining that the § 4312 criteria were satisfied and then proceeding under § 4313 to identify an appropriate reemployment position. The airline thus contends that it was under no obligation to formally rehire Harwood until it had identified a proper position. And it argues further that, in light of Harwood's medical condition, its identification of

such a position on October 22 was sufficiently prompt under the statute.

Harwood contends, as the district court held, that USERRA requires an employer to rehire returning servicemembers as soon as it determines that the § 4312 criteria are satisfied, and only then may it determine which particular position meets § 4313's requirements.

Under the statutory scheme, §§ 4312 and 4313 are interconnected, operating in a complementary manner. Section 4312 provides that a returning servicemember is "entitled to the reemployment rights" provided by USERRA if he satisfies three criteria: (1) that he have given "advance written or verbal notice" of his uniformed service to his employer; (2) that the cumulative length of his absence for service up until the time of reemployment "does not exceed five years"; and (3) that he have submitted "an application for reemployment." 38 U.S.C. § 4312(a). And § 4313 operates to define the rights of returning servicemembers "entitled to reemployment under section 4312." *Id.* § 4313(a); *see also Butts*, 844 F.3d at 430. Specifically, § 4313 provides that "a person entitled to reemployment under section 4312 . . . shall be *promptly* reemployed in a position of employment" as determined under that section. 38 U.S.C. § 4313(a) (emphasis added). "Prompt reemployment" is defined by regulation to mean "as soon as practicable under the circumstances of each case." 20 C.F.R. § 1002.181.

Under § 4313(a)(2), the default employment position for a returning servicemember is the so-

called "escalator position" — "the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by . . . service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform." 38 U.S.C. § 4313(a)(2)(A). But if a returning servicemember has a "disability incurred in, or aggravated during" his service that prevents him from qualifying for the escalator position, he must be reemployed "in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer," or the "nearest approximation" of such a position. *Id.* § 4313(a)(3).

In short, under the statutory scheme created by §§ 4312 and 4313, eligible returning servicemembers must be *promptly* reemployed an in an appropriate position *for which they are qualified.*

Of course, in Harwood's case, it is clear from the record that he was not qualified at the time his tour ended to perform the duties of the escalator position, as without the proper medical clearance, he was ineligible to serve as a pilot. But Harwood *was* eligible for other positions that met the requirements of § 4313, as the airline itself acknowledged when it offered him reemployment in just such a position on October 22. Thus, the issue presented is simply whether the airline acted sufficiently promptly to meet its burden under § 4313 to reemploy Harwood in an appropriate position as soon as was practicable under the circumstances.

On the record in this case, we conclude that the district court did not err in ruling that American Airlines failed to discharge its statutory duty *promptly*. The airline determined at least as early as August 3, 2015 — when it was without knowledge of Harwood's medical condition — that Harwood qualified for reemployment under § 4312. An airline employee so testified, and her testimony is consistent with the airline's contemporaneous response to Harwood, advising him that he would be reemployed on September 1, 2015. And, because the airline was on notice as of August 20 that Harwood had not obtained the clearance necessary for a pilot position, it had nearly two weeks to identify under § 4313 an appropriate alternative position for him to assume on the start date that had previously been scheduled. Thus, we see no error in the district court's conclusion that "promptly" entailed reemployment by September 1, as promised and anticipated by the airline.

American Airlines argues that its October 22 offer to reemploy Harwood in an appropriately senior non-pilot position was sufficiently prompt in view of the circumstances, *i.e.*, Harwood's ineligibility to fly as of September 1. We cannot agree. As noted, the airline learned of Harwood's medical condition on August 20, and it has provided no reason why it could not have identified an appropriate position for Harwood by September 1. Yet it did not offer him reemployment in an appropriate position until October 22, 2015, over two months after it learned that he would likely need to be rehired in a non-pilot position.

At bottom, we find no error in the district court's conclusion that the airline did not reemploy Harwood promptly in an appropriate position. Accordingly, we affirm the district court's order finding that the airline violated USERRA when it failed to reemploy Harwood on September 1.

IV

While Harwood succeeded in the district court on his §§ 4212 and 4213 claims, he nonetheless argues that the court erred in rejecting his argument that American Airlines' conduct in violation of those provisions was "willful," as used in § 4323(d)(1)(C), and therefore that he was also entitled to liquidated damages in an amount equal to his backpay award. In support of this contention, he points to various statements made by American Airlines' employees to the effect that the airline would not reemploy him as a pilot due to his lack of a medical certificate. He focuses especially on statements like the one that the airline's Manager of Flight Administration made — "Under no circumstances would American Airlines ever reemploy a pilot without a medical [certificate]." He argues that communications of this kind constituted "an obvious attempt to get Harwood to go away and forget about any reemployment rights."

The district court, however, rejected Harwood's argument, concluding that on the record before it, "there [was] simply no evidence that American or any of its agents acted unreasonably and in bad faith. Accordingly, liquidated damages are not applicable to the facts of this case."

Section 4323(d)(1) authorizes an award of liquidated damages in an amount equal to the

backpay award if the employer's violations are found to be willful. And according to the applicable regulation, a violation is willful "if the employer either knew or showed reckless disregard for whether its conduct was prohibited by the Act." 20 C.F.R. § 1002.312(c). Thus, for example, if an employer ignores an employee's request for reemployment or fails to attempt to comply with the law, the employer's actions might be willful. *See Serricchio v. Wachovia Secs., LLC*, 658 F.3d 169, 191 (2d Cir. 2011).

But the evidence in this case fails to support Harwood's claim. Indeed, it shows without dispute that American Airlines *immediately agreed* to rehire him when he notified the airline of his intent to return. Harwood told the airline that his tour of duty would end on August 31, 2015, and the airline instructed him to report for service the next day, September 1, 2015. And when Harwood later advised the airline that he had a medical condition that precluded his employment as a pilot without an FAA waiver, the airline asked Harwood to let it know about the status of his application for a waiver "as soon as possible" so that it could schedule the necessary training. In a follow-up, the airline told Harwood, "[O]ur first goal is to try to work with you to see if we can make any reasonable accommodations that will get you back to your position as a line pilot. If there's nothing we can do to reasonably accommodate you so that you can return to flying status, then we can explore other paths." And on October 22, it offered Harwood an alternative position that it maintains had the same seniority, status, and pay as he would have received as a pilot. Finally, when Harwood later accepted the

offer and also advised the airline of his receipt of an FAA waiver, the airline hired him as a pilot the very next day, a position that he continues to hold. This conduct, which demonstrates that the airline made efforts to work with Harwood to accommodate his request for reemployment — even if it operated under a misunderstanding of the statutory relationship between § 4312 and § 4313 — does not manifest a willful violation, as the district court duly found.

V

Finally, both parties challenge the relief that the district court ordered. Harwood contends that the district court erred in reducing the award by the income he received for military service during the relevant period, arguing that the service income was a "collateral source" that should not have impacted his backpay award. He also contends that the district court abused its discretion in refusing to issue an injunction against American Airlines to prohibit similar conduct in the future.

American Airlines contends that the period for which it owes backpay should not have included the period between September 4 and October 1, during which the airline was waiting to hear back from Harwood, as well as the time after October 22, when the airline offered Harwood a position that he did not accept until January 25, 2016. The airline also contends that the district court should not have awarded backpay beginning on September 1, the original scheduled start date, as the airline should have been allowed additional time to rehire Harwood in an alternative position.

With respect to Harwood's argument that his backpay should not have been offset by his Air Force earnings, the district court concluded that Harwood's income during that period was payment for "services that he would not have been able to complete or that would have required leave from [the airline] but for the USERRA violation." Thus, Harwood suffered no lost wages or benefits attributable to the airline's failure to reemploy him during the time he was on active duty with the Air Force. *See* 38 U.S.C. § 4323(d)(1)(B) (authorizing a court to "require the employer to compensate [the plaintiff] for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter"). We find no error in this conclusion reached by the district court.

With respect to the district court's denial of Harwood's request for injunctive relief, we conclude similarly that the district court did not abuse its discretion. While the statute directs the district court to employ all of its equitable powers to "vindicate fully" the servicemember's rights, *see* 38 U.S.C. § 4323(e), Congress nonetheless specified that the court exercise those powers only as it "determines it is appropriate," *id*., which we take as a direction for the district court to exercise discretion. In this instance, the court determined that equitable relief was not appropriate because, as it concluded, the airline construed the relationship between § 4312 and § 4313 in good faith, even if in error, and therefore there was no ground to suspect that the airline would repeat that error in the future. Indeed, since early 2016, Harwood has continued to work for American Airlines and has taken additional leave to serve in the Air Force

Reserve, both without incident. In these circumstances, we see no reason to conclude that the district court abused its discretion in determining that injunctive relief was not necessary to ensure that Harwood's rights were fully vindicated.

Finally, with respect to damages, in view of our conclusions in Part III, above, we agree with the district court that the backpay period began September 1, because it was not error to conclude that promptness in this case required Harwood's reemployment by that date. We also reject American Airlines' argument that the period from September 4 to October 1 be excluded on the ground that Harwood failed to engage in the deliberative process. After receiving Hansen's letter on September 4, in which Hansen recited the varying application of three statutory provisions — §§ 4311, 4312, and 4313 — Harwood reasonably perceived a need to retain counsel, and that period therefore should not be charged to him. And because the subsequent delay during the period from October 1, when counsel first contacted American Airlines, and October 22, when American Airlines extended Harwood an offer, is attributable to the airline, it is also responsible for backpay for that time. Thus, Harwood was entitled to damages at least for the period from September 1 to October 22, when American Airlines made its offer to Harwood for an alternative position, which Harwood turned down. On the other hand, the period from October 22, when Harwood turned down American Airlines' offer, until January 25, when he accepted the offer and was rehired, should be at Harwood's expense, unless the position that American Airlines offered on October 22 was not an equivalent position in terms of

seniority, status, and pay for purposes of § 4313(a)(3). On that subject, the district court declined to make findings as to the appropriateness of the position offered, and the parties disagree on whether it was an equivalent.

In short, the district court should recalculate damages consistent with this opinion, presumptively imposing backpay damages against American Airlines for the period from September 1 to October 22 and denying damages for the period from October 22 to January 25, unless the offered position was not an equivalent under the Act. And any such calculation should include a setoff for service income Harwood received.

AFFIRMED IN PART,
VACATED IN PART, AND REMANDED

ENTERED MAY 16, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF VIRGINIA
Alexandria Division

MAJOR GENERAL THOMAS P. HARWOOD Ill,	) Case No. 1:17-cv-0484
Plaintiff,	) Hon. Liam O'Grady
v.	
AMERICAN AIRLINES, INC.,	
Defendant.	

ORDER

This matter comes before the Court on Plaintiff's Petition for Attorney's Fees and Costs. Dkt. 70. For the following reasons the Petition is granted in part and denied in part. The Court awards $68,648.83 in attorney's fees and $4,349.85 in costs for a total award of $72,998.68.

I. Background

In the underlying case, Plaintiff, Thomas Harwood. sued Defendant, American Airlines, for violating the Uniformed Services Employment and Reemployment Rights Act of 1994. ("USERRA"). Plaintiff, a Major General in the United States Air

Force Reserve, was employed by Defendant as a pilot. Plaintiff took military leave from his pilot duties from June 2013 to August 2015 to serve in an active duty status with the Air Force.

During his tour of duty, Plaintiff was diagnosed with atrial fibrillation. As a result of this diagnosis, Plaintiff was unable to obtain a first class medical certificate, which is required by the Federal Aviation Administration for all pilots. For this reason, Defendant informed Plaintiff that upon his return from active duty he would not be reemployed as a pilot, but that he would be reemployed in an equivalent position consistent with the requirements of 38 U.S.C. § 4313. Plaintiff argued the first class medical certificate was not a condition of reemployment under 38 U.S.C. § 4312 and that he met all statutory conditions of reemployment. Thus, Plaintiff alleged, Defendant violated USERRA by not reemploying him as a pilot promptly following his active duty military service.

The case turned on the interpretation of these two provisions of USERRA and was decided on summary judgment in favor of Plaintiff on the statutory interpretation claims, but in favor of Defendant on the liquidated damages claim. Plaintiff then filed an appeal. Presently before the Court is Plaintiff's Petition for $156,131.20 in fees and $5,362.35 in costs.

II. Legal Standard

USERRA provides that "the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses." 38 U.S.C.

§ 4323(h)(2). Therefore, this Court has discretion to award attorney's fees in this case.

When shaping an award of attorney's fees, the court "must first determine a lodestar figure by multiplying the number of reasonable hours expended times a reasonable rate." *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235,243 (4th Cir. 2009). To do this, the court considers the twelve factors set out in. *Johnson v. Georgia Highway Express, Inc.*:

> (I) The time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

488 F.2d 714, 717-19 (5th Cir. 1974). Although each factor is persuasive, the court need not consider each of them individually because they all are "subsumed" into an analysis of what constitutes a reasonable

rate and number of hours expended. *Smith v. Loudoun Cty. Pub. Sch.,* 2017 WL 176510 at *2 (E.D. Va. Jan. 17, 2017). Once the court has determined the reasonable number of hours and the reasonable rate, it will "subtract fees for hours spent on unsuccessful claims unrelated to successful ones" and "award some percentage of the remaining amount, depending on the degree of success enjoyed." *McAfee v. Boczar*, 738 F.3d 81, 88 (4th Cir. 2013).

Ill. Lodestar Calculation

A. Reasonable Rate

Defendant only challenges the reasonable rates for the principals and of counsel attorneys' in this matter, which were $563 an hour. Therefore, this analysis will only focus on the principals' and of counsel's hourly rates.

The reasonable rate for attorney's fees is determined based on the "prevailing market rates in the relevant community factoring in any required skill or experience." *Burke v. Mattis*, 315 F. Supp. 3d 907, 913 (E.D. Va. 2018). This Court follows the Vienna Metro Matrix as a guide for reasonable rates in Northern Virginia. *Id*. Less than a year ago this Court declined to award a rate of $563 an hour, despite the fact that the rate fell into the *Vienna Metro* Matrix and despite the fact that the case at issue was complex and went to trial. *Id*. In making this determination, the Court noted it did not "recall ever awarding a lodestar rate of $563, even for more complex cases." *Id*. at 913-14. Instead , the Court awarded a lodestar rate of$450. *Id*. at 914.

Plaintiff emphasizes that $563 an hour falls into the range set by the *Vienna Metro* Matrix and points to a recent R&R issued by this Court which held the same rates requested by the same attorneys were reasonable. *Antekeier v. Laboratory Corp. of Am.*, No I: 17-cv-00786-TSE-TCB (E.D. Va. Aug. 29, 2018). However, in *Antekeier* there was no challenge to whether $563 an hour was a reasonable rate. Thus, finding the rate fit within the *Vienna Metro* Matrix and that the rate was not challenged, the Court held it was reasonable. However, as this Court has previously stated, "[t]he fact that 'hourly rates sought ... are at or below the rates quoted in the *Vienna Metro* Matrix ... by itself, does not conclusively establish that they are reasonable.'" *Hair Club for Men, LLC v. Ehson*, 2017 U.S. Dist. LEXIS 51370, *18 (E.D. Va. Apr. 3, 2017) (quoting *Route Triple Seven, L.P. v. Total Hockey, Inc.*, 127 F. Supp. 3d 607, 619 (E.D. Va. 2015)).

A reduction in the billing rates for principals is justified here and supported primarily by two of the *Johnson* factors: the novelty and difficulty of the questions raised and the skill required to properly perform the legal services rendered. This case was not as complex as Plaintiff characterizes it and, as will be discussed in more detail below, there are many instances in the billing records where principals billed for work that could have been done by a law clerk or a paralegal. For these reasons, a reasonable rate for the principals and of counsel in this action is $450 an hour.

The rates for law clerks and paralegals were not challenged, and the Court finds them appropriate without any adjustment.

B. Reasonable Hours

i. Overstaffing Plus Excessive Hours Spent on Interoffice Conferences

First, Defendant argues that Plaintiff overstaffed the case and spent excessive time in interoffice conferences. The Court disagrees. While in total ten attorneys and law clerks are listed in the billing entries, this is because Plaintiff cycled through law clerks throughout this case. Only rarely were two law clerks billing at the same time and when they were, it was for what seemed to be a brief transition period. The bulk of the billing at any given time came from one principal and one law clerk. The other principals were brought in rarely, usually to be briefed on case updates. This case was not overstaffed and a reduction in fees for overstaffing is not appropriate.

Second, Defendant argues Plaintiff spent an excessive amount of time in interoffice conferences and there should be a reduction in fees to reflect this. The Court disagrees. Many of the entries Defendant identifies as interoffice conferences are not interoffice conferences at all. For example, Defendant has highlighted billing entries that involve circulating calendar events for the motion for summary judgment moot, downloading and circulating Plaintiffs opposition brief, and emailing a draft brief to a supervising partner. While some of these entries should be deducted because they encompass mere clerical tasks (discussed in more detail below), Defendant's counsel has exaggerated the time Plaintiffs counsel spent in meetings. To the contrary, when actual meetings do appear on the

billing entries they are generally brief and the purpose is clearly described, suggesting that Plaintiffs counsel used their meeting time effectively. Thus, a reduction in fees for excessive interoffice meetings is not warranted.

ii. Noncompensable Clerical Time

"'[A]n award of attorneys' fees may not include 'purely clerical or secretarial tasks.'" *Gregory v. Belfor USA Grp., Inc.*, 2014 WL 468923, at *6 (E.D. Va. Feb. 4, 2014) (quoting *Lemus v. Burnham Painting & Drywall Corp.*, 426 F. App'x 543, 545 (9th Cir. 2011)). This is because purely clerical tasks are part of a law office's overhead and are included in the hourly rate charged. *Two Men & A Truck Int'l, Inc. v. A Mover Inc.*, 128 F. Supp. 3d 919, 929 (E.D. Va. 2015). Some examples of clerical tasks are

> collating and filing documents with the court, issuing summonses, scanning and mailing documents, reviewing files for information, printing pleadings and preparing sets of orders, document organization, creating notebooks or files and updating attorneys' calendars, assembling binders, emailing documents, or logistical telephone calls

> with the clerk's office or the judge's chambers.

Id. at 929-30 (citations omitted).

Defendant has compiled examples of billing entries that describe purely clerical tasks in Dkt. No. 85, Ex. 7. Although not every billing entry highlighted by Defendant describes a clerical task, the majority do. Based on the Court's review of the billing record it is clear that Plaintiffs billing entries are replete with clerical tasks and no apparent effort was made by Plaintiff to remove the clerical tasks from his fee request, even after Defendant pointed them out in its opposition to Plaintiffs fee petition. To account for the widespread billing of clerical tasks the Court applies a 5% across-the-board reduction to the total number of hours Plaintiff billed.

iii.Excessive Hours Spent Prior to Filing Suit

Defendant argues that Plaintiff needlessly churned the bill in this case before ever filing suit and the pre-filing hours should be reduced accordingly. A party may recover attorney's fees for pre-suit actions if the time spent before the complaint was filed was "reasonably expended on the litigation."" *Page v. Va. State Bd. of Elections*, 2015 U.S. Dist. LEXIS 180310, at *36 (E.D. Va. Mar. 10, 2015) (quoting *Webb v. Bd. of Educ. Of Dyer Cnty., Tenn.*, 471 U.S. 234, 242 (1985)). [I]t is difficult to treat time spent years before the complaint was filed as having been 'expended on the litigation.'" *Webb*, 471 U.S. at 242. Legitimate pre-suit actions include "attorney-client interviews, investigation of the facts of the case, research on the viability of potential legal claims, drafting of the complaint and

accompanying documents, and preparation for dealing with expected preliminary motions and discovery requests." *Page*, 2015 U.S. Dist. LEXIS 180310, at *37 (quoting *Webb*, 471 U.S. at 250 (Brennan, J., concurring in part and dissenting in part)). These actions are legitimate because "careful pre-filing investigation of the facts and law is required by the ethical rules of profession and the Federal Rules of Civil Procedure, and the realities of civil rights litigation." *Id*.

Here Defendant emphasizes that Plaintiff's billing entries begin over a year and a half before the Complaint was filed, and the pre-suit work comprises approximately 20% of the total hours expended on the litigation. A review of the billing entries from before the Complaint was filed shows the majority of entries describe case status meetings, correspondence with opposing counsel, and multiple settlement attempts. These are not the sorts of legitimate pre-suit actions described in the caselaw. Thus, the Court applies an across-the-board reduction of 7.5% to Plaintiff's total hours.

iv. Excessive Hours Spent on Fee Petition

While the Fourth Circuit allows parties to recover costs related to the preparation of fee petitions, the amount collected may not be unreasonable. *EEOC v. Service News Co.*, 898 F.2d 958,966 (4th Cir. 1990); *Daly v. Hill*, 790 F.2d 1071, 1080 (4th Cir. 1986). Further, work on a fee petition is "relatively straightforward" and "much of it [can] be delegated to staff." *Capital Hospice v. Global Lending, LLC*, 2009 U.S. Dist. LEXIS 56673, at *12 (E.D. Va. Jul. I, 2009) (reducing the hours spent

preparing a fee petition in half because 12.7 hours spent on fee petition was unreasonable).

Plaintiff identified 33.1 hours that were spent on the fee petition (excluding hours that describe purely clerical tasks). Further, 22.3 of those hours were billed by principals. This request is excessive. Even though this fee petition was for a relatively long litigation, assembling the fee petition itself, as this Court has previously noted, is relatively straightforward. Even if it required more hours than a typical fee petition it certainly did not require the work of principals. This was work that could have been done by a law clerk or paralegal. Instead, two-thirds of the hours requested here were worked by principals.

To compensate for the excessive number of hours and principal time dedicated to this fee petition the Court applies an across-the-board reduction of 4% to Plaintiffs total hours.

v. Inadequate Documentation

Block billing is "grouping, or lumping several tasks together under a single entry, without specifying the amount of time spent on a particular task." *Page*, 2015 U.S. Dist. LEXIS 180310, at *33-34 (quoting *Guidry v. Clare*, 442 F. Supp. 2d 282, 294 (E.D. Va. 2006)). It is appropriate to reduce the total fee award for block billing because block billing prevents a court from making "an accurate determination of the reasonableness of the time expended in the case." *Id.* at *34. This Court has previously imposed 10% and 20% fee reductions for block billing. *Id.* (imposing a 20% reduction for block billing; citing to two recent cases that imposed 10%

and 20% reductions for block billing).

Billing entries must "describe specifically the tasks performed." *Id*. at *34-35 (quoting *Rum Creek Coal Sales v. Caperton*, 31 F. 3d 169, 175 (4th Cir. 1994). This is because vague billing entries present the same problem as block billed entries – in both cases the court cannot "weigh the hours claimed and exclude hours that were not reasonably expended." *Id*. at *35.

Defendant has highlighted 150.3 hours of block-billed time entries and 113.6 hours of vague time entries. Dkt. 85, Exs. 9, l 0. It is clear based on the Court's review of the billing record that the billing in this case was replete with block billing and vague billing entries and warrants a reduction. The Court applies an across-the-board reduction of 10% to Plaintiffs total hours.

vi. Travel Time

It is inappropriate to recover full fees for travel time. *Diaz v. Banh Cuon Saigon Rest., Inc.*, 2017 U.S . Dist. LEXIS I 87252, *21 (E.D. Va. July 20, 2017). This Court has previously found that a $100 per hour rate for travel is reasonable. *Id*. at *22. If the travel time has been block billed such that the Court cannot determine how much time was spent travelling, the Court may reduce the overall fee award rather than engaging in calculations to determine travel hours. *Id*.

Defendant has identified seven line items where Plaintiff has billed for travel time, mostly to and from the courthouse in Alexandria to argue motions. Dkt. 85, Ex. 5. All but one of these billing entries is block billed, so it is impossible to determine exactly how much time Plaintiff spent traveling as opposed to conducting substantive legal work. For the one line item that describes pure travel: "Drive to and from courthouse in EDVA; pick up client and drop him off at DCA," the Court will adjust Adam Carter's hourly rate to $100. To account for the other 30.3 block billed hours, the Court will apply an across-the-board reduction of 1.5% to Plaintiff's total hours.

C. Lodestar Amount

For the above reasons, the principal and of counsel billing rates are adjusted to $450. The billing rates for law clerks and paralegals remain the same. To account for Adam Carter's billed travel time, 1.2 of his billed hours will be changed to an hourly rate of $100. As discussed above, to account for noncompensable clerical time, excessive hours spent prior to filing suit, excessive hours spent on the fee petition, inadequate documentation, and travel time, Plaintiff's overall hours are given an across-the-board reduction of 28%. This results in a

lodestar amount of $98,069.76, as can be seen in the chart below.[1]

Biller	Requested Hours	Requested Rates	Requested Fees	Adjusted Hours	Adjusted Rates	Adjusted Fees
Adam Carter	139	563	$ 78,257.00	100.1	450	$ 45,036.00
Adam Carter's travel hours	1.2	563	$ 675.60	0.9	100	$ 86.40
Drew Howell	189.4	164	$ 31,061.60	136.4	164	$ 22,364.35
Grant Olan	79.6	164	$ 13,054.40	57.3	164	$ 9,399.17
John Arszulowicz	17.5	164	$ 2,870.00	12.6	164	$ 2,066.40
Lauren Farruggia	36.4	164	$ 5,969.60	26.2	164	$ 4,298.11
Nick Woodfield	22.2	563	$ 12,498.60	16.0	450	$ 7,192.80
Paul Smiskol	21.6	164	$ 3,542.40	15.6	164	$ 2,550.53
Rick Seymour	3	495	$ 1,485.00	2.2	450	$ 972.00
Sam Wright	11	150	$ 1,650.00	7.9	150	$ 1,188.00
Scott Oswald	9	563	$ 5,067.00	6.5	450	$ 2,916.00
Total	**529.9**		**$ 156,131.20**	**381.5**		**$ 98,069.76**

IV. Reductions for Lack of Success

After calculating the lodestar amount the court "then awards some percentage of the remaining amount, depending on the degree of success enjoyed by the plaintiff." *Robinson v. Equifax Info. Servs.,* LLC, 560 F.3d 235, 244 (4th Cir. 2009). "That the plaintiff is a 'prevailing party . . . may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved." *Hensley v. Ec:kerhart,* 461 U.S. 424 (1983). If, in complex civil litigation, a plaintiff only prevails on one of several claims, requesting

[1] Taken together, Plaintiffs original fee petition and the supplemental fee petition submitted with Plaintiffs Reply request $154,615 in fees. However, the Court has calculated $156,131.20 in requested fees because Billing Entry 24 of the supplemental fee petition identifies Nick Woodfield billing 3.8 hours at a law clerk rate. Because it was unclear whether the error lay in the name or the billing rate the Court elected to treat it as an error in billing rate.

fees for hours spent on all claims "clearly would [be] excessive." *See id.* The district court has discretion in making this determination. *Id* at 437.

Here, Plaintiff was successful in two out of the three matters before the Court on summary judgment. However, Plaintiffs discrimination claim was disposed of in a motion to dismiss, Plaintiff's request for a permanent injunction against Defendant was denied, and of the $238,582 in damages Plaintiff sought he was only awarded $50,184.75. A further indicator of the lack of Plaintiff's success is the fact that he has filed an appeal of this Court's decision.

For these reasons, the Coun will reduce the lodestar amount by 30%, resulting in a total fee award of $68,648.83.

V. Costs

Defendant takes issue with three categories of costs Plaintiff had identified: (1) litigation support from a vend or called Jury Solutions. LLC. (2) the expert report of Richard B. Edelman, and (3) legal research.

Defendant points out there is no indication of what type of support Jury Solutions, LLC provided, and from its name presumes it is jury consultation. Defendant then argues there was no need for Plaintiff to prepare for jury selection because the case was resolved well before trial. In his Reply, Plaintiff did not refute that Jury Solutions, LLC was used for jury consultation. The Court agrees with Defendant that there was no need to prepare

for jury selection in this case as it was resolved well in advance of trial. The $1,012.50 in costs ought for this service will not be awarded.

The Court finds the remainder of Plaintiff's costs are permissible. Thus, the Court awards $4,349.85 in costs.

VI. Conclusion

For the above reasons, Plaintiff's Petition for Award of Attorney' s Fees and Costs, Dkt. 70. is **GRANTED IN PA RT AND DENIED IN PART.** The Court awards $68,648.83 in attorney fees and $4,349.85 in cost for a total award of $72,998.68.

It is **SO ORDERED.**

/s/ Liam O' Grady
Liam O'Grady
United States District Judge

May 16, 2019
Alexandria, Virginia

ENTERED AUGUST 20, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MAJOR GENERAL THOMAS P. HARWOOD III,	)	
Plaintiff,	)	Case No. 1:17-cv-0484
	)	Hon. Liam O'Grady
v.	)	
AMERICAN AIRLINES INC.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Plaintiffs Motion for Reconsideration of the Court's Order Granting Summary Judgment on Liquidated Damages, For Permanent Injunction, and for Award of Damages, Interest, and Equitable Relief. Dkt. 60. The motion is fully briefed and the Court heard oral argument on July 6, 2018. For the reasons that follow and for good cause shown, the motion is **GRANTED IN PART** and **DENIED IN PART.** The Court awards Plaintiff Major General Thomas P. Harwood III $50,184.75 in damages.

I. Background

In a hearing on April 13, 2018, the Court granted summary judgment in favor of General Harwood on his two USERRA claims and granted summary judgment in favor of American Airlines (American) on the issue of liquidated damages. The ruling was memorialized in a memorandum opinion issued May 23, 2018 and formalized in a judgment entered on May 24, 2018. During the April 13 hearing, the Court ordered supplemental briefing on damages if the parties were unable to reach a settlement agreement. The settlement conference occurred on May 29, 2018. After the parties failed to reach an agreement, Harwood filed the instant motion, seeking 1) reconsideration of the Court's summary judgment decision on liquidated damages; 2) damages for the period of September 1, 2015 to January 25, 2016 ($98,398 in lost wages and benefits); 3) damages pertaining to General Harwood's 40 I (k) plan ($20,893); 4) injunctive relief, including the issuance of a compliance order; and 5) an evidentiary hearing. American opposes reconsideration of the Court's grant of summary judgment on liquidated damages, calculates General Harwood's damages to be $10,227.01, contends that Plaintiff's arguments on the 40l(k) plan assert a new cause of action, and opposes injunctive relief and an evidentiary hearing as unnecessary.

II. Discussion

A. Reconsideration

General Harwood moves the Court to reconsider its grant of summary judgment for American Airlines on the issue of liquidated damages. Harwood contends that 1) the case the Court cited for authority in its memorandum opinion is inapposite to this case; 2) the Court used the wrong standard; and 3) there is "ample and overwhelming evidence that [American] knew what it was doing."

A motion for reconsideration pursuant to FED. R. CIV. P. 59(e) may be brought 1) to accommodate an intervening change in controlling law; 2) to account for new evidence not available at trial; or 3) to correct a clear error of law or prevent manifest injustice. *Pac. Ins. Co. v. Am. Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). Such a motion is not an appropriate vehicle for raising new arguments or to simply re-litigate issues already decided by the court. *Id.; Hutchinson v. Staton*, 994 F.2d 1076, 1082 (4th Cir. 1993).

Here, General Harwood argues that the Court clearly erred in rendering its decision. The Court finds his arguments without merit. First, while he correctly argues that the facts of the case the Court cited in its memorandum opinion, *Davis v. Crothall Servs. Corp., Inc.*, 961 F. Supp. 2d 716 (W.D. Pa. 2013), are readily distinguishable from this case, the case is nonetheless otherwise instructive. The Court cited *Davis* because it contains a lengthy and accurate discussion of the

appropriateness of liquidated damages in USERRA cases, a standard parroted by General Harwood in the instant motion for reconsideration.

Second, General Harwood is incorrect that the Court applied the wrong standard. As Harwood notes, for liquidated damages to apply, the defendant must have acted willfully or recklessly. The Court's finding in its May opinion that there was no evidence to demonstrate bad faith or unreasonable conduct on American's part necessarily precludes the Court from concluding that American's conduct was willful or reckless. Indeed, the *Davis* court found that good faith conduct by a defendant precludes the imposition of liquidated damages under the *Thurston* standard Harwood now cites in his motion for reconsideration.

Third, Harwood's purported evidence of willfulness - that American knew about USERRA's requirements and nonetheless failed to promptly reemploy General Harwood- was considered by the Court and rejected as evidence of willfulness. General Harwood appears to be taking the position that willfulness is demonstrated by proving merely voluntary conduct not understood to violate the law. It is not. Accordingly, General Harwood's motion for reconsideration is denied.

B. Damages

General Harwood submits that he is entitled to $98,398 in damages, covering September 1, 2015 (the date upon which General

Harwood should have been reemployed) to January 25, 2016 (the date upon which General Harwood was reemployed). To this $98,398 figure, Harwood seeks to add $20,893, which he contends represents underpayment to his 401(k) plan. [1] General Harwood requests prejudgment interest at 6%.

American Airlines argues that General Harwood is entitled to damages for the period of September 15, 2015[2] to October 22, 2015 (the date General Harwood was offered an alternative position), but contends that the damages award should be reduced for periods during that time when General Harwood returned to active military service. American's position on the 40l(k) damages is that General Harwood is raising a new USERRA claim not properly before the Court. American submits that a prejudgment interest rate of 2.08% properly accounts for inflation and is the appropriate rate here.

American has submitted a daily measure of damages based upon flight hour compensation and the "likely minimum hours Captain Harwood would have flown." Dkt. 63, Ex. A. Those figures are $541.41 per day in 2015 and $571.03 per day in 2016. *Id.* General Harwood has extrapolated

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[1] General Harwood submits a figure of $41,786, but this represents a doubling of his damages figure based upon the requested imposition of liquidated damages, which this Court has denied.

[2] American cites to the Court's statement during oral argument that Harwood should have been employed on September I or at least within 14 days of the date he presented himself for reemployment.

from actual flight hours and benefits. General Harwood's total damages figure of$98,398 works out to a loss of $665.98 per day in 2015 and $685.96 per day in 2016.[3] *See* Dkt. 61, Ex. 1. The Court finds that General Harwood's calculations are the proper measure of damages, since they are based off of extrapolations of his actual work, rather than American's general calculations of minimum pay for an ordinary pilot.

i. Applicable Date Range

General Harwood's damages began to accrue on September l, 2015, the date he and American had previously agreed he would be reemployed. While true that USERRA simply requires "prompt" reemployment and fourteen days is a reasonable amount of time for a company to meet its § 4312 obligations, American's position would essentially render USERRA's promptness requirement replaced by a "within 14 days" requirement. Prompt reemployment requires a factual inquiry into a reasonable reemployment date. *See* 20 C.F.R. § 1002.225. Here, Harwood contacted American months in advance of September 1, 2015 and any delay in reemployment by American after September 1 was based on American's violation of USERRA. Indeed, the Court found the USERRA violation occurred on September 1, 2015 when prompt reemployment pursuant to § 4312 did not occur. Dkt. 53.

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[3] Because Professor Edelman did not show all his work in arriving at his final damages figure, the Court used the following equation: 122x +25(x+.03x)=98,398, with x being daily damages in 2015.

American's contention that damages should not be awarded for the period of October 22, 2015 to January 26, 2016 is also based on erroneous assumptions, specifically that the alternative position offered to General Harwood on October 22 satisfied the requirements of § 4313. The Court made no findings on the appropriateness of the escalator position offered to General Harwood, instead taking the position, consistent with other courts, that the § 4312 violation resu1ted in a § 4313 violation, because on September 1, 2015 American neither promptly reemployed Harwood as required by § 4312 nor took steps to find an appropriate alternative position for him as required by § 4313. *See* Dkt. 53.

Even if a fact-finder had ultimately determined that the position offered on October 22 was an appropriate escalator position under § 4313, Harwood's litigation posture at that point was reasonably based on the already-occurred § 4312 and § 4313 violations. American should not be able to save itself from damages after October 22 by a course-reversal that failed to cure the already-occurred USERRA violations. *Cf Hanna v. American Motors Corp.*, 724 F.2d 1300, 1309-10 (7th Cir. 1984) (holding that a veteran has no duty to mitigate damages in a nonconforming position under the Veterans Reemployment Rights Act).

For these reasons, the Court finds that the applicable date range for General Harwood's damages is September 1, 2015 to January 25, 2016.

ii. Damages Mitigated for Active Duty Status

American contends that, during the period of September 1, 2015 to January 25, 2016, General Harwood spent a substantial amount of time on active duty status with the Air Force for which he was compensated and during which time he could not have simultaneously been on paid status with American, thereby mitigating $50,184.75 in damages.[4] General Harwood contends that this approach would effectively let American off the hook for thousands of dollars they should have been paying but for their violation of USERRA. However, damages in this context are compensatory, not punitive. While General Harwood asks the Court to explore the nature of his military work, the Court sees no reason to do so - General Harwood does not contest that he earned $50,184.75 for his military service, service that he would not have been able to complete or that would have required leave from American but for the USERRA violations. Accordingly, American is entitled to a deduction of $50,184.75 from its damages obligations.

iii. 401(k)

General Harwood's expert report on damages states that it did not take into account losses to his 401(k) for the applicable damages period. 0kt. 61, Ex. 1. Instead, Harwood submits his own affidavit containing his own calculation of damages based on a theory that American unfairly delays re-institution of a returning service member's 401(k) plan. American agrees

[4] $3,345.65 for September 20, 2015 to September 26, 2015; $12,426.70 for October 12, 2015 to November 6, 2015; and $34,412.40 for October 23, 2015 to January 25, 2015.

that Harwood is entitled to damages for missed 401(k) contributions and asserts that those contributions, having already been made, are not relevant to damages here. General Harwood did not dispute during oral argument that American has already made catch-up payments on the 40l(k) plan. Accordingly, the Court finds the 401(k) issue to be well beyond the scope of this litigation and declines to consider it in calculating damages.

iv. Prejudgment Interest

The parties agree that prejudgment interest is applicable to the damages award. Harwood seeks Virginia's statutory rate of 6%. American seeks 2.08%, which reflects the average inflation rate for the time period. The purpose of prejudgment interest is to ensure that a dollar at the time of the harm equals a dollar today. *See Mabymchuk v. Frank*, 987 F.2d 1072, 1077 (4th Cir. 1993) ("'A dollar tomorrow, unless interest is added, does not equal a dollar today."). Accordingly, the Court finds that 2.08% is the appropriate prejudgment interest rate and adopts the formula offered by American for calculating prejudgment interest: F=$98,398 [1+ (.0208/12)]^M, where F equals the future value of money and M equals the number of months compounded – here, 30 months.[5] F equals $103,645.40.

In consideration of the mitigation discussed *supra*, the Court awards damages plus

[5] While the Court entered summary judgment in May 2018, the Court calculates prejudgment interest from the date of this Order.

prejudgment interest in the amount of $53,460.65.

C. Injunctive Relief

General Harwood moves the Court to issue a "compliance order," ordering American to comply with USERRA' s provisions as they relate to General Harwood or any other American employee. General Harwood also seeks a permanent injunction requiring 1) American's compliance with USERRA; 2) on-going training for both inside and outside counsel, human resources personnel, and other personnel responsible for administering programs that implicate USERRA; 3) changes to American's policies; 4) publication of those policies; and 5) the adoption of internal control measures.

Equitable relief is not necessary in this case. This litigation is the result of a misunderstanding of the interaction between two USERRA provisions as they relate to a single employee. Nothing about the case suggests that American will make this same mistake in the future with respect to General Harwood or any other employee, the law having been clarified. As American points out, broad injunctions requiring compliance with a statute "impermissibly subject[ ] a defendant to contempt proceedings for conduct unlike and unrelated to the violation which was originally charged." Dkt. 63, p. 14 (quoting *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 767 (4th Cir. 1998)). Further, the Court finds General Harwood's proposed injunctive relief to be well beyond the actual scope of this

litigation. Accordingly, the motion for various forms of equitable relief is denied.

D. Evidentiary Hearing

General Harwood has requested an evidentiary hearing to establish damages, however the Court finds that an evidentiary hearing would not have assisted in the above calculations. Accordingly, the motion for an evidentiary hearing is denied.

III. Conclusion

For these reasons and for good cause shown, General Harwood's motion is **GRANTED IN PART** and **DENIED IN PART.** The Court denies reconsideration, damages pertaining to an unpled 401(k) issue, equitable relief, and an evidentiary hearing. General Harwood is entitled to damages for the period of September 1, 2015 to January 25, 2016, mitigated by his employment with the Air Force during that period. The Court awards General Harwood $50,184.75 in damages. The Clerk of Court is instructed to modify the judgment entered on May 24, 2018 (Dkt. 55) to reflect this award.

It is **SO ORDERED.**

/s/ Liam O'Grady
Liam O'Grady
United States District Judge

August 20, 2018
Alexandria, Virginia

ENTERED MAY 23, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MAJOR GENERAL THOMAS P. HARWOOD III,	)	
Plaintiff,	)	Case No. 1:17-cv-0484
	)	Hon. Liam O'Grady
v.	)	
AMERICAN AIRLINES INC.,	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on cross-motions for summary judgment. Dkt. Nos. 41 and 44. The motions are fully briefed and the Court heard oral argument on April 13, 2018. For the following reasons, the reasons stated from the bench, and for good cause shown, summary judgment is **GRANTED in part** for the Plaintiff as to Counts II and Ill of the Amended Complaint and **DENIED** as to Defendant's affirmative defense against liquidated damages that it acted reasonably and in good faith and that its actions were not willful.

Defendant's motion for summary judgment is **DENIED in part** on Counts II and III of the Amended Complaint and **GRANTED in part** on the

question of liquidated damages.

I. Background

The facts of this case are undisputed. Plaintiff Thomas P. Harwood III alleges that Defendant American Airlines (American) violated the Uniformed Services Employment and Reemployment Act (USERRA) when it refused to reinstate him as a pilot following active duty military service where American determined that Plaintiff was ineligible to fly because he lacked medical clearance required by the Federal Aviation Administration. Harwood is a Major General in the United States Air Force Reserve. From June 2013 to August 31, 2015, General Harwood took military leave from his pilot duties at American to serve in an active duty status with the Air Force. During this tour of duty, on or about December 1, 2013, General Harwood was diagnosed with atrial fibrillation.

On June 3, 2015, General Harwood contacted Jerry Shaw with American to advise American that General Harwood intended to return to American at the conclusion of his active duty tour. He requested to be assigned duties as an airline captain based out of LaGuardia Airport and assigned domestic routes flying Boeing 737 aircraft. At the time, General Harwood lived in Alexandria, Virginia. Mr. Shaw contacted Ken Blessum with American to determine if that assignment would be available to General Harwood and Blessum determined that it would be. On July 29, 2015, with General Harwood's reemployment date approaching, Mr. Shaw advised General Harwood to contact Sue Kalosa with American to handle the logistics of his

reemployment. There is no evidence at this time that American had any intent but to promptly reemploy General Harwood in the pilot position he requested.

As American was making arrangements for General Harwood's reemployment as a pilot pursuant to his request, General Harwood, around late July or early August 2015 had discovered that he was unable to obtain a first class medical certificate because of his atrial fibrillation. A first class medical certificate is required by the Federal Aviation Administration (FAA) for all pilots. General Harwood first notified American of the situation on August 20, 2015. Subsequent to that notification, Mr. Shaw e-mailed General Harwood to ask for a time frame for obtaining the certificate and to "'let [Shaw] know as soon as possible if the medical is going to take some time so [American] can avoid setting up training that [Harwood] will not be able to attend."

During a subsequent phone call with Mr. Shaw on August 26, 2015, General Harwood made Mr. Shaw aware that General Harwood still wanted to be reemployed as a pilot, despite the FAA regulations, but that he wanted to use his sick leave balance of 854 hours until he could try to obtain his certificate. American took the position that it could not return General Harwood to work as a pilot because he was not eligible to fly.

On August 27, 2015, American conveyed to General Harwood that he could not be reemployed as a pilot without a first class medical certificate. On September 1, 2015, General Harwood e-mailed Scott Hansen, American's agent in charge of decisions

regarding pilots returning from military leave, to clarify that he was, in fact, reemployed on September l, 2015. Mr. Hansen replied that day that General Harwood was cleared to start that day as a pilot if he had a valid first class medical certificate. General Harwood replied that he had not obtained the certificate but argued that he met all the conditions of 38 U.S.C. § 4312 and that the first class medical certificate is not a condition precedent to his reemployment. Mr. Hansen responded on September 4, 2015 that General Harwood would not be reemployed as a pilot but that American would reemploy him consistent with 38 U.S.C. § 4313 by reemploying him in an equivalent position.

General Harwood responded on October 1, 2015, through counsel, requesting that he be reemployed. He requested reemployment as a pilot or in the alternative be employed in Operations Safety and Compliance within the Flight Department, or be employed in Flight Operations within the Flight Department, both located in Dallas, Texas. On October 22, 2015, American offered Harwood a custom-made position with American's Flight Technical Operations Group within the Flight Department in Texas.

General Harwood accepted that position on January 25, 2016. Also on January 25, 2016, Harwood obtained a waiver from the FAA for special issuance of a first class medical certificate, he notified American that he had finally obtained that certificate, and he was promptly reassigned the next day as a 737 pilot as he had requested in the summer of 2015.

In the months between September 1, 2015 and his official reemployment in 2016, General Harwood spent from September 14 to 18, September 21 to 26, October 13 to 30, November 2 to 6, November 17 to January 7 and January 19 to 22 on active duty status with the Air Force. General Harwood continues to be employed by American as a pilot and has taken and returned from military leave since 2015 without incident.

The parties have cross-moved for summary judgment on both remaining counts of the complaint. General Harwood has also moved for summary judgment on American's affirmative defense that it acted reasonably and in good faith and that its actions were not willful.

II. Legal Standard

Summary judgment will be granted where, viewing the facts in a light most favorable to the non-moving party, there remains no genuine issue of material fact. FED. R. CIV. P. 56(c); *Marlow v. Chesterfield Cty. Sch. Bd.* 749 F. Supp. 2d 417, 426 (E.D. Va. 2010). A party opposing a motion for summary judgment must respond with specific facts, supported by proper documentary evidence, showing that a genuine dispute of material fact exists and that summary judgment should not be granted in favor of the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Conclusory assertions of state of mind or motivation are insufficient. *Goldberg* v. *B. Green & Co.,* 836 F.2d 845, 848 (4th Cir. 1988). As the Supreme Court has held, "the mere existence of *some* alleged factual dispute between the parties will not defeat an

otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Bouchat v. Baltimore Ravens Football Club, Inc.,* 346 F.3d 514, 519 (4th Cir. 2003) *(quoting Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 247-248 (1986)) (emphasis in original).

III. Discussion

Section 4312

In support of his motion for summary judgment on Count II of the amended complaint, alleging a violation of 38 U.S.C. § 4312, General Harwood contends that, as a matter of law, American was required to conduct an analysis solely under § 4312 to determine his eligibility for reemployment under USERRA. 38 U.S.C. § 4312 mandates that an employee returning from military service will be reemployed if 1) the employee or an appropriate military officer gave the employer advance notice of the service (with exceptions); 2) the cumulative length of non- exempt periods of military service during the employee's employment relationship with the employer does not exceed five years; 3) after completing the service, the employee timely returned to the employer or applied for reemployment; and 4) the employee was separated from the service without one of the eight disqualifying discharges. General Harwood contends that by adding the requirement that he be qualified for the position he sought to be reemployed into before American reemployed him, American violated the plain terms of 38 U.S.C. § 4312.

American concedes that General Harwood met all the requirements of § 4312 prior to September 1, 2015. Dkt. 47, p. 4. Nevertheless, American asserts that it took reasonable steps to reemploy General Harwood pursuant to § 4312. When American discovered, prior to reemployment, that General Harwood was not eligible to be a pilot because of his inability to obtain a first class medical certificate, American then took steps pursuant to § 4313 to find an equivalent position, asserting "[a]n employer that knows an individual cannot perform the duties of the "escalator" position, in this case a pilot, is not required to ignore that knowledge when processing reemployment." *Id.* at p. 5. American contends that, upon learning of General Harwood's condition, § 4312 and § 4313 together permit American to not reemploy General Harwood until the full § 4313 analysis is complete and a suitable alternative position identified.

Id.

In support of this statutory reading, American relies on language in the statute, regulations arising from USERRA, and case law. First, American contends that the plain language of the statutes supports its position. *Id.* Second, American contends that 20 C.F.R. § l002.l91, .192, and .226 support its position that an employer must evaluate not just reemployment eligibility but reemployment eligibility for a specific position prior to re-hiring a USERRA-covered employee. *Id.*, p. 7-8. Third, American cites to *Francis v. Boaz, Allen & Hamilton, Inc.*, 452 F.3d 299 (4th Cir. 2006) and *Butts v. Prince William Cty. Sch. Bd*, 844 F.3d 424 (4th Cir. 2016) for the proposition that both § 4312 and § 4313

govern at the time of re-hire. *Id*., p. 8-9.

The Court finds American's arguments unavailing. In advancing its argument, American concedes, as it must, that it failed to abide by § 4312's explicit requirement that an employee who meets § 4312's statutory requirements be reemployed. Plainly, then, American concedes that it violated § 4312 by failing to promptly re-employ General Harwood on September 1, 2015. American seems to want to read § 4312 and § 4313 together as a single statute; they are not. While American notes correctly that USERRA should be read holistically, courts must also construe USERRA's protections in favor of returning service members. *See Francis*, 452 F.3d at 303; *Hill v. Michelin N. Am., Inc*., 252 F.3d 307, 312-13 (4th Cir. 2001). Importantly, the purpose of a holistic reading is to give full effect to the protections afforded by the statutory scheme. *Francis*, 452 F.3d at 303 ("USERRA provides a multi-tiered and "comprehensive remedial scheme to ensure the employment and reemployment rights of those called upon to serve in the armed forces of the United States.") (quoting *Morris-Hayes v. Bd. of Educ*., 423 F.3d 153, 160 (2d Cir. 2005)).

Under a holistic reading that broadly construes USERRA's protections, Section 4313 does not add a complex fifth requirement to § 4312's list, and qualification issues addressed by § 4313 never appear in § 4312(d)(1)'s exclusions. *See* § 4312(d)(1) (allowing an employer to not reemploy a USERRA-covered person where reemployment would be impossible or unreasonable). There is no doubt that American is entitled to engage in a § 4313 analysis upon learning that General Harwood cannot fly

airplanes because he lacks a first class medical certificate from the FAA. But the plain language of the statutes required American to re-employ General Harwood on September 1, 2015, even if American had not yet identified an appropriate position for him under a § 4313.

The various sections of the Code of Federal Regulations and the case law cited to by American are consistent with this reading. For instance, in *Butts*, the Fourth Circuit interpreted § 4312 and § 4313 to be a two-step process: "[i]f a veteran satisfied the [§ 4312] criteria, then Section 4313 sets forth the rights under Section 4312 - namely, the specific position to which veterans are entitled upon their return." 844 F.3d at 430. In *Francis*, Judge Hilton clarified that §§ 4312 and 4313 operate at the time of reemployment, while §§ 4311 and 4316 protect employees after rehire. 452 F.3d at 304. While they may operate together at the time of reemployment, § 4313 cannot be fairly read to wholly excuse an employer of its express obligation to reemploy under § 4312.

While 20 C.F.R. § 1002.198 specifies that "[t]he employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position," the regulation also requires the employer to make "reasonable efforts to help the employee become qualified to perform the duties of this position." The parties debate whether American could have taken steps to help General Harwood become qualified for his escalator position. The Court need not make a finding on that question. The regulation can only be

read to permit an employer to not reemploy a returning employee *into a position* for which the employee is not qualified - it cannot be read as an escape hatch from § 4312's explicit reemployment requirement.

As a factual matter, American contends that the delay between September 1, 2015, when Harwood presented himself for reemployment, and the official offer of an alternative position in late October is attributable to General Harwood's decision to not engage with American in the § 4313 process. Yet the record is clear that General Harwood, after not being promptly reemployed in violation of § 4312, shifted to a litigation posture. This decision does not insulate American from § 4312 liability – the § 4312 violation occurred at the time General Harwood was not reemployed on September 1, since any delay was the result of American's impermissible decision to add return-to-work requirements and was therefore unreasonable.

By reading into § 4312 a requirement that General Harwood qualify for the specific position of reemployment prior to that reemployment, American unlawfully imposed a prerequisite to General Harwood's reemployment. *See Pelly v. Metro. Gov't of Nashville- Davidson Cty.*, 538 F.3d 431, 441-42 (6th Cir. 2008); *Brown v. Prairie Farms Dairy, Inc.*, 872 F. Supp. 2d 637, 643 (6th Cir. 2012). American failed to re-employ General Harwood on September 1 in violation of § 4312. Accordingly, General Harwood is entitled to summary judgment on Count II of the Amended Complaint.

Section 4313

Because American plainly had an obligation to reemploy General Harwood under § 4312 and it failed to so reemploy him into any position, American also violated § 4313. *See Brown v. Prairie Farms Dairy, Inc.*, 872 F. Supp. 2d 637, 645 (M.D. Tenn. 2012). As noted *supra*, American's contention that General Harwood failed to engage in an interactive § 4313 process is unavailing where General Harwood necessarily sought out legal counsel in the face of what was, as of September 1, a USERRA violation.

Liquidated Damages

While clear that American violated both § 4312 and § 4313 in its action toward General Harwood, there is simply no evidence that American or any of its agents acted unreasonably and in bad faith. Accordingly, liquidated damaged are not applicable to the facts of this case. *See Davis v. Crothall Servs. Grp., Inc.*, 961 F. Supp. 2d 716, 735 (W.D. Pa. 2013).

IV. Conclusion

For these reasons, the reasons stated from the bench during the hearing, and for good cause shown, Plaintiff's motion summary judgment is **GRANTED in part** for the Plaintiff as to Counts II and III of the Amended Complaint and **DENIED** as to Defendant's affirmative defense to liquidated damages that it acted reasonably and in good faith and that its actions were not willful. Defendant's motion for summary judgment is **DENIED in part o**n Counts II and III of the Amended Complaint and **GRANTED in part** on its affirmative defense to liquidated damages that it acted reasonably and in

good faith and that its actions were not willful. A separate Order will issue.

It is **SO ORDERED.**

/s/ Liam O'Grady
Liam O'Grady
United States District Judge

May 23, 2018
Alexandria, Virginia

ENTERED AUGUST 9, 2017

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

MAJOR GENERAL THOMAS P. HARWOOD III,	)	
Plaintiff,	)	Case No. 1:17-cv-00484-GBL-JFA
v.	)	
AMERICAN AIRLINES INC.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant American Airlines Inc. ("AA")'s Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 9.) This case concerns claims brought by Plaintiff Major General Thomas P. Harwood III pursuant to the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4301, *et seq*. Plaintiff asserts claims for discrimination and failure to reemploy against AA, who, prior to Plaintiff's June 2013 to August 31, 2015 military leave of absence, employed Plaintiff as an airline pilot. (Dkt. No. 1, "Compl.") Plaintiff filed a Complaint against AA alleging violation of USERRA on the following three counts: Discrimination, in violation of 38 U.S.C.

§ 4311 (Count One); (2) Failure to Reemploy, in violation of 38 U.S.C. § 4312 (Count Two); and (3) Failure to Reemploy, in violation of 38 U.S.C. § 4313 (Count Three). (Compl. ¶¶ 65-93.)

There are three issues before the Court. The first issue before the Court is whether Plaintiff states a plausible claim for relief under 38 U.S.C. § 4311, where Plaintiff contends that AA discriminated against him on the basis of his fulfillment of military service with the United States Air Force, when AA did not reemploy him from September 1, 2015 through January 26, 2016. (Comp. ¶ 71.) The second issue before the Court is whether Plaintiff states a plausible claim for relief under 38 U.S.C. § 4312 where Plaintiff maintains that AA failed to reemploy him despite his compliance with § 4312 requirements for reemployment. (Compl. ¶¶ 77-82.) The third issue before the Court is whether Plaintiff states a plausible claim for relief under 38 U.S.C. § 4313 where Plaintiff claims that AA failed to promptly reemploy Plaintiff in accordance with § 4313. (Compl. ¶¶ 88-92.)

With respect to the first issue, the Court holds that Plaintiff has failed to state a plausible claim for relief under § 4311 because § 4311 protects veterans from discrimination *after* they have been reemployed following deployment, and Plaintiff has failed to plead any facts that demonstrate that Plaintiff was discriminated against subsequent to his January 26, 2016 reemployment. In regard to the second issue, the Court holds that Plaintiff states a plausible claim for relief because Plaintiff pleaded sufficient facts to support his claim that he complied with §

4312 requirements for reemployment. With respect to the third issue, the Court holds that Plaintiff stated a plausible claim for relief under § 4313, because Plaintiff pleaded sufficient facts to support his claim that AA failed to promptly reemploy him within two weeks of his request for reemployment. Accordingly, the Court GRANTS AA' s Motion to Dismiss with respect to Count One, and DENIES AA's Motion to Dismiss with respect to Count Two and Count Three.

I. BACKGROUND

A. Factual Background

Plaintiff is a United States Air Force general who has been employed with AA since 1992. (Compl. ¶¶ 13, 17.) From 1991 to 2015, Plaintiff served in various capacities in the Air Force, including: combat deployments in Bosnia, Iraq, and Afghanistan; serving as a mobilization assistant in Air Education and Training Command, Pacific Air Force, and Headquarters U.S. Air Force; working in the capacity of Air Component Commander in multiple Joint Chief of Staff-level exercises and two Presidential visits; experience as Chief of Staff for Air Forces Pacific during Operations Tomodachi and Pacific Passage; and serving as Chief of the United States Military Training Mission to the Kingdom of Saudi Arabia. (Compl. ¶¶ 14-15.)

Plaintiff began employment with AA on November 24, 1992. (Compl. ¶ 17.) Around October 1993, Plaintiff was furloughed by AA, but was subsequently reemployed by AA in August of 1996 and began training to become a B-727 Flight Engineer, where he flew out of Dallas/ Fort Worth

International Airport in Texas. (Compl. ¶ 20.) Around the summer of 1997, Ruben Garza, an AA Dallas Flight Officer[1], told Plaintiff that AA would not allow Plaintiff to take "so much military leave," and that Plaintiff would "have to decide if [he is] going to play soldier or be an airline pilot." (Compl. ¶ 21.) Garza did not provide Plaintiff with a written policy to support his statements. (Compl. ¶ 21.)

Around the year 2000, Plaintiff was promoted to become a B-757-767 First Officer and received an Airline Transport Pilot Certificate. (Compl. ¶ 25.) From 2000 to 2011 Plaintiff flew domestic and international flights for AA from Los Angeles International Airport, and also completed assignments for the United States Air Force. (Compl. ¶¶ 26-27.) Around 2011, Plaintiff was transferred by AA from Los Angeles International Airport to John F. Kennedy International Airport in New York, where Plaintiff continued to fly international and domestic flights. (Compl. ¶ C.)[2]

Around June of 2013, Plaintiff commenced a period of military leave of absence from AA to serve as Chief of the United States Military Training Mission in Riyadh, Saudi Arabia. (Compl. ¶¶ 28-29.) In December 2013, Plaintiff was diagnosed with atrial fibrillation. (Compl. ¶ 30.) Subsequently, in December 2013 and August 2014, Plaintiff underwent two procedures to rectify the condition,

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[1] Plaintiff's Complaint names Ruben Garza as an "AA Dallas Flight Office." (Dkt. No. 1 at 4 ¶21.) The Court infers that Plaintiff intended to describe Garza as an American Airlines Dallas Flight *Officer*.

[2] Paragraph C is on page 5 of the Plaintiff's complaint.

but both procedures were unsuccessful. (Compl. ¶ 30.)

Around June 3, 2015, Plaintiff emailed AA's New York Flight Office to ask for a new bid status as a 737 domestic captain in New York, and also to notify the office that he expected to return to New York on September 20, 2015. (Compl. ¶ 31.) However, on about July 13, 2015, Plaintiff received Separation Orders from the United States Air Force with an effective date of August 31, 2015. (Compl. ¶ 32.) Ten days later, on July 23, 2015, Plaintiff emailed AA to notify AA that Plaintiffs then period of service with the Air Force would be terminated on August 31, 2015. (Compl. ¶ 33.) Two days later, on July 25, 2015, Plaintiff emailed a copy of his Separation Orders to AA's New York Flight Office. (Compl. ¶ 34.)

On about July 28, 2015, Ken Blessum, an American Airlines Senior Analyst of Crew Planning and Analysis, emailed Plaintiff instructing Plaintiff to contact Sue Kalosa, AA's Manager of Flight Administration. (Compl. ¶ 35.) As such, Plaintiff emailed Kalosa on about July 29, 2015, to again request his bid status as a 737 domestic captain in New York. (Compl. ¶ 36.) Kalosa responded on about August 3, 2015 confirming Plaintiffs return to

LaGuardia Airport[3] in New York as a 737 captain for domestic flights. (Compl. ¶ 37.) Kalosa also told Plaintiff that the Training Department would notify Plaintiff of a start date for training, and that Plaintiff would need a First Class Medical Certificate to begin his role as domestic captain even though Plaintiff had only needed a Second Class Medical Certificate in his prior position. (Compl. ¶ 37.)

On August 5, 2015, the United States Air Force asked Plaintiff to attend a Joint Flag Officer Warfighting Course from September 13, 2015 to September 18, 2015 so that Plaintiff could qualify as a Joint Force Commander. (Compl. ¶ 39.) On August 7, 2015, Plaintiff notified AA of the required course, and asked AA's New York Flight Office to modify Plaintiffs schedule to allow him to attend the class. (Compl. ¶ 40.) Around August 10, 2015, Plaintiff and Lorrain Sutera of AA's New York Flight Administration discussed Plaintiff's reemployment with AA and Plaintiffs upcoming military leave of absence from September 15 - 18, 2015. (Compl. ¶ 7.) Sutera informed Plaintiff that AA would "bring [Plaintiff] back on payroll September 1st." *Id.* Around August 20, 2015, Plaintiff was assigned a training schedule by AA that did not include a period

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[3] Plaintiff's Complaint indicates that prior to his period of service in Saudi Arabia, which began in June of 2013, Plaintiff was employed by AA as a domestic Captain at *John F. Kennedy International Airport* in New York. (Compl. ¶¶ 28, C.) Though Plaintiff maintains that he requested to "*return to Laguardia* [sic.] *Airport*," (Compl. ¶ 37) (emphasis added) after his period of service in Saudi Arabia, LaGuardia Airport is an entirely different airport than John F. Kennedy International Airport, of which Plaintiff pleaded to have originally worked.

of military leave of absence from September 13 - 18, 2015. (Compl. ¶ 42.)

Also, on August 20, 2015, Plaintiff emailed Sue Kalosa to notify her that he was unable to secure the required First Class Medical Certificate for the domestic captain position at LaGuardia Airport. (Compl. ¶ 43.) Around late August of 2015, the Aviation Medical Examiner's Office informed Plaintiff that he would need a waiver from the Federal Aviation Administration ("FAA") in order to be able fly. (Compl. ¶¶ 44-45.)

On August 26, 2015, Jerry Shaw of the AA's New York Flight Administration, informed Plaintiff that AA could not reemploy Plaintiff without a First Class Medical Certificate. (Compl. ¶ 46.) In response, Plaintiff reminded Shaw of Plaintiffs rights under the USSERA, and asked Shaw for help with his medical condition after he was reemployed with AA. *Id.* On August 27, 2015, Kalosa contacted Plaintiff again to tell Plaintiff that AA required pilot service members to have a valid First Class Medical Certificate. (Compl. ¶ 47.) On August 27, 2015, Kalosa also told Plaintiff that AA would keep Plaintiff on military leave of absence until Plaintiff received a waiver of the First Class Medical Certificate from the FAA. *Id.*

Around September 1, 2015, Plaintiff contacted Scott Hansen, AA's Director of Flight Administration to ask Hansen whether Plaintiff was eligible for reemployment with AA. (Compl. ¶ 49.) Hansen responded by informing Plaintiff that Plaintiff would be "returned to active employment based upon [Plaintiff's] notification to the company and

presuming [Plaintiff met] USERRA guidelines and the company policy for re-employment [sic.]. So long as [Plaintiff had] a current and valid medical, and [was] able for training, [Plaintiff was] good to go." (Compl. ¶ 49.) When Plaintiff told Hansen that Plaintiff believed AA's policy of requiring pilots to have a First Class Medical Certificate was a violation of 38 U.S.C. § 4312, Hansen confirmed that AA would extend Plaintiff's military leave of absence until Plaintiff received a FAA waiver. (Compl. ¶ 51.)

On October 22, 2015, Conrad S. Kee, a principal with Jackson Lewis P.C., which is counsel for AA, emailed Plaintiff's counsel to confirm with him a prior conversation Kee had with Plaintiff's counsel regarding Plaintiff. (Dkt. 9-1.) Kee reaffirmed that Plaintiff was unqualified to return to his pilot position "because he [was] unable to qualify for a First Class Medical certificate [sic.]." (Dkt. No. 9-1.) Kee's email to Plaintiff's counsel went on to say the following:

> [AA] is willing to accommodate [Plaintiff's] medical condition by extending his military leave to permit him time to seek a waiver from the FAA so that he can qualify for a First Class Medical certificate [sic.]. [AA] will also offer reasonable assistance to [Plaintiff] in his waiver process, although the ultimate determination is up to the FAA, rather than [AA]. Alternatively, if [Plaintiff] does not wish to extend his military leave, [AA] will reemploy him in the Flight Technical Operations Group at the Flight Academy in DFW,

> in a position appropriate for his status. In that position, [Plaintiff] will be compensated at the same rate he would receive if actively flying. If [Plaintiff] elects employment in the Flight Technical Operations Group, he can continue to seek a waiver from the FAA on his First Class Medical. To be clear, the option whether to remain on military leave pending an [sic.] FAA decision on his First Class Medical certificate or to be reemployed in the Flight Technical Operations Group at the Flight Academy is [Plaintiff's] choice and [AA] will fully support whatever decision he makes.

(Dkt. No. 9-1.)

Subsequently, on November 9, 2015, Plaintiff notified AA that he planned to commence active duty orders with the Air Force on November 16, 2015, and on November 16, 2015, Plaintiff began those active duty orders. (Compl. ¶ 54.) Additionally, Plaintiff continued to take actions toward obtaining a waiver of his First Class Medical Certificate from the FAA. (Compl. ¶¶ 55-56.) Specifically, around early November 2015, Plaintiff took a nuclear stress test, and on December 21, 2015 Plaintiff took an echocardiogram test in an effort to obtain the waiver. *Id.*

On December 21, 2015, Plaintiff also notified AA that he would again request reemployment on January 8, 2016 when he completed this term of service with the Air Force. (Compl. ¶ 57.) On

January 21, 2016, AA extended Plaintiff another offer to work at the Flight Technical Operations Group at the AA's Flight Academy in Dallas, Texas, which is the same position they offered on October 22, 2015. (Compl. ¶ 59; Dkt. No. 9-1.) Plaintiff accepted AA's offer of reemployment at the Flight Academy in Dallas. (Compl. ¶ 59.)

On January 25, 2016, Plaintiff was issued an Authorization for Special Issuance of a Medical Certificate pursuant to 14 C.F.R. § 67.401. (Compl. ¶ 160.) The next day, on January 26, 2016, Plaintiff was notified by AA that he could "return to the line."[4] Plaintiff accepted AA's offer and on February 18, 2016, Plaintiff began upgrade training with AA. (Compl. ¶¶ 62- 63.)

B. Procedural Background

On April 24, 2017, Plaintiff filed a complaint against AA alleging the following violations of USERRA: (1) Discrimination, in violation of 38 U.S.C. § 4311 (Count One); (2) Failure to Reemploy, in violation of 38 U.S.C. § 4312 (Count Two); and (3) Failure to Reemploy, in violation of 38 U.S.C. § 4313 (Count Three). (Compl. ¶¶ 65-93.) Subsequently, on June 27, 2017, AA filed this Motion to Dismiss on all three counts arguing that Plaintiff did not adequately state a claim for relief pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 9 at 1 and 2.) This matter has been fully briefed, and is now ripe for disposition.

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[4] It is the Court's understanding the phrase "return to the line" denotes that Plaintiff could be reemployed with AA as a 737 domestic captain at LaGuardia Airport in New York.

II. DISCUSSION

A. Standard of Review

i. Fed. R. Civ. P. 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) enables a defendant to move for dismissal by challenging the sufficiency of the plaintiff's complaint. Fed. R. Civ. P. 12(b)(6). A 12(b)(6) motion should be granted where the plaintiff has failed to "state a plausible claim for relief" under Rule 8(a). *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012) (internal quotation marks omitted) (quoting *Ashcroft* v. *Iqbal*, 556 U.S. 662, 679 (2009)). To survive a Rule 12(b)(6) motion, a claim must be facially plausible, meaning the complaint contains sufficient factual allegations, which if taken as true, "raise a right to relief above the speculative level" and "nudg[e] [the] claims across the line from conceivable to plausible," allowing "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Vitol, S.A. v. Primerose Shipping Co.*, 708 F.3d 527, 543 (4th Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)); *Iqbal*, 556 U.S. at 678. The requirement for plausibility does not mandate a showing of probability but merely that there is more than a possibility of the defendant's unlawful acts. *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678). As a result, a complaint must contain more than "naked assertions" and "unadorned conclusory allegations" and requires some "factual enhancement" in order to be sufficient. *Id.* (citing *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 557).

Thus, in reviewing a 12(b)(6) motion to dismiss, a court must separate factual allegations from legal conclusions. *Burnette v. Fahey*, 698 F.3d 171, 180 (4th Cir. 2012). Further, a court may "consider documents incorporated into the complaint by reference, as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic." *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014) (citations and internal quotation marks omitted).

ii. USERRA

USERRA "was enacted to protect the rights of veterans and members of the uniformed services," and thus the statute should be construed liberally "in favor of its military beneficiaries." *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 303 (4th Cir. 2006). Sections 4311, 4312, 4313, and 4316 provide the framework for USERRA. *Butts v. Prince William Cty. Sch. Bd*, 844 F.3d 424, 430 (4th Cir. 2016).

Section 4311 precludes employers from discriminating against employees who are service members. Section 4311 is applicable to veterans subsequent to their "reemployment following deployment." *Butts*, 844 F.3d at 430; *Francis*, 452 F.3d at 304. Sections 4312 and 4313 apply to veterans who seek ~~are looking~~ to be reemployed. *Butts*, 844 F.3d at 430. Under 38 U.S.C. § 4312, "any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of

[USERRA] if," the following three requirements are fulfilled: "(l) the employee gives notice to his employer when leaving; (2) the absence is for less than five years as defined by the USERRA; and (3) the employee timely applies for reemployment upon his return." *Sulton v. City of Chesapeake*, 713 F. Supp. 2d 547, 551 (E.D. Va. 2010); 38 U.S.C. § 4312(a).

Should the employee satisfy these conditions of eligibility, the employer's actions must comport with § 4313(a)(l)-(4), which set forth the position the service member is entitled to after completion of their period of service. 38 U.S.C. § 4313(a)(l)-(4); *see also Butts*, 844 F.3d at 430.

B. Analysis

The Court GRANTS AA's Motion to Dismiss Count One, and DENIES AA's Motion to Dismiss with respect to Counts Two and Three. The Court GRANTS AA's Motion to Dismiss Count One alleging that AA discriminated against Plaintiff in violation of 38 U.S.C. § 4311 because § 4311 protects veterans from discrimination *after* they have been reemployed following deployment, and Plaintiff has failed to plead any facts that demonstrate that Plaintiff was discriminated against subsequent to his January 26, 2016 reemployment. The Court DENIES AA's Motion to Dismiss Counts Two and Three of Plaintiff's complaint because Plaintiff adequately stated plausible claims for relief. Plaintiff pleaded that AA violated 38 U.S.C. §§ 4312 and 4313 when despite Plaintiff's compliance with the reemployment requirements of 38 U.S.C. § 4312, AA failed to promptly reemploy Plaintiff in an

appropriate position in accordance with § 4313, following Plaintiff's period of active duty with the United States Air Force ending on August 31, 2015.

1. Count One

The Court GRANTS AA's Motion to Dismiss Count One alleging that A discriminated against Plaintiff in violation of 38 U.S.C. § 4311 because § 4311 protects veterans from discrimination *after* they have been reemployed following deployment, and Plaintiff has failed to plead any facts that demonstrate that Plaintiff was discriminated against subsequent to his January 26, 2016 reemployment. Plaintiff's first count specifically alleges that AA violated 38 U.S.C. § 4311 when it "denied [Plaintiff] a benefit of his own employment when [AA] *failed to reemploy* [Plaintiff] on or around September 1, 2015, through January 26, 2016, on the basis of [Plaintiff's] performance of service with the United States Air Force ending on or around August 31, 2015 ...." (Compl. ¶ 71.) The Court holds that Plaintiff's reliance on § 4311 is misplaced.

Although 38 U.S.C. § 4311 protects veterans against discrimination, the Fourth Circuit has held that § 4311 protects veterans against discrimination only *after* the veteran has been reemployed following the veteran's completion of a term of military service. *See Butts*, 844 F.3d at 430 ("[s]ection 4311 applies after a veteran is reemployed following deployment."); *Francis*, 452 F.3d at 304 ("§ 4311 operates to prevent employers from treating those employees differently *after* they are rehired.") (emphasis added). Plaintiff does not contend that Plaintiff was further discriminated against again

after he was reemployed by AA on January 26, 2016. (Dkt. No. 1.) Because Plaintiff has not alleged that he was discriminated against by AA after being reemployed by AA after January 26, 2016, Plaintiff has failed to state a plausible claim for relief under Federal Rule of Civil Procedure 8(a) with respect to Count One. Accordingly, the Court GRANTS AA's motion to dismiss Count One because Plaintiff has not pleaded any facts to demonstrate he was discriminated against subsequent to reemployment with AA.

2. Counts Two and Three

The Court DENIES AA's Motion to Dismiss Counts Two and Three of Plaintiff's complaint because Plaintiff adequately stated plausible claims for relief. Plaintiff pleaded that AA violated 38 U.S.C. §§ 4312 and 4313 when despite Plaintiff's compliance with the reemployment requirements of 38 U.S.C. § 4312, AA failed to promptly reemploy Plaintiff in an appropriate position in accordance with § 4313, following Plaintiff's period of active duty with the United States Air Force ending on August 31, 2015.

a. Count Two

The Court DENIES AA's Motion to Dismiss because Plaintiff has adequately pleaded facts to support him claim that he complied with the requirements for reemployment outlined in § 4312. Count Two of Plaintiff's complaint specifically

alleges that AA violated 38 U.S.C. § 4312 when "[AA] denied [Plaintiff] the reemployment rights and benefits and other employment benefits of USERRA on or around August 26, 2015, when [AA] denied [Plaintiff] reemployment until [Plaintiff] possessed a valid First Class Medical Certificate." (Compl. ¶ 82.) Section 4312 provides that:

> any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if (1) the person . . . has given advance written or verbal notice of such service to such person's employer; (2) the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service does not exceed five years; and (3) ... the person reports to or submits an application for reemployment to such employer in accordance with subsection (e).

38 U.S.C. § 4312(a)(l)-(3). The parties do not dispute that Plaintiff pleaded sufficient facts, which if taken as true, meet each of the three requirements of § 4312. (Dkt. No. 14 at 9 and Dkt. No. 15.) For the following three reasons, the Court holds that Plaintiff's complaint supports that conclusion.

First, the Court holds that Plaintiff has pleaded sufficient facts to satisfy the first requirement of § 4312, because it can be inferred

from Plaintiff's complaint that Plaintiff gave AA advance notice of his July 2013 to August 31, 2015 period of military service. The first requirement of § 4312 is that a person give their employer advance notice of their upcoming period of service. 38 U.S.C. § 3412(a)(l). The period of service at issue in this case is Plaintiff's June 2013 to August 31, 2015 period of active duty with the United States Air Force in Saudi Arabia. (Compl. ¶¶ 77-78.) Plaintiff has pleaded that AA placed Plaintiff on military leave of absence when Plaintiff began his term of active duty with the United States Air Force in June of 2013 in Saudi Arabia. (Compl. ¶¶ 28-29.) Had AA not known about Plaintiff's June 2013 - August 31, 2015 period of service in advance, it would not have been able to place Plaintiff on military leave of absence. (Compl. ¶¶ 28-29.) Thus a reasonable inference could be drawn that such placement on military leave of absence was provided when Plaintiff gave AA advance notice of this period of military absence. Taking this allegation as true, the Court finds that Plaintiff pleaded sufficient facts to support his claim that he met the first § 4312 requirement for reemployment.

Second, the Court finds that Plaintiff has also pleaded sufficient facts to support Plaintiff's claim that he has met the second condition of § 4312. The second reemployment requirement of § 4312 is that the cumulative length of absence for military service be no more than five years. As previously mentioned, Plaintiff maintains that his term of service commenced in June of 2013, and ended on August 31, 2015, totaling two years and two months. (Compl. ¶¶ 28, 32.) Because this period of time was less than five years, the Court holds that

Plaintiff has adequately pleaded facts to support his argument that he has met the second requirement of § 4312.

Third, the Court holds that Plaintiff has pleaded adequate facts to satisfy the third condition of § 4312. Section 4312 requires that a veteran must submit an application for reemployment in accordance with subsection (e) of § 4312. 38 U.S.C. § 4312(a)(3). Section 4312(e) provides that "[i]n the case of a person whose period of service in the uniformed services was for more than 180 days," such person must submit "an application for reemployment with the employer not later than 90 days after the competition of the period of service "38 U.S.C. § 4312(e)(l)(D). Section 4312(e)(l)(D) is applicable to this case because the Plaintiff's period of service began in June of 2013, and ended on August 31, 2015, and thus was a period of 26 months, which is more than 180 days. Therefore, Plaintiff had ninety days after his period of active duty ended on August 31, 2015, to submit an application for reemployment to AA.

Plaintiff applied for reemployment with AA on June 3, 2015 when he emailed AA's New York Flight Office to "request a new bid status," and then emailed AA's same office again on July 23, 2015 to inform them that Plaintiff's service with the United States Air Force would be finished on August 31, 2015. (Compl. ¶¶ 31, 33.) Both of these dates fulfill the conditions of § 4312(e)(l)(D) because they were both within the ninety-day time frame that Plaintiff had to apply for reemployment following his period of active duty ending on August 31, 2015. Because the Court finds that Plaintiff pleaded sufficient facts

to state a valid claim for relief under § 4312(a)(3), the Court holds that Plaintiff has satisfactorily pleaded facts to meet the third requirement of § 4312.

Because the Court finds that Plaintiff pleaded sufficient facts to state a valid claim for relief under § 4312, the Court DENIES AA's Motion to Dismiss Count Two.

b. Count Three

The Court DENIES AA's Motion to Dismiss Count Three because Plaintiff has pleaded sufficient facts to state a plausible claim that AA failed to promptly reemploy Plaintiff within two weeks of his request for reemployment in accordance with § 4313. Plaintiff avers that AA failed to promptly reemploy Plaintiff in accordance with § 4313 although Plaintiff fulfilled each of the reemployment obligations of § 4312. (Compl. ¶¶ 84 - 93.) The Court holds that based on the facts pleaded in Plaintiff's complaint, which at this juncture must be taken as true, Plaintiff sufficiently stated a plausible claim that AA failed to promptly reemploy Plaintiff. Therefore, AA's Motion to Dismiss Count Three is DENIED.

38 U.S.C. § 4313 provides that if a person meets each of the three conditions for reemployment outlined in Section 4312(a)(l)-(3) then, the employer must "promptly reemploy [the employee] in a position of employment" in conformity with the provisions provided in § 4313. 38 U.S.C. § 4313(a). Section 4313 generally requires that if a person's period of military service was longer than ninety days, then such persons should be reemployed "in the position of employment in which the person

would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform . . . ." 38 U.S.C. § 4313(2)(A). However, 38 U.S.C. § 4313(3) addresses how employers should reemploy employees who became disabled in or aggravated a disability during their period of military service, and, as a result, are no longer qualified to perform the duties of the position they had prior to deployment. 38 U.S.C. § 4313(3). Specifically, Section 4313(3) provides that such service members should be reemployed either

> (a) in any position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or (b) if not employed under subparagraph (a) in a position which is the nearest approximation to a position referred to in subparagraph (a) in terms of seniority, status, and pay consistent with circumstances of such person's case.

38 U.S.C. § 4313(3)(A)-(B). Such reemployment must occur promptly, which under 20 C.F.R. § 1002.181 means "within two weeks of the employee's application for reemployment," unless there is an "unusual circumstance." 20 C.F.R. § 1002.181.

For the reasons stated in the previous Section of this order (see *supra*, p.12-15), Plaintiff alleges sufficient facts to support his claim that he meets each of the three conditions for reemployment provided in § 4312, thus the relevant inquiry is whether Plaintiff stated a plausible claim that AA failed to comply with § 4313. Prior to Plaintiff's period of service beginning in June of 2013 and ending on August 31, 2015, Plaintiff was employed by AA as a pilot flying domestic and international flights out of John F. Kennedy Airport in New York. (Compl. ¶ C.) This period of service lasted a total of two years and two months. (Compl. ¶¶ 28, 32.) Then, Plaintiff left AA's company in June 2013 for this period of two years and two months to complete the aforementioned period of military service. (Compl. ¶ 128.) Therefore, because this period of active duty was for more than ninety days, *if Plaintiff had been qualified for* the pilot position that he previously held, under § 4313(a)(2), Plaintiff should have been reemployed by AA as a pilot flying domestic and international flights from John F. Kennedy Airport after he returned from service on August 31, 2015.

However, Plaintiff was *not* qualified for the pilot position because he did not have a FAA required First Class Medical Certificate. (Compl. ¶ 37). Plaintiff further avers that he was diagnosed with atrial fibrillation in December of 2013 while he was fulfilling his period of service with the United States Air Force in Saudi Arabia. (Compl. ¶ 30.) Plaintiff pleaded that although Plaintiff underwent two procedures to correct the condition, both procedures were unsuccessful. (Compl. ¶ 30.) Taking these facts as true, Plaintiff was unqualified for the pilot position because he did not possess a First

Class Medical Certificate, and because he incurred atrial fibrillation during his period of service.

Therefore, in order to have a stated a plausible claim for relief under § 4313, Plaintiff must have pleaded that AA did not make a reasonable effort to accommodate Plaintiff's disability and employ Plaintiff in a position equivalent in "seniority, status, and pay," to Plaintiff's prior pilot position, or "in a position a position [that] is the nearest approximation to [the pilot position] in terms of seniority, status, and pay consistent with circumstances of [Plaintiff's] case," 38 U.S.C. § 4313(a)(3). Moreover, under to 38 U.S.C. § 4313(a) and 20 C.F.R. § 1002.181, Plaintiff must plead sufficient facts to show that AA did not make reasonable efforts to accommodate Plaintiff's disability and reemploy Plaintiff in a position equivalent in seniority, status, and pay promptly within two weeks of Plaintiff's application for reemployment. 38 U.S.C. § 4313(a); 20 C.F.R. § 1002.181.

AA first argues that its Motion to Dismiss should be granted because AA acted appropriately when it extended Plaintiff's military leave of absence in September of 2015, in that 20 C.F.R. § 1002.116 allows a person who cannot "perform the duties of his prior position" due to an illness or injury incurred during a period of active service ... " the option of reporting to or submitting an application for reemployment once they have recovered from such illness. (Dkt. No. 9 at 9.) However, as AA maintains (*Id.*), this decision is to be made at the discretion of the individual who is injured or ill. 20 C.F.R. § 1002.116. Thus, in this

case, the decision to remain on military leave of absence was to be made at the discretion of the Plaintiff - not AA. Plaintiff has pleaded, that on August 27, 2015, AA "require[ed]" Plaintiff be placed military leave of absence until Plaintiff could obtain a First Class Medical Certificate or a waiver of such certificate from the FAA. (Compl. ¶ 47.) Instead of requiring Plaintiff remain on military leave of absence, AA should have taken reasonable efforts to accommodate Plaintiff's disability by reemploying Plaintiff in a position equivalent to the pilot position he previously had promptly after Plaintiff applied for reemployment. Taking, these facts as true, the Court holds that Plaintiff stated a plausible claim against AA for violating § 4313, when AA "required" Plaintiff to extend Plaintiffs period of military leave of absence instead of offering Plaintiff another position of equal seniority, status, and pay.

AA further maintains that AA acted in compliance with 38 U.S.C. § 4313 when on October 22, 2015, AA offered Plaintiff the option to either "extend [Plaintiff's] military leave to permit him time to seek a waiver from the FAA so that [Plaintiff could] qualify for a First Class Medical Certificate," or be reemployed by AA "in the Flight Technical Operations Group at the Flight Academy in DFW." (Dkt. No. 9 at 4 and Dkt. No. 9-1.) AA further asserts that because this offer indicated that the position at the Flight Academy at DFW would be "compensated at the same rate [Plaintiff] would [have] receive[d] if actively flying," such officer is of the same seniority, status, and pay that Plaintiff would have received if reemployed as a pilot at John F. Kennedy Airport. (Dkt. No. 9 at 4 and Dkt. No. 9-1.) Although AA may have, *eventually* extended this offer to Plaintiff,

which may have been a reasonable accommodation that would have compensated Plaintiff at the same rate of pay that Plaintiff would have received had he been reemployed as a pilot at John F. Kennedy Airport, the Court holds that this offer was not extended promptly in accordance with 38 U.S.C. § 4313(a) and 20 C.F.R. § 1002.181.

As previously mentioned, Plaintiff applied for reemployment with AA on June 3, 2015 when Plaintiff emailed AA's New York Flight Office to "request a new bid status," and then emailed the same office again on July 23, 2015 to inform them that his service with the United States Air Force would be finished on August 31, 2015. (Compl. ¶¶ 31, 33.) Therefore, under 38 U.S.C. § 4313(a) and 20 C.F.R. § 1002.181, AA had two weeks from July 23, 2015, at the latest, to accommodate Plaintiff or provide Plaintiff with another position that was of the same seniority, status, and pay as Plaintiff's previous pilot position. However, Plaintiff has pleaded that AA "require[ed]" Plaintiff to remain on military leave of absence, and failed to offer Plaintiff any alternate position until October 22, 2015, when AA emailed Plaintiff to provide Plaintiff an opportunity to take a position in the Flight Technical Operations Group at the Flight Academy in DFW. (Compl. at ¶ 52.) AA does not dispute that AA's offer was not extended until October 22, 2015. (Dkt. No. 9-1.) Accordingly, taking this fact as true, the Court holds that Plaintiff has stated a plausible claim against AA for violating 38 U.S.C. § 4313, because AA failed to promptly reemploy Plaintiff within two weeks of his request for reemployment, in a position of equivalent seniority, status, and pay to Plaintiff's

prior pilot position. Accordingly, the Court DENIES AA's Motion to Dismiss Court Three.

III. CONCLUSION

The Court GRANTS AA's Motion to Dismiss Count One, and DENIES AA's Motion to Dismiss with respect to Counts Two and Three. The Court GRANTS AA' s Motion to Dismiss Count One alleging that AA discriminated against Plaintiff in violation of 38 U.S.C. § 4311 because § 4311 protects veterans from discrimination *after* they have been reemployed following deployment, and Plaintiff has failed to plead any facts that demonstrate that Plaintiff was discriminated against subsequent to his January 26, 2016 reemployment. The Court DENIES AA's Motion to Dismiss Counts Two and Three of Plaintiff's complaint because Plaintiff adequately stated plausible claims for relief. Plaintiff pleaded that AA violated 38 U.S.C. §§ 4312 and 4313 when despite Plaintiff's compliance with the reemployment requirements of 38 U.S.C. § 4312, AA failed to promptly reemploy Plaintiff in an appropriate position in accordance with § 4313, following Plaintiff's period of active duty with the United States Air Force ending on August 31, 2015.

Accordingly, **IT IS HEREBY ORDERED** that AA's Motion to Dismiss (Dkt. No. 9) is **GRANTED** in part with respect to Count One of Plaintiff's Complaint (Compl. ¶¶ 65-72) and **DENIED** with regard to Count Two (Compl. ¶¶ 73-83) and Count Three of Plaintiff's Complaint (Compl. ¶¶ 84-93).

IT IS SO ORDERED.

ENTERED this 9th day of August, 2017.

/s/
Gerald Bruce Lee
United States District Judge

ENTERED JULY 18, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-2200(L)
(1:17-cv-00484-LO-JFA)

MAJOR GENERAL THOMAS P. HARWOOD, III,

Plaintiff - Appellant

v.

AMERICAN AIRLINES, INCORPORATED,

Defendant - Appellee.

No. 21-1137
(1:17-cv-00484-LO-JFA)

MAJOR GENERAL THOMAS P. HARWOOD, III,

Plaintiff - Appellant

v.

AMERICAN AIRLINES, INCORPORATED,

Defendant - Appellee.

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Wynn, and Senior Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves violations of the reinstatement provisions Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301-35 *et seq*., ("USERRA"), and specifically 20 C.F.R. §§ 1002.139 (describing an employer's affirmative defenses), 1002.191 (defining "escalator position"), 1002.194 (defining "escalator"), 1002.225 (defining "entitlement.").

38 U.S.C. § 4301. Purposes; sense of Congress.

(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.

(b) It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.

38 U.S.C. § 4302. 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.

38 U.S.C. § 4303. Definitions.

For the purposes of this chapter –

(10) The term "reasonable efforts", in the case of actions required of an employer under this chapter, means actions, including training provided by an employer, that do not place an undue hardship on the employer.

(12) The term "seniority" means longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment.

(16) The term "undue hardship", in the case of actions taken by an employer, means actions requiring significant difficulty or expense, when considered in light of—

> **(A)** the nature and cost of the action needed under this chapter;
>
> **(B)** the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
>
> **(C)** the overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and
>
> **(D)** the type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of

the facility or facilities in question to the employer.

38 U.S.C. § 4312. Reemployment rights of persons who serve in the uniformed services.

(a) Subject to subsections (b), (c), and (d) and to section 4304, any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if –

(1) the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer;

(2) the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years; and

(3) except as provided in subsection (f), the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e).

(b) No notice is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all of the

relevant circumstances, the giving of such notice is otherwise impossible or unreasonable. A determination of military necessity for the purposes of this subsection shall be made pursuant to regulations prescribed by the Secretary of Defense and shall not be subject to judicial review.

(c) Subsection (a) shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service –

(1) that is required, beyond five years, to complete an initial period of obligated service;

(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

(3) performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by

the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or

(4) performed by a member of a uniformed service who is –

(A) ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, 12304a, 12304b, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14;

(B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;

(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;

(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or

(F) ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.

(d)

(1) An employer is not required to reemploy a person under this chapter if –

(A) the employer's circumstances have so changed as to make such reemployment impossible or unreasonable;

(B) in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) or section 4313, such employment would impose an undue hardship on the employer; or

(C) the employment from which the person leaves to serve in the

uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.

(2) In any proceeding involving an issue of whether –

(A) any reemployment referred to in paragraph (1) is impossible or unreasonable because of a change in an employer's circumstances,

(B) any accommodation, training, or effort referred to in subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313 would impose an undue hardship on the employer, or

(C) the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period,

the employer shall have the burden of proving the impossibility or unreasonableness, undue hardship, or the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period.

(e)

(1) Subject to paragraph (2), a person referred to in subsection (a) shall, upon the completion of a period of service in the uniformed services, notify the employer referred to in such subsection of the person's intent to return to a position of employment with such employer as follows:

(A) In the case of a person whose period of service in the uniformed services was less than 31 days, by reporting to the employer –

(i) not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence; or

(ii) as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.

(B) In the case of a person who is absent from a position of employment for a period of any length for the purposes of an examination to determine the person's fitness to perform service in the uniformed services, by reporting in the manner and time referred to in subparagraph (A).

(C) In the case of a person whose period of service in the uniformed services was for more than 30 days but less than 181 days, by submitting an application for reemployment with the employer not later than 14 days after the completion of the period of service or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible.

(D) In the case of a person whose period of service in the uniformed services was for more than 180 days, by submitting an application for reemployment with the employer not later than 90 days after the completion of the period of service.

(2)

(A) A person who is hospitalized for, or convalescing from, an illness or

injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for reemployment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), such period of recovery may not exceed two years.

(B) Such two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the period specified in subparagraph (A) impossible or unreasonable.

(3) A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits referred to in subsection (a) but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and

discipline with respect to absence from scheduled work.

(f)

(1) A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person's employer (upon the request of such employer) documentation to establish that –

(A) the person's application is timely;

(B) the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c)); and

(C) the person's entitlement to the benefits under this chapter has not been terminated pursuant to section 4304.

(2) Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary shall satisfy the documentation requirements in such paragraph.

(3)

(A) Except as provided in subparagraph (B), the failure of a person to provide documentation that satisfies regulations prescribed

pursuant to paragraph (2) shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), and (C) of paragraph (1), the employer of such person may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.

(B) An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318(a)(2)(A).

(4) An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not

then exist or is not then readily available.

(g) The right of a person to reemployment under this section shall not entitle such person to retention, preference, or displacement rights over any person with a superior claim under the provisions of title 5, United States Code, relating to veterans and other preference eligible.

(h) In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) and the notice requirement established in subsection (a)(1) and the notification requirements established in subsection (e) are met.

38 U.S.C. § 4313. Reemployment Positions.

(a) Subject to subsection (b) (in the case of any employee) and sections 4314 and 4315 (in the case of an employee of the Federal Government), a person entitled to reemployment under section 4312, upon completion of a period of service in the uniformed services, shall be promptly reemployed in a position of employment in accordance with the following order of priority:

(1) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for less than 91 days –

(A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, the duties of which the person is qualified to perform; or

(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for more than 90 days –

(A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties

of which the person is qualified to perform; or

(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(3) In the case of a person who has a disability incurred in, or aggravated during, such service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service—

(A) in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or

(B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.

(4) In the case of a person who (A) is not qualified to be employed in (i) the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or (ii) in the position of employment in which such person was employed on the date of the commencement of the service in the uniformed services for any reason (other than disability incurred in, or aggravated during, service in the uniformed services), and (B) cannot become qualified with reasonable efforts by the employer, in any other position which is the nearest approximation to a position referred to first in clause (A)(i) and then in clause (A)(ii) which such person is qualified to perform, with full seniority.

(b)

(1) If two or more persons are entitled to reemployment under section 4312 in the same position of employment and more than one of them has reported for such

reemployment, the person who left the position first shall have the prior right to reemployment in that position.

(2) Any person entitled to reemployment under section 4312 who is not reemployed in a position of employment by reason of paragraph (1) shall be entitled to be reemployed as follows:

(A) Except as provided in subparagraph (B), in any other position of employment referred to in subsection (a)(1) or (a)(2), as the case may be (in the order of priority set out in the applicable subsection), that provides a similar status and pay to a position of employment referred to in paragraph (1) of this subsection, consistent with the circumstances of such person's case, with full seniority.

(B) In the case of a person who has a disability incurred in, or aggravated during, a period of service in the uniformed services that requires reasonable efforts by the employer for the person to be able to perform the duties of the position of employment, in any other position referred to in subsection (a)(3) (in the order of priority set out in that subsection) that provides a similar status and pay to a position referred

to in paragraph (1) of this subsection, consistent with circumstances of such person's case, with full seniority.

20 C.F.R. § 1002.139. Are there any circumstances in which the pre-service employer is excused from its obligation to reemploy the employee following a period of uniformed service? What statutory defenses are available to the employer in an action or proceeding for reemployment benefits?

(a) Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if the employer establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employer may be excused from reemploying the employee where there has been an intervening reduction in force that would have included that employee. The employer may not, however, refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee;

(b) Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if it establishes that assisting the employee in becoming qualified for reemployment would impose an

undue hardship, as defined in § 1002.5(n) and discussed in § 1002.198, on the employer; or,

(c) Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if it establishes that the employment position vacated by the employee in order to perform service in the uniformed services was for a brief, nonrecurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.

(d) The employer defenses included in this section are affirmative ones, and the employer carries the burden to prove by a preponderance of the evidence that any one or more of these defenses is applicable.

20 C.F.R. § 1002.191. What position is the employee entitled to upon reemployment?

As a general rule, the employee is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service. This position is known as the escalator position. The principle behind the escalator position is that, if not for the period of uniformed service, the employee could have been promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events. The escalator principle requires that the employee be reemployed in a position that reflects with reasonable certainty the pay,

benefits, seniority, and other job perquisites, that he or she would have attained if not for the period of service. Depending upon the specific circumstances, the employer may have the option, or be required, to reemploy the employee in a position other than the escalator position.

20 C.F.R. § 1002.194. Can the application of the escalator principle result in adverse consequences when the employee is reemployed?

Yes. The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.

20 C.F.R. § 1002.225. Is the employee entitled to any specific reemployment benefits if he or she has a disability that was incurred in, or aggravated during, the period of service?

Yes. A disabled service member is entitled, to the same extent as any other individual, escalator position he or she would have attained but for uniform service. If the employee has a disability incurred in or aggravated during, the period of service in the uniformed services, the employer must make reasonable efforts to accommodate that disability and to help the employee become qualified to perform the duties of his or her reemployment position. If the employee is not qualified for reemployment in the escalator position because of a disability after reasonable effort by the employer to accommodate the disability and to help the employee to become qualified, the employee must be re-employed in a position according to the following priority. The employer must make reasonable efforts to accommodate the employee's disability and help him or her to become qualified to perform the duties of one of these positions.

(a) A position that is equivalent and seniority, status, and pay to the escalator position; or,

(b) A position that is the nearest approximation to the equivalent position, consistent with the circumstances of the employee's case, in terms of seniority, status, and page. A position that is the nearest approximation to the equivalent position may be a higher or lower position, depending on the circumstances.