No. _____

In The
Supreme Court of the United States

MAJOR GENERAL THOMAS P. HARWOOD, III,

Petitioner,

v.

AMERICAN AIRLINES, INCORPORATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Adam Augustine Carter
Counsel of Record
R. Scott Oswald
Nicholas W. Woodfield
THE EMPLOYMENT LAW GROUP, PC
1717 K Street, NW, Suite 1110
Washington DC, 20006
(202) 261-2803
acarter@emloymentlawgroup.com
soswald@emloymentlawgroup.com

Michael L. Foreman
PENN STATE LAW CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Boulevard, Suite 118
University Park, Pennsylvania 16802
(814) 865-3832
Mlf25@psu.edu

Counsel for Petitioner

Dated: October 14, 2022

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTIONS PRESENTED FOR REVIEW

I. Does 38 U.S.C. § 4312, consistent with USERRA's literal language, entitle a disabled service member, who meets all the conditions specified in § 4312, to prompt reemployment in the escalator position he or she would have attained but for uniformed service and help to become qualified to perform the duties of his or her escalator position at no cost to the service member, OR can the employer determine, prior to reemployment, that the service member is not qualified and therefore not entitled to the escalator position he or she would have attained but for uniformed service, not entitled to any help to become qualified, and that the disabled service member must pay the expenses to become qualified?

II. Where an employer fails to place the returning service member into the escalator position, does 38 U.S.C. § 4313 require specificity in a job offer, as held by several circuits, or does an employer comply with USERRA where it provides a vague offer, as held by the Fourth Circuit?

PARTIES TO THE PROCEEDING

Petitioner in this Court is Major General Thomas P. Harwood, III ("Harwood") who was plaintiff in the district court and plaintiff-appellant in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Harwood is an individual.

STATEMENT OF RELATED CASES

The only pending case between the parties other than the case at bar is *Scanlon v. American Airlines*, Case No: 2:18-cv-04040, pending in Eastern District of Pennsylvania, of which Harwood is a class member and not a class representative.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULE

REGULATIONS

OTHER AUTHORITIES

OPINIONS BELOW

The August 9, 2017 unreported opinion of the United States District Court for the Eastern District of Virginia ("District Court") addressing American Airlines' Motion to Dismiss is reproduced at Pet. App. 98a (2017 WL 11318161). The May 23, 2018 opinion of the District Court addressing the parties' cross motions for summary judgment is reproduced at Pet. App. 86a (2018 WL 2375692). The August 20, 2018 opinion of the District Court addressing Harwood's Motion for Reconsideration is reproduced at Pet. App. 75a (2018 WL 8803959).

The July 6, 2020 reported opinion of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") affirming in part, vacating in part and remanding is reproduced at Pet. App. 37a (963 F.3d 408) ("*Harwood I*").[1] The October 6, 2020 remand opinion of the District Court is reproduced at Pet. App. 81a (2020 WL 6580394).

The June 17, 2022 final order of the Fourth Circuit is reproduced at Pet. App. 3a. (37 F.4th 954) ("*Harwood II*").[2] The July 18, 2022 denial of rehearing and rehearing *en banc* of the Fourth Circuit is reproduced at Pet. App. 124a.

---

[1] Citations to the Joint Appendix of Harwood's first appeal to the Fourth Circuit appear throughout as J.A.1.

[2] Citations to the Joint Appendix of Harwood's second appeal to the Fourth Circuit appear throughout as J.A.2.

STATEMENT OF JURISDICTION

The Fourth Circuit entered its final judgment on June 17, 2022. On July 18, 2022, the Fourth Circuit denied the petition for rehearing *en banc*. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Harwood refers the Court to the Appendix at Pet. App. 126a-143a.

STATEMENT OF THE CASE

A. Overview

In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Congress's intent in passing USERRA was explicitly 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." 38 U.S.C. § 4301(a)(1). Even before Congress made the purpose of USERRA clear, the Court recognized the crucial importance of protecting the reemployment rights of those who serve in holding that the law "is to be liberally construed for the benefit of those who left private life to serve their country." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

General Harwood, after returning from active military service, attempted to exercise his rights to be employed into the escalator position with American

Airlines as promised by USERRA. When American Airlines refused to honor the literal requirements of USERRA, Harwood was required to initiate this litigation. While Harwood was able to prevail on some of his claims, the decision by the Fourth Circuit rewrote the requirements of 38 U.S.C. § 4312 and § 4313, and what an employer's obligations are to those returning from service to this Country. It creates a dangerous and disturbing precedent that ignores Supreme Court precedent and conflicts with how other Circuits have interpreted USERRA. If not reversed, the decision will discourage civilians from serving in the uniformed service.[3]

The decision warrants this Court's review. It is of vital importance for the Court to address this disregard for USERRA and to protect the rights of uniformed service men and women.

B. Factual History

Petitioner Harwood is a decorated member of the Air Force Reserve (Ret.) and a pilot with American Airlines ("AA").[4] Pet. App. 5a-7a. Harwood was hired by AA as an airline pilot in 1992. J.A.2 at 137; Pet. App. 100a. From June 2013 through August 2015, Harwood took a qualifying period of military leave from AA for a tour of duty to serve as the Chief of the

---

[3] Lolita C. Baldor, *National Guard Struggles as Troops Leave at Faster Pace,* AP NEWS (Oct. 8, 2022), https://apnews.com/article/health-middle-east-covid-government-and-politics-987f5dbc245858f372eaeeb3edc018bd.

[4] *Major General Thomas P. Harwood III,* AIR FORCE, https://www.af.mil/About-Us/Biographies/Display/Article/108437/major-general-thomas-p-harwood-iii/ (last visited Sept. 27, 2008).

U.S. Military Training Mission to Saudi Arabia, U.S. Central Command. Pet. App. 100a. During this military service he was diagnosed with atrial fibrillation.[5] J.A.2 at 243, 247; Pet. App. 39a. On June 3, 2015, roughly two months before the end of his tour, Harwood contacted AA stating his intent to return to work as a pilot. J.A.2 at 407; Pet. App. 40a. On August 3, 2015, AA initially confirmed to Harwood that he would be employed on September 1, 2015, as a Boeing 737 Captain based out of LaGuardia Airport.[6] J.A.2 at 314.

Around August 26, 2015, Jerry Shaw, AA New York Flight Administration, advised Harwood that AA would not reemploy Harwood until Harwood possessed a valid First-Class Medical Certificate from the FAA ("Medical Certificate"). J.A.2 at 101, 185-86, 327. Harwood still requested that AA reemploy him as a pilot and allow him to use his sick leave balance of 854 hours until he could obtain a Medical Certificate. J.A.2 at 185-86, 327-28, 458. AA informed Harwood that it could not return him to work as a pilot because he was not eligible to fly without a Medical Certificate. *Id.*

Harwood informed AA that AA's policy appeared to violate USERRA; specifically, 38 U.S.C. § 4312, by adding a requirement to possess a valid Medical Certificate prior to reemployment that is not found anywhere in USERRA. J.A.2 at 330-32.

---

5 Atrial fibrillation is a common condition involving an irregular heartbeat. Pet. App. 39a.

6 Harwood was based out of LaGuardia Airport as a pilot at the time of his deployment in June 2013. Pet. App. 40a-41a.

Despite AA having already acknowledged that Harwood had met the conditions for reemployment set out in USERRA § 4312, Pet. App. 6a, AA told Harwood that it would not reemploy him as a pilot without the Medical Certificate or a waiver. J.A.2 at 330; Pet. App. 41a-42a.

On September 1, 2015, Harwood emailed Scott Hansen, Director of Flight Operations at AA, to confirm his reemployment had begun on that date as initially agreed. J.A.2 at 202. During an exchange of multiple emails beginning that day, Hansen confirmed that Harwood had met USERRA § 4312's requirements for reemployment but that Harwood had not satisfied company policy regarding the Medical Certificate, so AA would not reemploy Harwood as a pilot.[7] J.A.1 at 275-78. Hansen stated that AA was willing to get Harwood back to work "in a reasonable time" and that the first step was to see if AA could provide reasonable accommodations for the pilot position. J.A.2 at 330. Barring that, Hansen stated, "we can explore other paths," referring to USERRA § 4313. *Id.* Hansen concluded by asking when Harwood was available for a meeting. J.A.1 at 276. Harwood retained counsel upon receiving this response.

Around this same time, Hansen affirmed that AA would extend Harwood's period of military leave

---

[7] If Harwood had developed atrial fibrillation while he was an active pilot at AA and not while out on military leave, Harwood would have had full access to the 854 hours of sick leave he had accrued during his employment with AA -- this access would have extended to the time when Harwood was waiting to receive a Medical Certificate from the FAA. J.A.1 at 156-58; J.A.2 at 102-03.

until Harwood could obtain an FAA waiver, but AA declined to reemploy Harwood. J.A.2 at 330-32.

On October 1, 2015, Harwood, through counsel, advised AA in writing that he wished to be "'reemployed as quickly as possible so that he [could] gain access to his 854 hours of sick leave.'" J.A.2 at 365. He also requested that – *if he was unable to obtain* the Medical Certificate or waiver – he be reemployed in an equivalent position in Operations Safety and Compliance or Flight Operations, both of which are located in Dallas, Texas. *Id.*

On October 22, 2015 — more than six weeks after Harwood's active military service ended — AA offered to reemploy Harwood conditioned upon his return to a different ad hoc position in the Flight Technical Operations Group at the AA Flight Academy in Dallas, Texas.[8] J.A.2 at 367. The ad hoc position offer included no job description, no indication of what the work involved, nor any means of comparing it to the position of pilot other than AA's lawyer's vague statement that it would be "appropriate for his status" and pay the same as if actively flying. *Id.* AA maintained its refusal to reemploy Harwood as a pilot until he obtained the

---

[8] AA's offer consisted of an email to Harwood's attorney and read as follows: "[I]f . . . Harwood does not wish to extend his military leave, [AA] will reemploy him in the Flight Technical Operations Group at the Flight Academy in [Dallas], in a position appropriate for his status. In that position, Harwood will be compensated at the same rate he would receive if actively flying. If . . . Harwood elects employment in the Flight Technical Operations Group, he can continue to seek a waiver from the FAA on his First Class Medical." J.A.2 at 367.

Medical Certificate. *Id.* AA did not offer to provide all lost wages and benefits. *Id.*

Harwood initially declined this offer, but effective January 25, 2016, Harwood accepted the ad hoc position. Pet. App. 7a. On that same day, the FAA issued Harwood an authorization for special issuance of a Medical Certificate under 14 C.F.R. § 67.401. J.A.1 at 292-94. AA advised Harwood upon learning this news that AA could return Harwood "immediately to the line." J.A.2 at 200.

C. Proceedings Below

Harwood sued AA in the District Court on April 24, 2017. The District Court granted AA's motion to dismiss as to the § 4311 discrimination claim on August 9, 2017. Pet. App. 98a, 111a, 122a-123a. After lengthy discovery, the parties filed cross motions for summary judgment in the District Court on March 9, 2018. *See* J.A.2 at 43, 213. The District Court granted summary judgment in favor of Harwood as to liability and issued a memorandum opinion on May 23, 2018. Pet. App. 86a, 96a, 97a.

After the District Court received submissions from the parties, the District Court, without holding an evidentiary hearing, awarded damages to Harwood for the period of September 1, 2015 to January 25, 2016. Pet. App. 81a, 85a.

The parties cross-appealed, and on July 6, 2020, the Fourth Circuit affirmed the District Court's holdings as to liability under §§ 4312 and 4313 of USERRA. Pet. App. 50a-54a. The Fourth Circuit remanded the case for a recalculation of damages

consistent with its opinion requesting that the District Court make factual findings as to whether the position offered to Harwood by AA's lawyer on October 22, 2015 was equivalent under USERRA. Pet. App. 50a-54a, 59a.

On September 8, 2020, the District Court ordered briefing on that issue, and the parties submitted their briefs on September 28, 2020. *See* J.A.2 at 842-43. On October 6, 2020, the District Court reduced Harwood's damages award to $28,771.41, which was the back pay from September 1, 2015 through October 22, 2015. *Id.* at 833. The District Court concluded, again without holding an evidentiary hearing, that the position offered on October 22, 2015 was equivalent in status, seniority, pay, and benefits. *Id.* Harwood appealed once more to the Fourth Circuit on the matter of whether the District Court erred in finding that the ad hoc position offered to Harwood on October 22, 2015 was equivalent in status, seniority, pay, and benefits as required under USERRA. J.A.2 at 836.

On June 17, 2022, the Fourth Circuit affirmed the District Court's decision, finding that the position offered to Harwood on October 22, 2015 was equivalent as required under USERRA and that damages were properly calculated on remand. Pet. App. 10a–13a, 18a.

Harwood requested a panel rehearing and rehearing *en banc* of this decision rendered by the panel of the Fourth Circuit. The Fourth Circuit denied Harwood's petition on July 18, 2022. Pet. App. 124a–125a.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

The Fourth Circuit's disregard for USERRA's purpose deeply impacts active-duty service members and reservists who desire to return to their civilian employment after risking their lives for the safety of our nation. Today, there are roughly 1.195 million active-duty service members and over 770,000 reservists across the six branches of the U.S. military.[9] As of June 30, 2022, there are 329,479 Americans actively serving in the U.S. Air Force and Space Force.[10] These statistics exhibit a sizable military population whose service members, from across the nation, pause their civilian lives to serve our country, trusting that USERRA will protect them when they return. When our service members fight for this country, they fight for the *entire* country. Their promised reemployment rights should not be defined by their zip codes or judicial circuits; they should be uniform across the country. This case presents a sound vehicle for this Court to ensure uniformity—and with it, peace of mind for those brave enough to serve.

Since its inception following the September 2001 terrorist attacks, the ongoing War on Terror has led many service members, like Harwood, to leave their family, friends, and civilian careers behind to

---

[9] Zoe Manzanetti, *2021 Military Active-Duty Personnel, Civilians by State*, GOVERNING (Feb. 1, 2022), https://bit.ly/3TF6Qex.

[10] Air Force Demographics, AIR FORCE'S PERS. CTR. (June 30, 2022), https://bit.ly/3BgUGkG.

join the military. These periods of military leave put emotional and financial strains on military families, as those valiant enough to serve our country "see their incomes shrink and businesses dry up."[11] Military leave from civilian jobs has put a "relatively minor" burden on employers, while military families instead bear the brunt of the strain, "feel[ing] pushed to [their] economic breaking point[s], with reactions running from cutting back on cable television to selling one of the family cars." *See* source cited *supra* note 11. This was not Congress' intent when USERRA was signed into law on October 13, 1994.

USERRA serves as a solemn obligation to service members, who voluntarily or involuntarily take military leave, that their careers will be reinstated without loss of seniority, status, or pay upon return from service. USERRA's explicit purpose is to (1) "encourage [military service] by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;" (2) "minimize the disruption to the lives of persons performing [military] service;" and (3) "to prohibit discrimination against persons because of their [military] service." 38 U.S.C. §§ 4301(a)(1)-(3). USERRA functions to "ensure reemployment to our military men and women returning from military service," irrespective of their employer's wishes.

---

[11] Steven Greenhouse, *After the War: The Reservists; Balancing Their Duty to Family and Nation*, N.Y. TIMES (June 22, 2003), https://www.nytimes.com/2003/06/22/us/after-the-war-the-reservists-balancing-their-duty-to-family-and-nation.html.

United States v. Nevada, 3:09-CV-00314-LRH, 2012 WL 1517296, at *4 (D. Nev. Sept. 26, 2011).

The purpose of USERRA is unequivocal — protect "those who left private life to serve their country in its hour of great need." *Fishgold*, 328 U.S. at 285. Service members should not be required to wait for a deep circuit split to ensure their financial security. These brave men and women deserve to take military leave—as USERRA intended—without fear that employers will exploit the Fourth Circuit's outlier decision to deny benefits promised them under the law.

II. THERE IS CONFLICT AMONG COURTS AS TO THE APPROPRIATE APPLICATION OF 38 U.S.C. §§ 4312 AND 4313.

Despite having a lengthy and complex procedural history, the issue for this Court to resolve is straightforward but critically important for those who serve our country or are considering military service. Justice Kavanaugh, in a recent oral argument, highlighted the importance of USERRA protections: "We don't know what's going to be happening over the next 50 days in terms of national security and personnel. And so I think it's important to recognize that a significant component of the power to wage war successfully is having personnel who are willing to sign up, and they're not going to be willing to sign up."[12] Justice Kavanaugh further noted, "And those people need protection . . . for their jobs." *See* source cited *supra* note 12 at 88.

---

[12] Transcript of Oral Argument at 89, *Torres v. Texas Dept. of Pub. Safety*, 142 S. Ct. 2455 (2022) (No. 20-603).

The issue presented here goes to the heart of the concerns Justice Kavanaugh raised. Reduced to its essence, the issue presented is whether the literal language of § 4312, as applied by the Sixth Circuit, various district courts, and the U.S. government, requires the immediate reemployment of the service person, allowing the person to immediately access their accrued employment rights and benefits. The Fourth Circuit below complicated this issue when it ignored whether there was a violation of § 4312 and instead focused on whether AA violated § 4313 by failing to promptly reemploy Harwood in an "appropriate" position.

By framing the sole issue as "simply whether the airline acted sufficiently promptly to meet its burden under § 4313 to reemploy Harwood in an appropriate position as soon as was practical under the circumstances," the Fourth Circuit rewrote the employment protection Congress provided in § 4312. Pet. App. 52a. Lest there be any doubt, the Fourth Circuit reiterated the issue as whether AA "failed to discharge its statutory duty *promptly*[,]" using language only found in § 4313. Pet. App. 53a–54a (finding no error in District Court's conclusion that AA did not "reemploy Harwood promptly in an appropriate position.").

This improper analysis stripped Harwood of the employment rights promised to him by USERRA and will harm other service members if not corrected by this Court. Had §§ 4312 and 4313 been independently applied to Harwood's case, *he would have been immediately reemployed, enabling him to access his accrued sick leave and other employment benefits.* But by commingling the requirements of

§§ 4312 and 4313, rather than analyzing whether each subsection was violated individually—as the District Court did below—the Fourth Circuit diluted the congressional purpose of § 4312 and undermined this Court's holding in *Fishgold*. *Fishgold*'s mandate is clear: a court faced with applying multiple USERRA provisions must "give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Fishgold*, 328 U.S. at 285.

This mistaken interpretation of §§ 4312 and 4313's operation circumvents *Fishgold*'s holding and conflates the distinct purposes of these crucial provisions. While § 4312 "creates an entitlement to reemployment" if its four conditions are satisfied, *Hart v. Family Dental Grp., PC*, 645 F.3d 561, 563 (2d Cir. 2011), § 4313 "protects only the [returning] service person's 'seniority, status and pay.'" *Petty v. Metro. Gov't of Nashville-Davidson Cnty.*, 538 F.3d 431, 445 (6th Cir. 2008). Though § 4312 entitles service members to the reemployment rights and benefits granted under § 4313 and the other employment benefits found in §§ 4316-4319, § 4312 also acts as the gatekeeper to further analyses. If it and § 4313 are construed to be one and the same, there is cause for confusion among the courts and service members as to what rights they are entitled. The Fourth Circuit's opinion below serves as an example of this persistent confusion rearing its head.

A. SEVERAL CIRCUIT COURTS, DISTRICT COURTS, AND THE U.S. GOVERNMENT ADHERE TO THE LITERAL LANGUAGE OF USERRA BY APPLYING §§ 4312 AND 4313 AS TWO DISTINCT SUBSECTIONS.

The Fourth Circuit rightly held that AA violated § 4313, but it ran afoul of USERRA's clear mandate by conflating the analysis of §§ 4312 and 4313 and rewriting § 4312 to contain a requirement that Congress did not include.[13] The Fourth Circuit ignored the fact that the District Court found AA violated *both* §§ 4312 and 4313. The District Court's holding—which both appropriately outlined the distinct functions of these two provisions[14] and heeded *Fishgold*'s guidance—was explicit:

> Under a holistic reading that broadly construes USERRA's protections, Section 4313 does not add a complex

---

[13] 38 U.S.C. § 4302(b), when referring to USERRA, says: "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." In this case, the Fourth Circuit also neglected to discuss or make a determination on whether AA had violated this provision by requiring that Harwood have a Medical Certificate before reemployment.

[14] While the District Court appropriately outlined the distinct functions of the two provisions, Harwood maintains that it failed to properly apply the § 4313 analysis which would have reinstated him into his correctly-identified-escalator position of 737 Captain based out of New York on September 1, 2015, with all the rights and benefits he had when he left on June 13, 2013 and those accrued by seniority while absent.

> fifth requirement to § 4312's list, and qualification issues addressed by § 4313 never appear in § 4312(d)(1)'s exclusions. There is no doubt that American is entitled to engage in a § 4313 analysis upon learning that 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 [] § 4313.

Pet. App. 93a–94a. This analysis tracks the literal language of the statute, honors USERRA's legislative purpose, and abides by *Fishgold*'s command that courts liberally construe USERRA. 328 U.S. at 285.

The District Court below is not alone in this proper interpretation of §§ 4312 and 4313. The Sixth Circuit reversed a district court decision, pointing to its erroneous application of these two provisions. *See Petty*, 538 F.3d at 434. The Sixth Circuit explained that when a returning service member has "satisfied the only prerequisites to § 4313—those specified in § 4312," *id.* at 443, an employer is "not permitted to delay or otherwise limit [the service member's] reemployment rights in any way." *Id.* at 441 (quoting § 4302(b) and finding that "[b]y applying its return-to-work process to Petty, Metro . . . limited and withheld benefits to which Petty was entitled under USERRA."). The Sixth Circuit emphasized that once § 4312 is satisfied, any "attempt to impose additional

prerequisites" is "wholly impermissible." *Id.* at 444 (citing 38 U.S.C. § 4302(b)). This analysis correctly construes §§ 4312 and 4313 as separate provisions ensuring distinct rights to returning service members and properly recognizes that § 4313's mention of "qualifications" has no place in § 4312's analysis.

Numerous district courts have reached the same conclusion. *See Nevada*, 2012 WL 1517296, at *8, 12 (holding that "qualifications are relevant only in determining the appropriate *position* of reemployment under § 4313, not the existence of the right to reemployment generally," and recognizing that any argument to contrary "fails to appreciate the distinct operations of §§ 4312 and 4313"); *Brown v. Prairie Farms Dairy, Inc.*, 872 F. Supp. 2d 637, 645 (M.D. Tenn. 2012) (holding that "qualifications . . . cannot be taken into account before reemployment," and are only considered after returning service member has been reemployed). Indeed, the U.S. government explicitly embraced this view in its *Nevada* brief: "The 'plain language' of [§ 4312] 'creates an unqualified right to reemployment to those who satisfy the service duration and notice requirements . . . subject only to the defenses enumerated in § 4312, i.e. reemployment is unreasonable, impossible or creates an undue hardship.'"[15]

Simply put, the Sixth Circuit, several district courts, and the U.S. government all recognize the discrete purposes of §§ 4312 and 4313—namely, that § 4312 operates independently from § 4313's

---

[15] Mem. in Supp. of the United States' Mot. for Partial Summ. J. at 17, *Nevada*, 2012 WL 1517296 (No. 83-2) (quoting *Jordan v. Air Prods. & Chems., Inc.*, 225 F. Supp. 2d 1206, 1208 (C.D. Cal. 2022)).

"qualifications" analysis and provides a separate entitlement to reemployment. The Fourth Circuit, however, supersedes § 4312(d) by finding a strict qualification requirement in § 4313 despite the "reasonable efforts" language of § 4313 as defined in § 4303(10), which directly contradicts such a finding.[16] Such a finding also contradicts, or effectively erases subsection 4302(b) from USERRA.

B. THE FOURTH CIRCUIT'S IMPROPER APPLICATION OF USERRA §§ 4312 AND 4313 UNDERMINES USERRA'S CORE PURPOSE AND DIRECTLY CONTRADICTS THE COURT'S DECISION IN *FISHGOLD* WARRANTING THIS COURT'S REVIEW.

The Fourth Circuit's decision adds an additional requirement to § 4312, which Congress did not prescribe, for those service members returning from duty and seeking reemployment under USERRA. Where the District Court held that AA "failed to abide by § 4312's explicit requirement that an employee who meets § 4312's statutory requirements be reemployed[,]" Pet. App. 93a, the Fourth Circuit made no such finding. Instead, as discussed above in Section II(a), the Fourth Circuit viewed §§ 4312 and 4313 as "interconnected," which led to the impermissible addition of § 4313's "qualifications" calculus to § 4312's analysis. Pet. App. 51a; *see also* Pet. App. 52a ("[E]ligible returning servicemembers must be *promptly* reemployed an

---

[16] 38 U.S.C. § 4303(10) states that efforts are bounded only by "undue hardship," not by mere inconvenience or undesirability.

[sic] in an appropriate position *for which they are qualified.*") (emphasis in original).

This interpretation may at first appear inconsequential, but it carries significant ramifications for those placing their civilian employment on hold to serve our country. The Fourth Circuit's analysis substantially weakens the protections § 4312 was intended to provide to those service members returning to their civilian employer. Instead of recognizing § 4312's "entitlement to reemployment" in its own right, *Hart*, 645 F.3d at 563, the Fourth Circuit added an additional hurdle to this entitlement: that the service member be "qualified," Pet. App. 52a–53a. This "attempt to impose additional prerequisites" to reemployment under § 4312, is, as the Sixth Circuit noted, "wholly impermissible," and cannot "serve as a basis for delaying or otherwise limiting" a returning service member's right to reemployment. *Petty*, 538 F.3d at 443-44. Moreover, the Fourth Circuit's holding runs contrary to the decisions outlined above and thereby perpetuates judicial confusion surrounding the proper application of §§ 4312 and 4313.

In Harwood's case, this flawed interpretation brought with it real-life consequences that, if left unaddressed, will directly impact other service members seeking to return to their civilian employment. Had AA followed the plain language of § 4312 as written by Congress—and, as previously noted, as applied by numerous courts—Harwood would have been reemployed on September 1, 2015, allowing him to access all his employment benefits, including his accumulated sick leave, his seniority and other benefits under his union's Collective

Bargaining Agreement, and his bumping rights arising from USERRA until he received his Medical Certificate.[17] In short, five years of litigation would have been avoided.

Far from alleviating the confusion surrounding the application of §§ 4312 and 4313, the Fourth Circuit's opinion below fails to recognize the distinct role § 4312 plays in granting—subject only to the four prerequisites found in that provision—an entitlement to reemployment for returning service members, with that entitlement "backstopped" by the § 4302(b) prohibition against "additional prerequisites" or being superseded by company policy. If USERRA's "liberal maxim" is to be "appl[ied] with full force and effect," Kathryn Piscitelli & Edward Still, *The USERRA Manual* § 1:4 (2022), to ensure returning service members "not be denied their old jobs as reprisal for their service," *Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455, 2461 (2022), then the crucial role § 4312 plays in creating a strict liability entitlement to reemployment must be clearly understood and consistently applied across the country.

While Supreme Court Rule 10 notes that a circuit split may be a basis for granting certiorari, that Rule also recognizes that this is "neither controlling nor fully measuring th[is] Court's discretion." U.S. S. Ct. R. 10. Given USERRA's purpose and what we ask of those who put their lives

---

[17] Harwood was owed health benefits under 38 U.S.C. § 4312(a) as soon as he met the requirements for reemployment under the statute. *See* 38 U.S.C. § 4317. Harwood remained unemployed with only part-time military reserve pay and benefits.

on the line to serve our country, we respectfully urge this Court to grant certiorari on this compelling issue and provide employers—but most importantly those who serve—much needed clarity on the purpose of § 4312. Indeed, the Fourth Circuit's application of §§ 4312 and 4313, in contrast to the proper reading of those provisions employed by numerous other courts, has "spawned the sort of confusion in the lower courts that calls for the exercise of this Court's certiorari jurisdiction." *Ford v. Kentucky*, 469 U.S. 984, 986 (1984) (Marshall, J., dissenting).

III. THE FOURTH CIRCUIT'S HOLDING THAT USERRA DOES NOT REQUIRE SPECIFICITY IN OFFERS OF REEMPLOYMENT IS INCONSISTENT WITH 38 U.S.C. § 4313 AND OTHER CIRCUIT COURTS, RESULTING IN DIMINISHED PROTECTIONS FOR SERVICE MEMBERS.

A. THE FIFTH, SIXTH, AND SEVENTH CIRCUITS REQUIRE SPECIFICITY PROTECTING SERVICE MEMBERS' RIGHTS TO REJECT REEMPLOYMENT OFFERS NOT EQUIVALENT TO THE ESCALATOR POSITION.

USERRA is a service members' rights statute, and it mandates that if a returning service member with a service-related disability cannot qualify for their escalator position after reasonable efforts by the employer, the employer must reemploy the service member in a position "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[18] by the employer." 38 U.S.C. § 4313(a)(3). Accordingly, USERRA's guarantee of equivalent reemployment must be construed in a manner that best protects the serviceperson's interests. "The principle of liberal construction . . . is designed to ensure that servicemembers may take full advantage of the substantive rights and protections provided by a statute." *Ziober v. BLB Res., Inc.*, 839 F.3d 814, 819–20 (9th Cir. 2016).

Like other veteran and service member statutes, § 4313(a)(3) protects service members "against receiving a job inferior to that which [they] had before entering the armed services." *Fishgold*, 328 U.S. at 284. Consistent with the language of § 4313(a)(3) and the Court's reasoning in *Fishgold*, several circuits have held that a "veteran need not accept an offer of reemployment which extends anything short of the statutory guarantees" to preserve his or her right to reemployment or his or her right to a claim under USERRA. *Stevens v. Tenn.*

---

[18] The Fourth Circuit's decision below allowed AA to skip its burden of proving that it engaged in "reasonable efforts" to qualify Harwood for his escalator position. "Reasonable efforts" in USERRA means "actions, including training provided by an employer that do not place an undue hardship on the employer." 38 U.S.C. § 4303(10). As such, employers must exercise reasonable efforts up to the point of "undue hardship" to qualify returning service members for their escalator positions. "Undue hardship" is defined in 38 U.S.C. § 4303(16), explaining what lengths employers must go to in making reasonable efforts to qualify returning service members. This Court's *dicta* make it clear that USERRA "obliges an employer to restore a returning United States service member to his prior role unless doing so would cause an 'undue hardship.'" *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (quoting 38 U.S.C. §§ 4303(10), 4313(a)(1)(B), (a)(2)(B)). The Fourth Circuit directly contradicts the statute in not requiring such a finding.

Valley Auth., 699 F.2d 314, 315 (6th Cir. 1983); *see also Hembree v. Georgia Power Co.*, 637 F.2d 423, 428 (5th Cir. 1981); *Ryan v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 15 F.3d 697, 699 (7th Cir. 1994).

In *Hembree*, the returning service member's escalator position was any apprentice position within the General Repair Shop. 637 F.2d at 425. Because Hembree sustained an eye injury during military service, the company reemployed him as a clerk instead. *Id.* The service member sued, arguing that the company failed to reemploy him under USERRA's precursor statute. *Id.* In response, the company argued that there were no equivalent positions in the General Repair Shop and that he should have bid for a position in the Central Meter Shop. *Id.* at 427. The Fifth Circuit rejected the company's arguments, holding that "[w]hile plaintiff could have taken this course, plaintiff was not required to accept a position that did not approximate the apprentice electrician in pay, status, and seniority. It follows that plaintiff's refusal to accept a position that did not fully comply with the statutory requirements should not be held against him." *Id.* at 427–28.

Similarly, in *Stevens*, the Sixth Circuit held that a veteran need not accept an unconditional offer of employment before challenging its equivalency to avoid loss of backpay. *Stevens*, 699 F.2d at 316. To decide otherwise, "thwarts the literal terms of the statute and demeans the value of the veteran's service to his country." *Id.* at 316; *see also Ryan*, 15 F.3d at 699 (holding that veteran did not waive her reemployment rights by refusing to accept inferior and ill-defined position created by her employer).

These circuit court holdings are in harmony with the Court's instruction in *Fishgold* that a statute that protects service members' rights must be interpreted broadly in favor of the service member. *Fishgold*, 328 U.S. at 285. Because the disability provisions of USERRA mandate that after reasonable efforts, the service member be reemployed in a position of equivalent seniority, status, and pay, the employer must assess the service member's career trajectory to offer an appropriate position. If the employer presents an inferior offer, the service member may reject it. *See Hembree*, 637 F.2d at 428; *see also* 38 U.S.C. § 4313(a)(3).

B. By Not Requiring Specificity in Offers of Reemployment, the Fourth Circuit's Decision in *Harwood II* is in Direct Conflict with the Fifth, Sixth, and Seventh Circuits.

The Fourth Circuit below deviated from the holdings of the Fifth, Sixth, and Seventh Circuits,[19] weakening protections for returning service members within its jurisdiction.

In the Seventh Circuit's *Hanna* cases, the court decided that the plaintiff should have been reinstated "with all attendant rights under the collective bargaining agreement," and refused to penalize a returning service member for leaving an inferior

---

[19] The Fifth, Sixth, and Seventh Circuits require specificity in offers of reemployment. *See Hanna v. Am. Motors Corp.*, 557 F.2d 118, 122 (7th Cir. 1977); *Hanna v. Am. Motors Corp.*, 724 F.2d 1300, 1312–13 (7th Cir. 1984); *Hembree*, 637 F.2d at 427–28; *Stevens*, 699 F.2d at 316.

position. *Hanna*, 557 F.2d at 122. The Seventh Circuit followed *Fishgold* in its later *Hanna* decision, stating that a returning service member "steps back [into employment] at the precise point he would have occupied had he kept his position continuously during the war." *Hanna*, 724 F.2d at 1312–13 (quoting *Fishgold*, 328 U.S. at 284-85).

In *Hembree*, the Fifth Circuit stated that a returning disabled veteran is not obligated to accept a position that does not approximate the position which he would have had if he had not left employment in pay, status, and seniority. *Hembree*, 637 F.2d at 427–28. "It follows that plaintiff's refusal to accept a position that did not fully comply with the statutory requirements should not be held against him." *Id.*

In *Stevens*, the Sixth Circuit held that a returning service member does not need to accept an offer which includes anything less than what he is owed statutorily to retain his full right to reemployment and claims for damages. *Stevens*, 699 F.2d at 316.

All the above decisions point to the idea that there is in fact a specificity requirement in USERRA. An offer of reemployment must include all statutory rights and requirements and must be equal to the position that the service member would have held had he not left employment to serve. Moreover, a service member should not be penalized in the form of losing his right to damages if he rejects a position which does not meet the statutory requirements.

In affirming the District Court's findings as to whether the October 22 offer was an "appropriate

position" under § 4313, the Fourth Circuit penalized Harwood for refusing an inferior offer of reemployment. Pet. App. 13a. The panel reasoned that the District Court did not abuse its discretion in finding that the offer was "appropriate," despite Harwood's argument:

> that [AA]'s 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.

Pet. App. 12a.

Because of the vagueness of AA's offer, including its lack of inclusion of a clear definition of his seniority, and definition of only one element of his status (geographic location), Harwood should not be penalized for refusing the offer.[20] J.A.2 at 367. However, the Fourth Circuit reasoned that "USERRA does not have a *specificity requirement and, more notably, neither Harwood nor his counsel sought*

---

[20] Congress made its intent clear that "a veteran or reservist does not waive his or her rights under [USERRA] by refusing an offer of reemployment which extends anything less than full statutory guarantees, including proper seniority, position, pay, and lost wages and benefits." H.R. Rep. No. 103-65, pt. 1, at *39 (1993) (citing *Hanna*, 724 F.2d at 1312–13 and *Stevens*, 699 F.2d at 316). Additionally, the employer has "the duty to disclose all positions that the veteran may be qualified to perform," USERRA, 70 FR 75246-01, whereas an employee has no obligation to accept an offer that is not comparable to the escalator position. *See Ryan*, 15 F.3d at 698–99.

further specifics about the position prior to rejecting it. We will not now hold American Airlines accountable for their silence." Pet. App. 12a. (emphasis supplied).

The Fourth Circuit's holding requires this Court's review because it strips a service member desiring to return to the workforce – specifically one who sustains an injury or whose medical condition is aggravated during military service – of the rights Congress promised in USERRA. The consequence of the Fourth Circuit's holding is contrary to the solemn promise our government made to service members through USERRA. Under the Fourth Circuit's analysis, an injured service member, who is not concurrently able to qualify for his escalator position, must accept *any* offer of *any* position despite the vagueness of the offer and without any evidence of any attempt by the employer to protect his seniority and status.

The Fourth Circuit encourages employers to issue vague offers, as it granted AA a presumption of equivalence though AA only asserted two out of three statutory criteria (equal status and pay), without providing any support for those claims. The Court has already recognized that when interpreting statutes dealing with service members' reemployment rights, employers must be specific, and employers do not comply by using misleading labels and definitions. *See Accardi v. Pennsylvania R. Co.*, 383 U.S. 225, 229 (1966). Employers in the Fourth Circuit should not be empowered to violate USERRA and then toll their liability with an offer of work, halfway across the country, consisting of little more than an office location and newly contrived title.

The Fifth, Sixth, and Seventh Circuits emphasize the importance of specificity in the reemployment offer by protecting service members' statutory right to reject inferior positions.[21] As discussed above, not only did the Fourth Circuit affirm the District Court's meager analysis as to the appropriateness of the offer,[22] but it also held that § 4313 contains no specificity requirement, directly conflicting with the purpose of USERRA and the holdings of other circuit courts.

This is a split from the broad protections other circuits and the Court have supported in their decisions protecting service members' reemployment rights.

The employer is the party who defines the job. *See* USERRA, 70 Fed. Reg. 75246-01 ("[B]ecause the employer has greater knowledge of the various positions and their requirements in the organization, the burden is appropriately placed on the employer" to disclose reemployment positions to which the employee is entitled). The burden should not be on the service member to ask for more information when the employer, who creates the position, is the master of the offer. In fact, it "demeans the veteran's service" to make them negotiate for statutory rights, particularly

---

21 *See supra* n.19.

22 The District Court, without explaining, held that AA offered an appropriate position, equivalent to the "pay and benefits that [Harwood] received as a pilot, plus equal status within the organization." Pet. App. 32a-34a. The District Court relied heavily on the fact that, before remanding the issue, the Fourth Circuit referred to the offered position as "appropriate." Pet. App. 33a.

in this case, while the service member is still unlawfully unemployed. *Stevens*, 699 F.2d at 316.

Where an employer is required 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" it does not follow that an undefined offer of reemployment could be sufficient. 20 C.F.R. § 1002.194. If the employer cannot describe the position because it lacks information at the time of the offer, the offered position is not equivalent. The details of the offer must be disclosed to facilitate its acceptance. Otherwise, the position is a label without meaning.

Moreover, where "no firm and definite offer was ever made either in writing or orally, there is nothing for the petitioner to accept or refuse." *See Travis v. Schwartz Mfg. Co.*, 216 F.2d 448, 455 (7th Cir. 1954). An offer that leaves out multiple necessary details can hardly be considered "firm" or "definite."

Because of the Fourth Circuit's deviation from the precedents established in the Fifth, Sixth, and Seventh Circuits and the Supreme Court, returning service members, who were injured while they served, seeking to return to their civilian jobs, lack an important right within the Fourth Circuit that they enjoy outside of its jurisdiction. This Court should grant certiorari to resolve this conflict in the circuits, and to ensure that service members' reemployment rights, as promised in USERRA, are always protected.

C. THE FOURTH CIRCUIT'S DECISION IN *HARWOOD II ALSO* CONFLICTS WITH SECOND, EIGHTH, AND FEDERAL CIRCUIT PRECEDENT CONCERNING WHAT POSITION IS APPROPRIATE UNDER THE ESCALATOR PRINCIPLE'S "LIKE SENIORITY, STATUS, AND PAY" REQUIREMENT WITH REGARD TO STATUS AND SENIORITY

Upon reemployment of a disabled returning service member, the employer must determine the service member's escalator position. When analyzing the status of the correct escalator position, the Second, Eighth, and Federal Circuits held that in accordance with 20 C.F.R. § 1002.194, an assessment of an employee's career trajectory including "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 . . . had remained continuously employed" is required. *See Serricchio v. Wachovia Securities LLC*, 658 F.3d 169, 182 (2d Cir. 2011); *Milhauser v. Minco Prod. Inc.*, 701 F.3d 268, 272 (8th Cir. 2012); *see also Nichols v. Dep't of Veterans Affs.*, 11 F.3d 160, 163 (Fed. Cir. 1993). The Fourth Circuit deviated from those holdings by refusing to analyze what Harwood's career trajectory would have been in enforcing the vague October 22 job offer from AA as an appropriate equivalent position. Pet. App. 10a-13a.

Further, an analysis of the offered responsibilities and duties is also essential. *Nichols*, 11 F.3d at 163 (holding that where returning service member was previously employed in position that

"had clear responsibilities, management duties, and the necessary authority to carry out those duties; a subsequent position must carry with it like responsibility, duties and authority if it is to be of like status and thus meet the requirements of the statute."). A position with "nebulously defined" duties is simply insufficient. *Id.*

The returning service member's employment trajectory must be analyzed with respect to what job they would have held and "the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he . . . had remained continuously employed." *See* 20 C.F.R. § 1002.194; *Serricchio*, 658 F.3d at 182; *Milhauser*, 701 F.3d at 272. After that analysis has been performed and a job has been provided, offered to, or accepted by the returning service member, that job must still have properly defined duties. *Nichols*, 11 F.3d at 163. Furthermore, the returning service member must have the same "clearly understood responsibility and objectives" and an understanding of "the criteria by which his success [is] to be judged." *Id.* If a returning service member's new position does not give him the information that he needs to be able to perceive what success is in that position, that position is not of like status under the statute. *Id.*

The Fourth Circuit, in finding that the "nebulously defined" position offered by AA on October 22 to be of like status, created new conflict with the law of the Second, Eighth, and Federal Circuits and failed to perform the required and proper analysis under 20 C.F.R. § 1002.194.

While the Fourth Circuit's conflict with the Second, Eighth, and Federal Circuits on the "status" analysis weighs heavy, so too does it conflict with the Eighth Circuit's "seniority" analysis. Part and parcel with seniority comes such benefits that are perquisites of seniority. The Eighth Circuit utilizes this Court's "two-pronged" reasonable certainty test to determine whether a benefit of employment is a "perquisite of seniority." *Goggin*, 702 F.2d at 701 (citing *Coffy v. Republic Steel Corp.*, 447 U.S. 191 (1980) and *Ala. Power Co. v. Davis*, 431 U.S. 581 (1977)).

The Eighth Circuit's two-pronged test includes (i) a finding of "reasonable certainty that the benefit would have accrued if the employee had not gone into military service;" and (ii) "the nature of the benefit must be a reward for length of service rather than a form of short-term compensation for services rendered." *Id.* (citing *Coffy*, 447 U.S. at 197-98 and *Alber v. Norfolk & W. Ry. Co.*, 654 F.2d 1271, 1276 (8th Cir. 1981)).

Seniority is defined under 38 U.S.C. § 4303(12) as "longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment." By that definition, it becomes necessary to use the Eighth Circuit's two-pronged test to decide whether specific benefits provided by an employer in a job offer to a returning service member are perquisites of seniority.

Without such an analysis, the Fourth Circuit determined below that, solely because Harwood might receive the "same pay and benefits that [he] received as a pilot" in a position which AA alleged held "equal status" within the organization, such

position was the correct equivalent position. Pet. App. 12a-13a. The statute established that a position offered to a returning service member must be equal in seniority, pay, and status, but the Fourth Circuit found that specific benefits were not necessary to make a decision on the position's equivalence. *Id.*

Without specific benefits being included in the job offer, including those which Harwood was owed under his union's Collective Bargaining Agreement made prior to his military leave, it was impossible for Harwood to know with reasonable certainty whether this October 22 offer was the correct escalator position with the correct level of seniority. Since seniority at AA includes benefits which are perquisites of seniority, Harwood required specifics to accept such a position. In the same vein, the Fourth Circuit has weakened returning service members' rights and protections by not requiring that the nebulous benefits offered were those to which Harwood would have been entitled with "reasonable certainty."

The Fourth and Eighth Circuits have previously held that "a transfer from one position to another was a denial of a 'benefit of employment' under USERRA." *See Maxfield v. Cintas Corp. No. 2*, 427 F.3d 544, 552 (8th Cir. 2005) (citing *Hill v. Michelin North America, Inc.*, 252 F.3d 307, 312 (4th Cir. 2001)). Under this precedent, an employer may be liable for a USERRA violation if a returning service member is transferred from a position with certain benefits to a position with uncertain and potentially lesser benefits. The Fourth Circuit not only fails to apply its own precedent, it creates new conflict with that of the Eighth Circuit in finding that a position with uncertain benefits is equal in seniority, status,

and pay, to the proper escalator position of 737 Captain based out of New York.

This Court should grant certiorari to resolve this conflict and ensure that service members' rights to reemployment and their benefits of employment, as promised in USERRA, are protected regardless of where they reside in the Country.

D. THE FOURTH CIRCUIT'S PRESUMPTION OF EQUIVALENCE BETWEEN JOBS RUNS COUNTER TO THE FIFTH CIRCUIT'S REJECTION OF SUCH A PRESUMPTION.

The Fifth Circuit rejects the existence of a presumption of equivalence between positions which the Fourth Circuit has read into the statute and created with its ruling. In *Hembree*, the Fifth Circuit required proof from the employer that a position was approximately accurate to that which he would have had if he never left to serve. 637 F.2d at 427, n.3:

> If a company has two positions that approximate the position to which a disabled veteran would be entitled but for his disability, the differences in the positions might be so de minimis as to allow the company to place the returning veteran in either position. But such is not the case here, for the . . . position offered plaintiff upon his return did not approximate the . . . position to which plaintiff would have been entitled but for his disability.

Id. A liberal construction of USERRA requires proof that a position offered to a returning serviceman approximates to that which the returning serviceman

"would have been entitled but for his disability." *See id.*; *see also Fishgold*, 328 U.S. at 282.

Under the Fourth Circuit's ruling, an employer may comply with USERRA by offering a position which only identifies the department and office location and by asserting equivalent status and pay, without evidence. The Fourth Circuit weakens returning service members' rights by not requiring employers to approximate accurately, with evidence, the appropriate escalator position. This Court should grant certiorari on this issue to provide clarity and guidance on whether a presumption of equivalence based on an employer's representations creates an equivalence with the position to which the returning service member would have been entitled but for his disability.

When a statute is largely construed in favor of the service member across the board, the Fourth Circuit's holding is an outlier and is a dangerous omission of the relevant legal considerations.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari to review the judgment of the Fourth Circuit, provide clarity as to the proper application of USERRA §§ 4312 and 4313, and remand. Additionally, because this case presents an extremely important issue of interpretation of USERRA guaranteeing our service members re-employment, this Court should invite the Solicitor General to file a brief in this matter expressing the position of the United States.

Respectfully submitted,

/s/ Adam Augustine Carter
Adam Augustine Carter
Counsel of Record
R. Scott Oswald
Nicholas W. Woodfield
THE EMPLOYMENT LAW GROUP, PC
1717 K Street, NW, Suite 1110
Washington, D.C. 20006
(202) 261-2803
acarter@employmentlawgroup.com

Michael L. Foreman
PENN STATE LAW
CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Boulevard, Suite 118
University Park, PA 16802
(814) 865-3832
Mlf25@psu.edu

APPENDIX

APPENDIX TABLE OF CONTENTS

Page

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.

JUDGMENT

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
FOR THE FOURTH CIRCUIT

No. 20-2200

MAJOR GENERAL THOMAS P. HARWOOD, III,

Plaintiff - Appellant

v.

AMERICAN AIRLINES, INCORPORATED,

Defendant - Appellee.

No. 21-1137

MAJOR GENERAL THOMAS P. HARWOOD, III,

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-

---

[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 1." 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,* v. AMERICAN AIRLINES INC., *Defendant.*	Case No. 1:17-cv-0484 Hon. Liam O'Grady

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. § 1002.194 ("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 1 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 419.

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.

JUDGMENT

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