No. 26-

IN THE

Supreme Court of the United States

ADAM MCLEAN AND JAMES DOYLE,

Petitioners,

v.

DELTA AIR LINES, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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AUGUST 28, 2026

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QUESTION PRESENTED

The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") prohibits civilian employers from denying servicemembers any benefit of employment "on the basis of" their membership in the uniformed services. 38 U.S.C. § 4311(a). Once an employee shows that military service was "a motivating factor" in an adverse employment action, the employer is liable "unless the employer can prove that the action would have been taken in the absence of such membership." *Id.* § 4311(c)(1).

The question presented is:

Whether the judge-made "honest belief" doctrine, applied in Title VII cases to insulate an employer that fires an employee based on a mistaken but sincerely held view that the employee violated a work rule, may be imported into USERRA cases to displace USERRA's express affirmative defense, which requires the employer to "prove that the action would have been taken in the absence of" the employee's protected military service—and, if it may, whether an employer's assertedly "honest belief" can be resolved in the employer's favor at summary judgment, when the existence, sincerity, and application of that belief present inherently factual questions reserved to the jury.

PARTIES TO THE PROCEEDINGS

Petitioners Adam McLean and James Doyle were plaintiffs in the district court and plaintiffs-appellants in the court of appeals.

Respondent Delta Air Lines, Inc. was defendant in the district court and defendant-appellee in the court of appeals and is a publicly traded corporation whose stock ticker symbol is DAL.

Because petitioners are individuals, no corporate disclosure statement is required under Rule 29.6.

RELATED PROCEEDINGS

United States District Court (N.D. Ga.): *Sorenson v. Delta Air Lines, Inc.*, No. 1:17-cv-00541-ELR (final judgment entered May 30, 2024).

United States Court of Appeals (11th Cir.): *McLean v. Delta Air Lines, Inc.*, No. 24-11946 (opinion issued and judgment entered April 22, 2026; petition for rehearing en banc denied June 10, 2026); No. 23-12698 (dismissed for lack of jurisdiction, January 3, 2024); No. 23-13373 (dismissed for lack of jurisdiction, January 4, 2024).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Adam McLean and James Doyle respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported as *Sorenson v. Delta Airlines, Inc.*, 174 F.4th 54 (11th Cir., April 22, 2026), and is reproduced in the Appendix hereto at App. 1a-18a.[1] The order of the court of appeals denying rehearing and rehearing en banc is unreported and is reproduced in the Appendix hereto at App. 97a-98a. The order of the district court granting summary judgment is unreported and reproduced in the Appendix hereto at App. 19a-82a. The district court's unreported order denying reconsideration is reproduced in the Appendix hereto at App. 83a–96a, and its unreported judgment is reproduced in the Appendix hereto at App. 101a-102a.

JURISDICTION

The court of appeals entered judgment on April 26, 2026 and a copy of the judgment appears in the Appendix hereto at App. 99a-100a. A timely petition for rehearing en banc was denied on June 10, 2026, and a copy of the denial order appears in the Appendix hereto at App. 97a-98a. This petition is filed within ninety days of the order denying rehearing. *See* Sup. Ct. R. 13.1, 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

1. Jeremy Sorenson was a Plaintiff in the District Court, who did not appeal the Judgment entered against him, and he is not a party to this appeal.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 4301 of Title 38 provides in relevant part:

(a) The purposes of this chapter are—

(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;

(2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and

(3) to prohibit discrimination against persons because of their service in the uniformed services.

Section 4302 of Title 38 provides in relevant part:

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter . . .

Section 4311 of Title 38 provides in relevant part:

> (a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.
>
> (b) An employer may not discriminate in employment against or take any adverse employment action or other retaliatory action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.
>
> (c) An employer shall be considered to have engaged in actions prohibited—
>
>> (1) under subsection (a), if the person's membership, application for membership,

> service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or
>
> (2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's actions, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

INTRODUCTION

"Military reservists play a vital role in our nation's defense policy." *Myrick v. City of Hoover*, 69 F.4th 1309, 1312 (11th Cir. 2023). "When called to service, these men and women are expected to leave their civilian jobs, sometimes for years on end." *Id.* USERRA enables servicemembers to strike a balance between fulfilling their military duties and civilian obligations, including civilian jobs, without suffering discrimination. *Id.* (citing *Travers v. Fed. Express Corp.*, 8 F.4th 198, 199 (3rd Cir., Aug. 10, 2021)). To alleviate the burden of serving in the military, Congress enacted the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), which "recognizes that those who serve in the military should be supported, rather than penalized, for their service." *Clarkson v. Alaska Airlines, Inc.*, 59 F.4th 424, 429 (9th Cir. 2023).

Congress wrote a burden of proof into USERRA. When an employee shows that military service was a motivating factor in an adverse employment action, the statute makes the employer liable "unless the employer can prove that the action would have been taken in the absence of such membership." 38 U.S.C. § 4311(c)(1). That affirmative defense poses a single, objective question: would the employer have treated the employee the same way if the employee had never served in the military? Four courts of appeals—the First, Third, Seventh, and Federal Circuits—have held that the provision means what it says: the employer must *prove* that the answer is yes.

In the published decision below, the Eleventh Circuit adopted a fundamentally different rule. Importing the "honest belief" doctrine from its Title VII precedents, the court held that "[a]n employer who fires an employee under the mistaken but honest impression that the employee violated a work rule is not liable for discriminatory conduct"—and affirmed summary judgment for Delta Air Lines on that basis. App. 11a–12a (citing *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1363 n.3 (11th Cir. 1999), and *Flowers v. Troup Cnty. Sch. Dist.*, 803 F.3d 1327, 1338 (11th Cir. 2015)). Under that rule, the employer need not prove what it *would have done* absent the employee's military service; it need only show that it sincerely *believed* its own stated reason. A subjective-belief inquiry has thus displaced the objective causation inquiry Congress enacted.

The decision below also deepens a second, broader conflict. The courts of appeals are openly divided over whether the judge-made "honest belief" doctrine may be used to take a discrimination case from the jury at summary judgment at all, given the inherently factual questions the doctrine asks a court to resolve. The D.C. Circuit, sitting en banc, and the Third Circuit hold that the credibility of an employer's asserted belief is "quintessentially" a question "for the finder of fact," *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1299 (D.C. Cir. 1998) (en banc); *see Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994), while the Sixth and Seventh Circuits apply the doctrine to withdraw such cases from juries upon the employer's assertion of sincerity. *E.g.*, *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir. 2001); *Forrester v. Rauland-Borg Corp.*, 453 F.3d 416, 419 (7th Cir. 2006). The decision below places the Eleventh Circuit at the far edge of that conflict—and does so under a statute in which Congress assigned the burden of persuasion to the employer, not the employee.

The question presented here is narrow, cleanly presented, fully preserved, and outcome-determinative. Because USERRA cases are overwhelmingly resolved at summary judgment, the standards adopted below will decide most such cases before any jury is empaneled. The Court should grant the petition.

STATEMENT OF THE CASE

A. Statutory Framework

USERRA is the latest in an unbroken line of statutes, dating to 1940, protecting those "who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). This Court has long instructed that these statutes are "to be liberally construed for the benefit" of returning servicemembers, *ibid.*, and "Congress adopted this rule of construction when it enacted USERRA." *Myrick*, 69 F.4th at 1318; *see King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980).) "Thus, when two plausible interpretations of USERRA exist—one denying benefits, the other protecting the veteran—we must choose the interpretation that protects the veteran." *Myrick,* 69 F.4th at 1318 (citing *Travers*, 8 F.4th at 208 n.25 ("[A]ny interpretive doubt is construed in favor of the service member, under the pro-veteran canon."); see also *Boone v. Lightner*, 319 U.S. 561, 575 (1943).

Congress codified a specific causation framework for discrimination claims—the framework this Court articulated in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977), and approved for labor cases in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401–03 (1983). *See* H.R. Rep. No. 103-65, pt. 1, at 18–19 (1993). Under § 4311(c)(1), the employee bears the initial burden of showing that military service was "a motivating factor" in the adverse action.

"An employee proves a violation [of USERRA] by establishing that his 'service . . . in the uniformed services

[was] a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such . . . service.'" *Thomas v. Broward Cnty. Sheriff's Office*, 71 F.4th 1305, 1312 (11th Cir., June 22, 2023)(citing §4311(c)(1)). "A person's military service is a motivating factor if 'it is one of the factors that a truthful employer would list if asked for the reasons for its decision." *Id.* "A wide range of evidence may prove that an employee's military status was a motivating factor in his termination, including 'an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity' and 'inconsistencies between the proffered reason and other actions of the employer.'" *Id.* (internal citations omitted).

The burden then shifts to the employer, which escapes liability only if it "can prove that the action would have been taken in the absence of such membership." 38 U.S.C. § 4311(c)(1); *see Staub v. Proctor Hosp.*, 562 U.S. 411, 417–20 (2011) (construing § 4311 by reference to traditional tort-causation principles). The defense is an affirmative one, on which the employer bears the burden of persuasion, and its object is counterfactual causation—what the employer *would have done*—not the employer's state of mind.

Congress recently reaffirmed USERRA's protective design, and strengthened the statute, in the Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025 (the "Dole Act"), Pub. L. No. 118-210, 138 Stat. 2797 (Jan. 2, 2025).

B. Factual Background

1. Petitioners Adam McLean and James Doyle flew for Delta Air Lines for nearly a decade while serving as officers in the United States Air Force Reserve. App. 3a.

2. The summary-judgment record documented sustained internal hostility at Delta toward military leave and toward those whose military service required military leave absences. Dist. Ct. dkt. 206 at 16-20.[2] Delta created policies and practices designed to discourage and reduce absences caused by military leave, to persuade pilots to resign from military service, and to penalize pilots who take military leave, with the goal of enabling Delta to minimize its USERRA responsibilities and to enable Delta to employ fewer pilots, thereby increasing its own profits. Dist. Ct. dkt. 206 at 4, 11; Dist. Ct. dkts. 198-15, 198-17, 195-1, 195-3, 195-9, 195-11.

There are numerous examples of this company wide hostility, including emails where Delta's Chief Pilot wrote that "[t]his is a case of the airlines subsidizing the military/government," that Delta would "start looking at whether to hire [military] guys or not," and that when "[Delta] show[s] intent to be more discriminatory, [pilots] start leaving the reserve/guard in droves. Cause and effect." App. 115a (Dist. Ct. dkt. 199-2 at 1); C.A. dkt. 50 at 11.[3]

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2. Citations to "Dist. Ct. dkt" refer to docket entries in the District Court for the Northern District of Georgia, Atlanta Division, Case No. 1:17-cv-00541-ELR.

3. Citations to "C.A. dkt" refer to docket entries in the United States Court of Appeals for the Eleventh Circuit, Case No. 24-11946.

Delta's anti-military behavior was so egregious that even Delta managers described the company's treatment of military pilots in emails as "boarders on harassment," and in writing observed that military commitments "make[] one think twice about hiring Res and Guard guys." App. 116a; Dist. Ct. dkt. 198-4 at 1; Dist. Ct. dkt. 199-2 at 2; C.A. dkt. 50 at 11. Delta was even accused of waging a "jihad" against pilots taking disfavored military leaves of absences. C.A. dkt. 50 at 11; Dist. Ct. dkt. 207 at 18-19; Dist. Ct. dkt. 197-2. Delta managers circulated by email an offensive meme mocking pilots' use of military leave. App. 112a-113a.

3. To reduce its burdens and the inconveniences of USERRA, Delta created and maintained a discriminatory "concurrent duty policy" prohibiting a pilot from performing military duty while being paid by or in a paid status with Delta, but it did not restrict any other activities. App. 10a. From 2006 until 2016, Delta's Concurrent Duty Policy was listed in Delta's Flight Operations Manual ("FOM") as follows: "It is Delta's policy that a pilot participating in active military duty is ineligible to perform Delta duties in any capacity," but was greatly expanded to the detriment of military servicemembers after August 2016. Dist. Ct. dkt. 206-7 at 63. Factual evidence showed that the policy was applied much more broadly than was written, such that military pilots were prevented from performing both military duty and working for Delta not just at the exact same moment in time they are flying Delta aircraft, but on the same calendar day, even when the two actions did not conflict or overlap during that same day. Dist. Ct. dkt. 198-32.

In practice, and as used against the Plaintiffs, these restrictions prevented individuals from performing military duty during their own free time and/or on sick leave, when notice under USERRA is not required to be given to the employer; and these restrictions only applied to those performing military work, and no other type of work or activity. This policy was discriminatory because the policy applied *only* to pilots with military obligations and Delta imposed no analogous restriction on pilots who pursued second jobs, side businesses, or any other personal activities during or on the same day that Delta compensated these employees, and the record showed such "double-dipping" by non-military pilots was commonplace and undisciplined. Dist. Ct. dkt. 198-36. This was not a neutral policy applied to all employees, and military affiliated pilots were subject to significant restrictions and penalties based on what they did on their own time that did not exist for any other pilots with second careers or who participated in other activities outside of their Delta employment. (see *Monroe v. Standard Oil Co.*, 452 U.S. 549, 554 (1981).)

The concurrent duty policy overlapped with sick time policies because if a pilot called in sick from Delta because the pilot could not perform the duties of a commercial airline pilot, and is paid by Delta for that sick time, that pilot cannot do any type of military service, but that pilot is not prohibited from doing anything outside of the military while they are recovering on paid sick leave. In fact, Delta's written sick leave polices do not address at all what a pilot can do, or not do, when they are recovering on sick leave and cannot work for Delta. But Delta's concurrent duty policy prevented that person from performing military duty while sick, unless the pilot goes off of paid sick leave and on unpaid military leave. Dist. Ct. dkt. 195 at 203:7-205:12. The concurrent duty policy would allow a pilot to work as a dentist on the same day he or she works for or is sick from Delta, but that same pilot cannot perform work as a military dentist. *Id.* It would allow a pilot to fly their own airplane, but that same pilot could not fly a military airplane. The pilot can even drink alcohol on the same day he or she is compensated by Delta, but the person could not perform military duty. Delta managers even acknowledged in writing that the policy was "a slippery slope" the company had "gone down," and that managers enforcing it had themselves performed concurrent duty. Dist. Ct. dkts. 198-32, 198-36, 202 at 46:14–47:18, 48:17–48:19.

4. Delta opened investigations into both petitioners—Doyle in 2015, McLean in 2016—because they took military leave and performed military service, and only later asserted that each had abused sick leave and military leave. App. 3a–5a. Doyle's investigation, which is clearly described in email, was triggered because he took a "single MLOA day in the middle of a reserve days block" which reduced his availability and thus his productivity, so Delta sought a pretext to punish him. App. 107a-111a; C.A. dkt. 30 at 16; C.A. dkt. 50 at 12. McLean was investigated because frequent military duty impacted his Delta availability, and following a hernia operation, McLean was unable to perform all the duties of a commercial flight crewmember, but he was well enough to perform other activities with certain physical limitations. App. 71a-72a; C.A. dkt. 50 at 12; C.A. dkt. 30 at 24–26; Dist. Ct. dkt. 171-13. However, Delta's contemporaneous internal records illustrate what truly motivated the terminations, and if military leave and military service was never performed, the investigations would never have even begun. The agenda for Delta's August 24, 2016 "Deals Meeting"—a working list of pilots facing discipline—identifies McLean

with the notation "MLOA abuse, manipulation, concurrent duty" with the status "[p]reparing for termination," and identifies Doyle with the single notation "MLOA abuse" with the status "[p]ending termination." App. 103a, 106a (Dist. Ct. dkt. 194-6). In this document Delta truthfully lists it's motivating factors for termination, and neither entry mentions sick leave, sick leave abuse, or any other company policy violations.

Only later did Delta's subsequent notices of intended termination mention misuse of military leave as an "independent ground[] for termination" alongside asserted sick-leave violations. App. 4a-5a. Only much later did Delta find that Doyle flew for the military on a morning, and then on the same day, injured his knee and called in sick for Delta that afternoon, because he was unable to walk long distances, and perform his duties as a commercial pilot. C.A. dkt. 50 at 12–13; C.A. dkt. 30 at 17-18. This event triggered a concurrent duty violation, even though the facts show Doyle never actually worked for the military at the same time he was on sick leave at Delta. Furthermore, Delta never formally accused Doyle of skiing while on sick leave, and Doyle never said or admitted he skied while on sick leave, but during company investigations and his deposition, he did discuss that people recovering from illness are allowed to do other activities, including skiing, even though they're physically unable to perform other duties as a flight crewmember. C.A. dkt. 50 at 13; C.A. dkt. 30 at 18; C.A. dkt. 25. Both pilots felt forced to resign rather than be terminated and risk their military security clearances, their military careers, and future employment at other airlines, and the courts below assumed they were constructively terminated. App. 9a n.2.

C. Proceedings Below

1. Petitioners sued Delta in the Northern District of Georgia, alleging (as relevant) that Delta constructively terminated them because of their military service in violation of § 4311. The district court granted summary judgment to Delta. App. 19a–82a. On the § 4311 claim, the court held that petitioners had "shown a prima facie case that Delta pressured them to resign because of their military service," but that Delta was entitled to judgment because it had a legitimate, nondiscriminatory reasons to discipline them, including admitted violations of the concurrent duty policy, "disregard for Defendant's ability to schedule . . . [][military] leave (which no doubt impacted other employees), lack of productivity, abuse or misuse of Defendant's leave systems" (App. 69a), and "perform[ing] military duty while on paid sick leave" (App. 71a), even though each reason is directly related to USERRA protected military duty. App. 69a; C.A. dkt. 30 at 16; Dist. Ct. dkt. 207 at 10, 16, 25, nn. 3–4, 7; Dist. Ct. dkt. 228-1 at 18–23.

2. A panel of the Eleventh Circuit affirmed the Judgment in a published opinion. App. 1a–18a. At the second step of § 4311(c)(1), the panel held that Delta's proffered belief that petitioners abused sick leave was dispositive—"even if that reason was mistaken" and even if the alleged violations never actually occurred. App. 11a. Quoting its Title VII decisions in *Damon* and *Flowers*, the panel held that "[a]n employer who fires an employee under the mistaken but honest impression that the employee violated a work rule is not liable for discriminatory conduct," and that employers "are free to fire their employees for a good reason, a bad reason, a

reason based on erroneous facts, or for no reason at all, as long as [the] action is not for a discriminatory reason." *Id.* (citations modified). The panel deemed petitioners' denials of sick-leave abuse irrelevant because "the focus of the second step . . . is on the employer's reason for terminating the employee, not the employee's conduct." *Id.*

3. The Eleventh Circuit denied rehearing and rehearing en banc on June 10, 2026. App. 97a-98a.

REASONS FOR GRANTING THE PETITION

I. The Courts Of Appeals Are Now Divided Over Whether An Employer's "Honest Belief" Satisfies § 4311(c)(1)'s Same-Action Defense.

A. Four circuits hold that § 4311(c)(1) imposes a burden of persuasion on counterfactual causation that subjective belief cannot carry.

The First, Third, Seventh, and Federal Circuits hold that § 4311(c)(1) imposes on the employer a burden of persuasion on counterfactual causation that a subjective "honest belief" cannot satisfy. The Federal Circuit—whose USERRA jurisprudence is the most developed by virtue of its review of federal-sector claims—holds that once discriminatory motivation is shown, the employer bears "the burden of persuasion" to prove "by a preponderance of the evidence[] that the action would have been taken despite the protected status." *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1013–14 (Fed. Cir. 2001). Because the "same-action" showing is an affirmative defense, *Sheehan* explained, USERRA's scheme differs fundamentally from Title VII burden-shifting, under which the burden of persuasion never leaves the plaintiff: under USERRA, the employer must do more than "articulat[e]" a legitimate reason—it must *prove* the counterfactual. *Ibid.* And *Sheehan* identified the very categories of circumstantial evidence that the honest-belief rule renders immaterial as the accepted means of proving discriminatory motivation: "proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses." *Id.* at 1014.

The First Circuit follows the same rule. Under *Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, 473 F.3d 11 (1st Cir. 2007), once the employee carries his motivating-factor burden, the employer "must prove, by a preponderance of the evidence, that the action would have been taken in the absence of the employee's military service." *Id.* at 17. The court was explicit about what that allocation means for the honest-belief question: under USERRA—unlike Title VII—"the employee does not have the burden of demonstrating that the employer's stated reason is a pretext. Instead, the employer must show, by a preponderance of the evidence, that the stated reason was *not* a pretext." *Ibid.* An employer's sincere belief in its stated reason therefore begins, rather than ends, the second step: the employer itself must persuade the factfinder that the proffered reason—and not the employee's service—was the real and sufficient cause of the adverse action.

The Third and Seventh Circuits agree. In *Carroll v. Delaware River Port Authority*, 843 F.3d 129, 132-133 (3d Cir. 2016), the Third Circuit emphasized that USERRA's two-step framework differs materially from the *McDonnell Douglas* regime precisely because both the burden of production and the burden of persuasion shift to the employer, and the employee at no point bears the burden of proving pretext. And the Seventh Circuit has expressly held that USERRA's framework is "more protective" than Title VII's and that courts may not import Title VII's burden-shifting structure into USERRA cases. *Arroyo v. Volvo Grp. N. Am., LLC*, 805 F.3d 278, 284-286 (7th Cir. 2015). Applying that rule, *Arroyo* reversed summary judgment for an employer that had discharged an Army reservist for asserted attendance-rule violations intertwined with her deployments, on a record containing contemporaneous expressions of hostility to her military obligations. In these four circuits, an employer's sincere-but-mistaken belief that the employee broke a work rule does not end the case; the factfinder must still decide whether the employer has *proved* that, with military service subtracted from the calculus, the same action would in fact have been taken.

B. Four more circuits likewise enforce § 4311(c)(1)'s employer-side burden of persuasion.

The Fifth, Sixth, Eighth, and Ninth Circuits have not yet confronted a square attempt to substitute the Title VII honest-belief doctrine for § 4311(c)(1)'s same-action showing. But each of those circuits likewise holds that § 4311(c)(1) is an affirmative defense on which the employer bears the burden of persuasion. *See Bradberry v. Jefferson Cnty.*, 732 F.3d 540, 547 (5th Cir. 2013); *Savage* *v. Fed. Express Corp.*, 856 F.3d 440, 447 (6th Cir. 2017); *Maxfield v. Cintas Corp. No. 2*, 427 F.3d 544, 551 (8th Cir. 2005); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 900 (9th Cir. 2002)(finding that the evidence only needs to support an inference that military status or conduct was a motivating or substantial factor in an employment decision). In each, the second step is framed as an objective showing about what the employer would have done—a showing the employer must prove by a preponderance of the evidence—not as an inquiry into the employer's good faith. Eight circuits thus enforce the employer-side burden of persuasion Congress enacted; only the Eleventh Circuit permits an employer to discharge that burden by attesting to the sincerity of its stated reason.

C. The Eleventh Circuit stands alone: no other circuit permits an employer's honest belief to satisfy § 4311(c)(1).

No other court of appeals has adopted the honest-belief doctrine as a rule of decision under USERRA. The decision below stands alone. At § 4311(c)(1)'s second step, the panel asked not what Delta *would have done* absent petitioners' military service, but whether Delta honestly *believed* petitioners had violated company policies (policies that are directly related to military service)—expressly extending to USERRA the "honest belief" rule of its Title VII cases: "An employer who fires an employee under the mistaken but honest impression that the employee violated a work rule is not liable for discriminatory conduct." App. 11a (citing *Damon*, 196 F.3d at 1363 n.3; *Flowers*, 803 F.3d at 1338). On that holding, petitioners' evidence disputing the truth of the asserted rule violations—and their evidence that the asserted violations were themselves entangled with their military service—was immaterial as a matter of law. App. 10a-11a.

The conflict is square and acknowledged in the case law's architecture. *Damon* and *Flowers* are Title VII decisions; neither mentions USERRA or confronts § 4311(c)(1)'s text. The panel nonetheless made their subjective-belief rule dispositive of a USERRA claim at summary judgment—precisely what the Seventh Circuit in *Arroyo* held impermissible, and precisely what the Federal, First, and Third Circuits' burden-of-persuasion holdings foreclose. A USERRA plaintiff whose employer honestly but wrongly believed him a rule-breaker survives summary judgment in Boston, Philadelphia, and Chicago, but loses as a matter of law in Atlanta, Miami, and Birmingham. Only this Court can resolve that conflict.

D. The Eleventh Circuit's rule is wrong.

1. The statutory text is unambiguous. Section 4311(c)(1) conditions the employer's escape from liability on its ability to "*prove* that the action *would have been taken* in the absence of such membership." Both operative phrases point away from the honest-belief rule. "Prove" imposes a burden of persuasion, not a burden of articulation. And "would have been taken" states a counterfactual-causation standard—an objective inquiry into what this employer would in fact have done in a world without the employee's military service. An employer's honest belief in a proffered reason answers a different question: what the employer *thought*. A sincerely held reason may nonetheless be a reason the employer would never have even acted upon absent the employee's protected status—particularly where, as here,

the evidence shows that Delta initiated its investigations only because military service was performed, Delta's own contemporaneous termination worksheet listed only military-leave-related grounds (App. 103a-106a), and the "work rule" invoked applies exclusively to employees performing military duty. App. 10a. If McLean and Doyle were not members of the military and did not take USERRA protected military leave, but instead behaved similarly and worked at a regular civilian job for pay on the same day they were paid by Delta, these investigations would never have even begun.

The panel itself recited the governing standard: once petitioners made "an initial showing . . . that military status was at least a motivating . . . factor" in the adverse employment actions, the burden passed to Delta, "upon which the [employer] must" show "that the action would have been taken despite the protected status." App. 8a (quoting *Coffman*, 411 F.3d at 1239). The court of appeals was correct about that allocation—and that allocation is fatal to the judgment, because Delta could not have made the required showing on this record. The asserted violations Delta labeled "sick leave" abuse were in fact based on the performance of military duty while on sick leave: the charge was not that petitioners engaged in some outside activity unrelated to their service, but that they performed military duty on days they were medically unable to perform the duties of a commercial flight crewmember. App. 4a–5a, 10a. But for petitioners' protected status as military servicemembers, they would not—and could not—have performed the military duty that constituted the asserted violations, and Delta would not have taken the adverse actions against them. An employer cannot prove that the action "would have been taken" in the absence of the employee's military service when the conduct underlying its stated reason *is* the performance of military service. *Cf. NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964). Having recited *Coffman*'s standard, the panel excused Delta from carrying it—accepting Delta's sincerity about a rationale that collapses into the very protected status the statute shields.

The employer's subjective state of mind is beside the statutory point. Section 4311(c)(1)'s same-action defense is a causation defense, not a good-faith defense. What the employer honestly *believed* speaks, at most, to step one's motivating-factor inquiry; it cannot answer step two's question, because what an employer wrongly believed says nothing about what it *would have done* absent the employee's military service obligations. Sincerity is not sufficient to carry the defense: an employer may genuinely believe an employee violated a work rule and still be unable to prove that it would have acted on that belief absent the employee's military service—where, for example, it tolerated identical conduct by employees without military obligations, invoked the rule only against those who serve, or, as here, would never have scrutinized the employee's conduct at all but for his performance of military service. To "prove" the counterfactual is to carry a burden of persuasion on an objective question of fact, *see Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 272–76 (1994) ("burden of proof" ordinarily denotes the burden of persuasion), and an employer's state of mind—however honest—is not evidence of what it would have done in a world where the employee never wore the uniform. That is why the circuits that apply § 4311(c)(1) as written hold that an employer's proffer of a sincerely held reason begins, rather than ends, the same-action inquiry.

2. The statutory history confirms the textual reading. Congress modeled § 4311(c)(1) on the *Mt. Healthy* same-decision framework, under which the defense is an affirmative one carrying a burden of persuasion. H.R. Rep. No. 103-65, pt. 1, at 18–19; *see Mt. Healthy*, 429 U.S. at 287; *Transp. Mgmt.*, 462 U.S. at 401–03. This Court in *Staub* construed § 4311 by reference to traditional tort-causation principles, treating the same-action showing as the employer's affirmative defense—not as a deferential review of the employer's state of mind. 562 U.S. at 417–20. When Congress wants an employer's honest business judgment to control, or wants the burden of persuasion to remain with the plaintiff, it knows how to say so; it wrote Title VII differently, and this Court has repeatedly refused to homogenize distinct discrimination statutes' causation standards. The Eleventh Circuit's importation of Title VII doctrine erases the very feature—an employer-side burden of proof—that distinguishes USERRA's scheme.

3. The honest-belief doctrine cannot bear the weight the panel placed on it even on its own terms. The doctrine is a transplant. The panel borrowed it wholesale from *Damon* and *Flowers*—Title VII cases in which the burden of persuasion never leaves the plaintiff and the doctrine serves only to blunt one particular form of pretext evidence: proof that the employer's asserted factual premise was false. Even in that setting, an employer's honest belief is not an affirmative defense to liability; it merely limits the inference a factfinder may draw from the falsity of the employer's explanation, and it forecloses neither other proof of unlawful motive nor a jury's assessment of whether the asserted belief was honestly held at all.

Courts applying the doctrine accordingly treat the sincerity of the asserted belief as itself a question for the factfinder: the inquiry is whether "the employer's explanation was so weak, implausible, inconsistent or incoherent that a reasonable fact finder could conclude that it was not an honestly held belief but rather was subterfuge for discrimination," *Young v. Dillon Cos.*, 468 F.3d 1243, 1250 (10th Cir. 2006), and summary judgment is unavailable where a jury could "disbelieve defendants' claim" that a rule, like the concurrent duty policy and its entanglement with sick leave, enforced against one protected group but not others "was merely a mistake," *Orr v. City of Albuquerque*, 531 F.3d 1210, 1218 (10th Cir. 2008).[4]

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4. Even under Title VII and other motive-based statutes, courts—including the Eleventh Circuit—have refused to treat an employer's honest belief as a defense that forecloses liability or removes the question from the jury. *See, e.g.*, *Miles v. S. Cent. Hum. Res. Agency, Inc.*, 946 F.3d 883, 890 n.5 (6th Cir. 2020) ("[T]he 'honest belief' rule only applies as a defense to a lack of a factual basis for the legitimate nondiscriminatory reason proffered by the employer."); *Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 425 (6th Cir. 2021) (honest belief unavailing where the asserted concerns "did not actually motivate" the decision); *Westmoreland v. TWC Admin. LLC*, 924 F.3d 718, 730 (4th Cir. 2019) ("[E]ven if TWC honestly believed Westmoreland violated its policy, the jury could reasonably infer (as it apparently did) that the company used this as a pretext for discrimination"); *Coleman v. Donahoe*, 667 F.3d 835, 853 (7th Cir. 2012) (a stated reason, "even if actually present to the mind of the employer," is pretextual if it "wasn't what induced" the challenged action); *Woodard v. Fanboy, L.L.C.*, 298 F.3d 1261, 1265–66 (11th Cir. 2002) (reversing summary judgment where a reasonable jury could conclude the employer "did not honestly believe" the facts underlying its stated reason); *Orr*, 531 F.3d at 1216–18 & n.4 (reversing summary judgment where the employer enforced against the protected group "a rule at

Transplanted to USERRA's second step, the doctrine does far more: it relieves the employer of the burden of persuasion Congress expressly imposed and converts a statutory causation defense into a good-faith defense appearing nowhere in the statute's text. Where Congress has enacted a *Mt. Healthy*-style same-action defense, courts have recognized that an honest belief cannot carry it. Construing the Federal Railroad Safety Act's materially similar framework, the Eighth Circuit held that "[l]iability will still exist notwithstanding such a[n] [honest] belief if the employer's retaliatory motive also played a contributing role in the decision and if the employer fails to carry the burden of proving" that it would have taken the same action absent the protected conduct—and it rejected a jury instruction that would have directed a verdict for the employer upon a finding of honest belief. *Blackorby v. BNSF Ry. Co.*, 936 F.3d 733, 737 (8th Cir. 2019). The Ninth Circuit likewise held that a plaintiff may prevail "even if [the employer] had an honestly-held, justified belief" in the asserted misconduct.

odds with Department policy and practice," the written policy "did not reflect what actually occurred in practice" (quoting *Trujillo v. PacifiCorp*, 524 F.3d 1149, 1159 (10th Cir. 2008)), and the employer's evidence of even-handed application post-dated notice of the plaintiffs' complaints and could be viewed as a "post-hoc effort to cover up past discriminatory practices"); *Young*, 468 F.3d at 1251–52 (identifying, as proof that would defeat an asserted honest belief, a reason "generated only after the termination," a failure to follow the employer's own "written termination procedures," and evidence "deliberately suppressed from the decision makers or ignored in order to further a discriminatory purpose"); *see generally* Eric Schnapper, *Honest Belief and Proof of Unlawful Motive*, 71 Buff. L. Rev. 769, 830 (2023) ("The existence of an honest belief is not some sort of affirmative defense to a claim of unlawful purpose.").

Frost v. BNSF Ry. Co., 914 F.3d 1189, 1196–97 (9th Cir. 2019).

4. This Court's precedents confirm that an employer's good faith cannot answer § 4311(c)(1)'s causation question. *Staub* was itself a USERRA case in which the ultimate decisionmaker acted on an honest assessment of the information before her; the Court nonetheless held that the employer may be liable where a supervisor's antimilitary animus was intended to cause, and proximately caused, the adverse action. *Staub*, 562 U.S. at 414–23. Applying *Staub*, the courts of appeals have repeatedly refused to let employers invoke the honest-belief doctrine in cat's-paw cases, because "the decisionmaker's intent does not matter, and consequently the honesty of the decisionmaker's belief does not matter." *Marshall v. Rawlings Co.*, 854 F.3d 368, 380 (6th Cir. 2017). And where the asserted misconduct arises out of the protected activity itself, this Court has held that an employer's good-faith belief that misconduct occurred is no defense at all; the misconduct must actually have occurred. *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964). That principle speaks directly to this case: the "concurrent duty" and leave "violations" Delta invoked were not conduct independent of petitioners' service—they consisted of the performance of military duty itself. A rule under which an employer's mistaken belief about conduct inseparable from protected service defeats liability as a matter of law cannot be reconciled with *Burnup & Sims*, much less with § 4311(c)(1)'s text.

5. Congress's allocation of the burden also reflects a reality this Court has long recognized: discrimination rarely announces itself, is seldom open and notorious, and an adverse employment action dressed in a facially

neutral justification may be nothing more than a pretext concealing a discriminatory motive. A factfinder may treat the falsity of, or inconsistencies in, an employer's explanation as affirmative evidence of discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). USERRA case law implements the same principle: discriminatory motivation may be inferred from, among other things, the timing of the adverse action, inconsistencies between the proffered reason and the employer's other conduct, expressed hostility toward those who serve, and disparate treatment of comparable employees. *Sheehan*, 240 F.3d at 1014.

The honest-belief rule dismantles that structure. By making the employer's sincerity dispositive, it places the pretext inquiry—the principal means by which covert discrimination against servicemembers is exposed—beyond the factfinder's reach: shifting explanations, disparate enforcement, and contemporaneous expressions of hostility all become immaterial the moment the employer attests to its own good faith. This record shows what is at stake. Delta's contemporaneous "Deals Meeting" worksheet identified only military-leave grounds for the planned terminations, App. 103a-106a; the sick-leave rationale surfaced only later, App. 5a; the "concurrent duty" rule was enforced exclusively against pilots performing military service while identical "double-dipping" by non-military pilots went undisciplined, Dist. Ct. dkt. 198-36; and the deciding chain of command documented its hostility to military leave in writing. App. 110a–116a; Dist. Ct. dkt. 198-4.

That is precisely the showing *Orr* held sufficient. There the employer defended its differential treatment on the ground that it was "merely applying a uniform policy applicable to all employees," 531 F.3d at 1212, and the Tenth Circuit held that a reasonable jury could find that justification pretextual because the policy the employer invoked was not the policy that in fact governed, and because the employer's practice for employees outside the protected class diverged from the rule it enforced against those within it. *Id.* at 1216–17. Delta's concurrent-duty policy presents the same proof and more: it was written to bar a pilot from performing Delta duties while "participating in active military duty," but was enforced to bar military service anywhere on the same calendar day even absent any overlap; non-military pilots' outside work on Delta-compensated days went unrestricted and undisciplined; the managers enforcing it had themselves performed concurrent duty and described it in writing as "a slippery slope"; and by its terms the rule reaches no conduct except military service. App. 10a; Dist. Ct. dkt. 198-32; Dist. Ct. dkt. 198-36; Dist. Ct. dkt. 202 at 46:14–47:18. The policy Delta invoked is therefore not a neutral premise from which its good faith can be measured; it is itself the evidence of pretext. Under the majority rule, that is a textbook pretext case for a jury; under the decision below, it is summary judgment for the employer.

6. Finally, the honest-belief rule inverts the statute's protective design. Under the decision below, any employer that can articulate a plausible—even erroneous—work-rule rationale obtains judgment as a matter of law, no matter how strong the evidence of military-based animus and no matter how disputed the underlying facts. That converts an affirmative defense Congress made deliberately demanding into a near-automatic exit from liability at summary judgment.

E. The question is recurring, outcome-determinative, and squarely presented in this case.

The § 4311(c)(1) standard is the fulcrum of virtually every USERRA discrimination case: because such cases are commonly resolved at summary judgment, the content of the employer's defense determines which cases reach a jury at all. The decision below is published and now binds every district court in the Eleventh Circuit. And the question is dispositive here. The district court found—and the panel accepted—that petitioners established a prima facie case that military service was a motivating factor in their constructive terminations. App. 6a, 9a. The case turned entirely on step two. Petitioners' evidence—the termination worksheet identifying only "MLOA abuse, manipulation, [and] concurrent duty" as grounds for termination (App. 103a, 106a); a "concurrent duty policy" that by definition applies only to pilots performing military service (App. 10a); and documented hostility to military leave within the deciding chain of command (App. 110a-116a; Dist. Ct. dkt. 198-4)—created a genuine dispute over whether Delta would have forced out these pilots absent their military service. The honest-belief rule applied below took that dispute from the jury. This case accordingly presents the question cleanly, with no antecedent or alternative ground obscuring it.

II. The Decision Below Also Implicates A Second, Broader Conflict: Whether An Employer's "Honest Belief" May Be Resolved At Summary Judgment At All.

A. The circuits are divided over whether an asserted honest belief presents a jury question.

Even on the honest-belief doctrine's home ground—Title VII and other motive-based statutes under which the plaintiff retains the burden of persuasion—the courts of appeals are divided over whether the doctrine may be applied at summary judgment at all, given the inherently factual character of the questions it purports to resolve. The D.C. Circuit, sitting en banc, rejected the notion that an employer's assertion of an honest belief can insulate its explanation from a jury's scrutiny: a jury may "conclude that an employer who fabricates a false explanation has something to hide," and where an asserted belief appears unreasoned or selectively applied, the jury may infer pretext. *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1292–93 (D.C. Cir. 1998) (en banc). Credibility, the court explained, is "quintessentially" an issue "for the finder of fact." *Id.* at 1299. The Third Circuit likewise holds that whether an employer's stated rationale is "unworthy of credence" is a function reserved to the factfinder. *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994). The Ninth Circuit has never adopted the doctrine, and it reverses summary judgment where circumstantial evidence casts doubt on the employer's explanation. *Noyes v. Kelly Services*, 488 F.3d 1163, 1170–71 (9th Cir. 2007). And the Tenth Circuit confines the doctrine narrowly, *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1118 (10th Cir. 2007), holding that the sincerity of the asserted belief is itself for the jury whenever the explanation is "weak, implausible, inconsistent or incoherent." *Young*, 468 F.3d at 1250; *see Orr*, 531 F.3d at 1216–18.

On the other side of the divide, the Sixth and Seventh Circuits apply the doctrine robustly to withdraw cases from juries, granting judgment as a matter of law where the employer asserts a sincerely held belief in its stated reason, even one that is factually mistaken. *E.g.*, *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir. 2001); *Babcock v. Michigan*, 812 F.3d 531, 536 (6th Cir. 2016); *Forrester v. Rauland-Borg Corp.*, 453 F.3d 416, 419 (7th Cir. 2006) (an "honest mistake, however dumb," is not pretextual); *Little v. Illinois Department of Revenue*, 369 F.3d 1007, 1012–13 (7th Cir. 2004). The First, Second, Fourth, Fifth, and Eighth Circuits recognize the doctrine in varying degrees. *See Ronda-Perez v. Banco Bilbao Vizcaya Argentaria–P.R.*, 404 F.3d 42, 45–46 (1st Cir. 2005); *McPherson v. New York City Department of Education*, 457 F.3d 211, 216 (2d Cir. 2006); *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 217–18 (4th Cir. 2007); *Waggoner v. City of Garland*, 987 F.2d 1160, 1165–66 (5th Cir. 1993); *Scroggins v. University of Minnesota*, 221 F.3d 1042, 1045 (8th Cir. 2000). Where a servicemember's case is filed thus determines not only who bears the burden of persuasion under § 4311(c)(1), but whether an employer's professed state of mind may be resolved by a judge rather than a jury.

B. Resolving an employer's state of mind at summary judgment cannot be squared with this Court's precedents committing credibility and motive to the factfinder.

This Court has held that circumstantial evidence of discrimination suffices to take a case to the factfinder, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99–100 (2003); that the factfinder's disbelief of the employer's explanation—together with the elements of the prima facie case—may itself establish liability, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993); *Reeves*, 530 U.S. at 147; and that judge-made evidentiary frameworks may not be used to impose atextual barriers on discrimination plaintiffs, *Ames v. Ohio Department of Youth Services*, 605 U.S. 303 (2025). Those holdings rest on a much older principle: determining "the weight and credibility" of testimony "has long been held to be" a "part of every case that belongs to the jury." *Aetna Life Insurance Co. v. Ward*, 140 U.S. 76, 88 (1891); *accord United States v. Scheffer*, 523 U.S. 303, 313 (1998). An employer's state of mind—whether it "honestly" believed its stated reason, and whether that belief rather than the employee's protected status in fact produced the discharge—is the paradigm of a question that turns on credibility and competing inferences, which Rule 56 reserves to the jury.

C. This record shows why: whether Delta's asserted belief was honest, and whether the concurrent duty policy was lawful or violated at all, are questions for a jury.

The courts below found that petitioners carried their step-one burden: the investigations and adverse actions against them were motivated by their performance of military duty. App. 6a, 9a. And the "standalone" reasons the district court articulated were dominated by asserted violations of the concurrent duty policy—performing military duty while in a paid status with Delta—and related leave-system charges. App. 67a, 70a. That rule prohibits nothing except the performance of military service. Whether Delta honestly believed the concurrent duty policy was lawful; whether Delta honestly believed petitioners violated it; and whether that belief, rather than hostility to their service, actually produced the constructive terminations, are each questions of fact: the managers who enforced the policy had themselves performed concurrent duty and described the policy in writing as "a slippery slope" the company had "gone down," Dist. Ct. dkt. 198-32; the policy as enforced diverged from the policy as written, App. 10a; identical "double-dipping" by non-military pilots went undisciplined, Dist. Ct. dkt. 198-36; and the sick-leave rationale surfaced only after a termination worksheet that listed military-leave grounds alone. App. 103a-106a. A court cannot resolve the honesty, content, or operative force of that belief at summary judgment without weighing credibility and choosing among competing inferences—the very functions Rule 56 withholds from courts and preserves for juries. Even the circuits most receptive to the honest-belief doctrine treat the sincerity of an asserted belief as a jury question on a record like this one. *Young*, 468 F.3d at 1250; *Orr*, 531 F.3d at 1216–18. The Eleventh Circuit resolved it as a matter of law. On either side of either conflict, that was error—and only this Court can restore uniformity.

III. The Question Presented Is Important, And This Case Is A Clean Vehicle For Resolving It.

USERRA is the sole federal guarantee that the hundreds of thousands of National Guard and Reserve members employed by civilian employers will not suffer for answering their country's call. The statute rests on a recognition of sacrifice: reservists are "expected to leave their civilian jobs, sometimes for years on end," *Myrick*, 69 F.4th at 1312, and Congress legislated "with the full understanding" that their "frequent absences from work" could "cause considerable inconvenience to an employer." *Clarkson*, 59 F.4th at 436 (quoting *Monroe v. Standard Oil Co.*, 452 U.S. 549, 555 (1981)). "Nevertheless, Congress has provided that employers may not rid themselves of such inconveniences and productivity losses by discharging or otherwise disadvantaging employee-reservists solely because of their military obligations." *Id.* Because of the sacrifice the Nation asks of those who serve, this Court has instructed for eighty years that these statutes are "always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone*, 319 U.S. at 575; *see Fishgold*, 328 U.S. at 285; *King*, 502 U.S. at 220 n.9. The honest-belief rule construes the statute in precisely the opposite direction: it reads into § 4311(c)(1) a judge-made escape from liability that Congress did not enact, and it resolves every interpretive doubt against the veteran.

The nation's reliance on the reserve components has only deepened, and Congress underscored the point by strengthening USERRA in the 2025 Dole Act. Pub. L. No. 118-210, 138 Stat. 2797. This Court has recently reaffirmed the seriousness of USERRA's guarantees.

See Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580 (2022). Yet the rules of decision that determine whether USERRA claims ever reach a factfinder now differ openly by circuit: the employer's burden under § 4311(c)(1) is a burden of persuasion in the First, Third, Seventh, and Federal Circuits, but a subjective honest-belief showing in the Eleventh. Servicemembers' federal rights should not depend on where their employer is headquartered.

This case is a clean vehicle. The courts below accepted that petitioners established a prima facie case that military service was a motivating factor in their constructive terminations (App. 6a, 9a), so Delta's § 4311(c)(1) defense is the only live issue, and the standard governing that defense dictates the outcome. The decision below is published and precedential. And the record presents the honest-belief problem in unusually stark relief: the employer's own contemporaneous termination worksheet identified only military-leave grounds (App. 103a-106a), yet the court of appeals held the employer's later-asserted belief in a different rationale dispositive as a matter of law.

Nor does the brevity of the panel's honest-belief discussion obscure the question; it underscores how settled the rule now is in the Eleventh Circuit. The panel did not hold that Delta carried its affirmative defense by proving that petitioners actually violated its sick-leave or concurrent-duty policies. It held instead that the truth of the asserted violations did not matter—Delta prevailed "even if that reason was mistaken" (App. 11a)—and that petitioners' contrary evidence was beside the point because "the focus of the second step . . . is on the employer's reason for terminating the employee, not the employee's conduct." App. 11a. The honest-belief rule was therefore the necessary ground of the judgment, not an alternative holding. Had the panel instead required Delta to *prove* that it would have taken the same actions absent petitioners' military service, the disputed record—the military-leave-only termination worksheet, the shifting explanations, the selective enforcement, and the documented hostility—would have precluded summary judgment. The question presented is accordingly dispositive here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 28, 2026

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED APRIL 22, 2026

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 24-11946

JEREMY SORENSON, *et al.*,
AN INDIVIDUAL,

Plaintiffs,

ADAM MCLEAN, AN INDIVIDUAL,
JAMES DOYLE, AN INDIVIDUAL, ON BEHALF
OF THEMSELVES AND ALL OTHERS
SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

DELTA AIR LINES, INC.,
A DELAWARE CORPORATION,

Defendant- Appellee.

Filed April 22, 2026

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:17-cv-00541-ELR

Before WILLIAM PRYOR, Chief Judge, and LUCK and BRASHER, Circuit Judges.

Luck, Circuit Judge:

This appeal involves a dispute between an airline and two of its former pilots. Adam McLean and James Doyle worked for Delta Air Lines for nearly a decade. At the same time, they also served in the United States Air Force Reserve. The former pilots sued Delta alleging that the airline pushed them out because of their military service obligations, in violation of the Uniformed Services Employment and Reemployment Rights Act. They also claimed that Delta's pension-contribution and vacation-time-accrual benefit programs violated the Act. The district court sided with Delta and granted summary judgment for the airline on all three claims. This is McLean's and Doyle's appeal. After careful review, and with the benefit of oral argument, we affirm.

FACTUAL BACKGROUND

Delta's Leave Benefits and Policies

As part of their collective bargaining agreement, Delta's pilots receive a package of benefits. Four benefits in that package are relevant to this appeal.

First, Delta provides military leave to pilots who have military service obligations. When a pilot informs Delta that he has military duty, the company notes the military leave on the pilot's schedule and marks him as unavailable for work during the leave period. The "pilot performing military duty (on orders . . . or any other duty that is paid by the state or the U.S. government) is ineligible to perform Delta duties in any capacity (except while on military terminal leave)." The prohibition against working for Delta while on military orders is called the concurrent duty policy.

Second, Delta offers paid sick leave for pilots who are unable to fly for medical reasons. "Delta pilots are entitled to use sick leave only when a personal medical condition, physical or mental, disables the pilot from performing duties as a flight crewmember."

Third, Delta's compensation includes pension contributions for its pilots, even when they are on military leave. For pilots on military leave, Delta calculates the pension contribution using the "average line value," which projects the average number of hours that the pilot would work if he were not on leave and then multiplies that number by the pilot's hourly rate.

And fourth, Delta allows pilots on known leaves of absence to accrue vacation time. Delta offers this type of leave to pilots when it needs to reduce its labor costs. During a known leave of absence, a pilot remains "active" but does not fly any routes.

The plaintiffs, McLean and Doyle, worked as Delta pilots for nearly a decade. While flying for Delta, they also served as reservists in the United States Air Force.

McLean

In 2017, Delta investigated McLean for abusing his military-leave and sick-leave benefits. During its investigation, Delta learned that McLean had "routinely misused military leave and sick leave in multiple ways."

Once, for example, McLean told Delta that he was too sick to fly, took paid sick leave, and then went on to fly jets for the military while on sick leave. McLean did so despite an express warning from his Delta supervisor that he could be fired if he did side work while on sick leave. Delta discovered at least ten other times when McLean took paid sick leave and then performed military duty on the same day.

The investigation also revealed that, twenty-five times, McLean falsely informed Delta that he had military duty. Because Delta cannot prevent its employees from fulfilling their military service obligations, McLean's false reports kept Delta from scheduling him for work on those days—despite the fact he was available. McLean further violated Delta's military leave policies by failing to inform the airline of his military orders on over one hundred days. At least twice, McLean flew military jets while he was being paid to be on standby for Delta, meaning that if the airline had needed him, he wouldn't have been able to fly. When asked about these incidents, McLean denied abusing his military leave, but acknowledged how Delta could have thought he was doing so. In total, Delta found that McLean received at least $53,628.70 in unearned pay and benefits due to his abuse of sick and military leave.

Based on the findings of the investigation, Delta notified McLean that it intended to terminate his employment. The notice listed two reasons for termination. First, it recounted McLean's extensive "misuse of military leave" as an "independent ground[] for termination." Second, it laid out McLean's sick leave violations and explained that his abuse of Delta's sick-leave benefits provided an "independent basis for [his] termination." McLean was entitled to contest his termination, but instead he chose to resign.

Doyle

In 2015, Delta investigated Doyle for abusing his military-and sick-leave benefits. Delta became concerned about Doyle's use of sick leave when he told a supervisor that he had gone skiing over the New Year when he was supposed to be on sick leave with the flu. Another time, Doyle told Delta he could not fly because of a knee injury, but his military record showed that he flew test flights for the Air Force that same day. Delta also suspected that Doyle was abusing its leave policies by stringing together sick days with military leave and vacation days to extend his time off.

Based on his leave-request records, Doyle said he could understand why Delta would be concerned that he was abusing his sick-leave benefits, although he thought it was a misunderstanding. Before Delta finished investigating him, Doyle resigned.

PROCEDURAL HISTORY

McLean and Doyle sued Delta for violating the Uniformed Services Employment and Reemployment Rights Act. They brought three claims. First, they alleged that Delta discriminated against them by constructively terminating them because of their military service. Second, the pilots claimed that Delta contributed less to their pensions while they were on military leave than the

Act required. And third, they alleged that Delta allowed pilots on comparable types of leave to accrue vacation time, but not pilots on long-term military leave. [1]

Delta moved for summary judgment on all three claims, which the district court granted. First, as to the constructive-termination claim, the district court explained that McLean and Doyle had shown a prima facie case that Delta pressured them to resign because of their military service. But, the district court wrote, Delta was entitled to summary judgment because the evidence was undisputed that the airline had legitimate, nondiscriminatory reasons for the forced resignations: McLean and Doyle were abusing their sick-leave benefits.

Second, as to their pension-contribution claim, the district court determined that the pilots' compensation was not reasonably certain and fluctuated month-to-month. Thus, for the periods McLean and Doyle were away on military leave, Delta was obligated to contribute to their pensions their average rate of compensation over the last twelve months. *See* 38 U.S.C. § 4318(b)(3)(B). Because the evidence showed that Delta contributed more to McLean's and Doyle's pensions than they were entitled to under the Act, the district court granted summary judgment to the airline.

And third, as to the vacation-time claim, the district court concluded that McLean and Doyle were not entitled to accrue vacation time during periods of long-term military leave under the Act because there was no

1. There were other plaintiffs and other claims in the district court, but they are not relevant to this appeal.

evidence that Delta allowed pilots on a comparable type of leave to accrue vacation time.

McLean and Doyle appeal the summary judgment for Delta.

STANDARD OF REVIEW

We review de novo a district court's grant of summary judgment, viewing the evidence in the light most favorable to the non-moving party. *Gogel v. Kia Motors Mfg. of Ga.*, 967 F.3d 1121, 1134 (11th Cir. 2020) (en banc). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

DISCUSSION

We divide our discussion into three parts. First, we consider the summary judgment for Delta on McLean's and Doyle's constructive-termination claim. Then, we address the summary judgment on their pension-contribution claim. Finally, we review the summary judgment on their vacation-time claim.

The Constructive-Termination Claim

McLean and Doyle brought their constructive-termination claim under the general discrimination provision of the Act. That provision says a "member of . . . a uniformed service shall not be denied . . . any benefit of employment by an employer on the basis of that membership." 38 U.S.C. § 4311(a). "An employer shall be considered to have engaged in actions prohibited . . . if the person's membership . . . in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership. . . ." *Id.* § 4311(c)(1).

In the summary-judgment context, we've explained that the general discrimination provision sets out a two-step burden-shifting framework. At the first step, the plaintiff may "establish his prima facie case" by showing a genuine dispute that his military status "was a motivating factor" in his termination (or any other denial of an employment benefit). *See Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1238 (11th Cir. 2005), *superseded by statute on other grounds*, Pub. L. No. 111-275 § 702, 124 Stat. 2864, 2887-88 (2010). "[M]ilitary status is a motivating factor if the defendant relied on, took into account, considered, or conditioned its decision on that consideration." *Id.* (citation modified).

If a plaintiff makes out a prima facie case, at the second step, "the burden shifts to the employer" to show undisputed evidence "that legitimate reasons, standing alone, would have induced the employer to take the same adverse action." *Id.* at 1238-39 (citation modified); *see also Thomas v. Broward Cnty. Sheriff's Off.*, 71 F.4th 1305, 1312 (11th Cir. 2023). Put together, in evaluating summary judgment under the Act's general discrimination provision, "there must be an initial showing by the employee that military status was at least a motivating . . . factor" in the adverse employment action, "upon which the [employer] must" show "that the action would have been taken despite the protected status." *Coffman*, 411 F.3d at 1239.

As to the first step, the district court concluded that McLean and Doyle established a prima facie case that their constructive termination was motivated, at least in part, by their military service.[2] And, at the second step, the district court ruled that Delta would have constructively terminated both pilots—irrespective of their military service—for the legitimate reason, standing alone, that they abused their sick-leave benefits. The summary judgment evidence supports the district court's conclusion.

Starting with McLean, he admitted he used his sick-leave benefits to perform military duties. McLean told Delta that he was too sick to fly, took paid sick leave, and then flew jets for the military while he was on leave. He did so despite a warning from his supervisor that he could be fired if Delta learned he was flying while on sick leave. Delta's investigation into McLean revealed ten other times when he took sick leave but then worked for the military while on leave. Delta expressed an intent to fire McLean because he abused his sick-leave benefits. The airline's notice of intended termination included that his "misuse of Delta sick leave provide[d] an independent basis for [his] termination."

Doyle, too, abused his sick-leave benefits. Doyle told a supervisor that he went skiing over New Year's while on sick leave with the flu. As part of its investigation, Delta found another incident where Doyle called in sick with a knee injury but then flew jets for the military on the same day. Delta questioned Doyle about his "sudden increase in [sick leave] usage beginning in 2012 and use of [sick leave]

2. We assume (without deciding) that McLean and Doyle were constructively terminated.

in conjunction with" other types of leave "in what appeared to be an attempt to extend time off." Doyle later resigned.

Against this evidence, McLean and Doyle argue that Delta's independent, standalone reason for constructively terminating them was really that they violated its concurrent duty policy. Because the concurrent duty policy only applies to those in military service, the argument goes, a termination based on that policy is a termination because of their military service in violation of the Act's general discrimination provision. But the pilots confuse Delta's concurrent duty policy with its sick-leave benefits. The concurrent duty policy prohibits a pilot from performing military duty while also being paid by Delta. It has nothing to do with sick leave. The sick-leave benefits allow a pilot to take paid time off only if he is medically unable to perform his job.

McLean points to notes from a Delta meeting agenda which lists his name next to "preparing for termination" for "[military leave] abuse, manipulation, [and the] concurrent duty [policy]." But all these notes show is that McLean's concurrent duty violations were one of several reasons Delta had for firing him. Delta was also concerned about McLean's "manipulation," which is consistent with his abuse of sick leave. Indeed, McLean's notice of termination listed his abuse of military and sick leave as separate, "independent" grounds for his termination.

Similarly, Delta questioned Doyle because he told his supervisor that he abused his sick-leave benefits and appeared to be stringing together sick leave with other types of leave to extend his time off. The undisputed evidence supports Delta's standalone reason for constructively terminating McLean and Doyle: notwithstanding their military service, they abused their sick-leave benefits.

The pilots also argue that because they denied abusing their sick-leave benefits there was a factual dispute for trial. But the focus of the second step in the burden-shifting framework is on the employer's reason for terminating the employee, not the employee's conduct. The question is whether the employer would have taken the same action, for an independent, standalone reason, regardless of the employee's military status. "An employer who fires an employee under the mistaken but honest impression that the employee violated a work rule is not liable for discriminatory conduct." *Cf. Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1363 n.3 (11th Cir. 1999); *Flowers v. Troup Cnty. Sch. Dist.*, 803 F.3d 1327, 1338 (11th Cir. 2015) ("[E]mployers are free to fire their employees for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as [the] action is not for a discriminatory reason." (citation modified)). Here, there's no dispute that Delta's independent, standalone reason for pushing out McLean and Doyle was that they abused their sick-leave benefits, even if that reason was mistaken.

The Pension-Contribution Claim

The pilots' pension-contribution claim involved a different provision of the Act governing pension benefit plans. Under that provision, where an employee's compensation includes pension benefits, while he's on military leave, he must "be treated as not having incurred a break in service." 38 U.S.C. § 4318(a)(2)(A). In other words, while on military leave, the employee must receive the same pension benefits that he would have received had he been working instead of on military leave.

The Act requires the employer to "compute[]" the employee's compensation in one of two ways. *Id.* § 4318(b)(3). By default, the employer must compensate its employee on military leave using "the rate the employee would have received but for the period of [military] service." *Id.* § 4318(b)(3)(A). But there's a different rule when "the determination of such rate is not reasonably certain." *Id.* § 4318(b)(3)(B). In that case, the employer must compensate the employee on military leave "on the basis of the employee's average rate of compensation during the [twelve]-month period immediately preceding" the period of military service. *Id.*

In reviewing the summary judgment evidence, the district court concluded that the pilots' compensation—including payments made for their pensions—did not violate the Act's pension-benefits provision because their compensation was not reasonably certain. It also found that Delta paid more than the pilots' average rate of compensation during the twelve-month period before their military leave. The pilots challenge the district court's first conclusion.

But the summary judgment evidence is undisputed that McLean's and Doyle's compensation was not reasonably certain. Delta's policies allowed pilots flexibility in fixing their schedules, and McLean's and Doyle's hours varied considerably. During months without leave, for example, McLean's hours ranged from seventy to ninety-nine, while Doyle's hours varied between seventy-two and 104. In January 2011, McLean worked seventy-one hours. In February, he worked ninety-five hours. And in March, he worked eighty hours. It was the same story for Doyle; his hours were also inconsistent. In February 2012, for instance, Doyle worked seventy-six hours. The next month he logged 104 hours.

To rebut this evidence, the pilots point to their expert's report, which they argue shows that the average rate of compensation for Delta's non-military pilots, as a group, was reasonably certain. But that testimony is immaterial under the Act's pension-benefits provision, which focuses on the reasonable certainty of "*the employee's* compensation," 38 U.S.C. § 4318(b)(3) (emphasis added), and not the group the employee is in. The Act's pension-benefits provision requires the employer to compensate the employee "at the rate *the employee* would have received but for the period of service," or, if the employee's rate of compensation "is not reasonably certain, on the basis of *the employee's* average rate of compensation" in the twelve months before the military leave. *Id.* § 4318(b)(3)(A) 0-(B) (emphasis added). The pilots' expert didn't do that. She did not calculate the rate of compensation for McLean and Doyle. While the average non-military pilot may have had a reasonably certain rate of compensation, we know from the record that McLean and Doyle did not.

So, under the Act's pension-benefits provision, Delta was allowed to compensate McLean and Doyle while they were on military leave "on the basis of [their] average rate of compensation during the [twelve]-month period immediately preceding" their military leave. *Id.* § 4318(b)(3)(B). It is undisputed that Delta did that and more. Delta's average-line-value formula, implemented "to benefit military reservists," resulted in greater pension contributions for McLean and Doyle than a normal twelve-month average would have. Delta was free to contribute more to McLean's and Doyle's pensions than the law required. *See* 20 C.F.R. § 1002.7(a) (explaining the Act "establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects" and that "an employer may provide greater rights and benefits than [the Act] requires").

The Vacation-Time Claim

McLean's and Doyle's final claim was that Delta did not allow them to accrue vacation time while they were on long-term military leave but permitted pilots on other types of comparable leave to accrue vacation time while on leave. The different treatment for long-term military leave, they say, violated the Act's rights-and-benefits provision. Under that provision,

> a person who is absent from a position of employment by reason of service in the uniformed services shall be –
>
> (A) deemed to be on furlough or leave of absence while performing such service; and
>
> (B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and

> pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.

38 U.S.C. § 4316(b)(1). The Act's regulations explain that "accrual of vacation leave . . . must be provided by an employer to an employee on a military leave of absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence." 20 C.F.R. § 1002.150(c).

"[T]o determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare." *Id.* § 1002.150(b). But "other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave" are also relevant. *Id.* "It is up to the employee to demonstrate that any given stretch of military leave is comparable to a form of non[-]military leave that is accorded a benefit." *White v. United Airlines, Inc.*, 987 F.3d 616, 624 (7th Cir. 2021).

The district court granted summary judgment for Delta on the pilots' vacation-time claim because they did not demonstrate that their long-term military leave was comparable to a form of non-military leave that accrued vacation time. On appeal, McLean and Doyle argue that this was error. They point to known leaves of absence as a comparable form of non-military leave. Delta, they explain, violated the Act's rights-and-benefits provision because pilots on comparable known leaves of absence accrued vacation time while pilots on long-term military leave did not.

But the undisputed summary judgment evidence shows that the two kinds of leave were not comparable. First, as to duration, a known leave of absence is only offered one month at a time. In contrast, long-term military leave, as the name suggests, lasts a long time—even years. For example, the evidence shows that Doyle was on long-term military leave from February 2008 to November 2011—more than three years.

Second, as to purpose, Delta offers senior pilots a known leave of absence when the company is overstaffed and needs to furlough employees. Pilots are considered active while on a known leave of absence—and can be recalled—but do not fly any flights. Long-term military leave, on the other hand, allows a pilot to perform military service and Delta cannot call the pilot back to work.

And third, as to the ability to choose when to take leave, Delta pilots can decide for themselves if they want to take a known leave of absence when it is offered. Military pilots have no choice. They must take leave when they are ordered to report to military service.

In short, none of the factors show that known leaves of absence are comparable to long-term military leave. Because they are not comparable, Delta was entitled to summary judgment on the pilots' vacation-time claim.[3] *Cf.*

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3. For the first time in their summary judgment response, the pilots added to their vacation-time claim that long-term military leave was comparable to special conflict military leave, a different type of military leave offered by Delta. The district court rejected this late amendment because a plaintiff "may

Clarkson v. Alaska Airlines, Inc., 59 F.4th 424, 434 (9th Cir. 2023) (explaining that summary judgment is appropriate where "the facts of a case suggest that no reasonable jury could see enough commonality for a meaningful comparison" (citation modified)).

AFFIRMED.

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not amend her complaint through argument in a brief opposing summary judgment." *See Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004). We reject it for the same reason. The proper procedure for the pilots to assert a new "basis for entitlement" was to seek to amend their complaint. *See Hurlbert v. St. Mary's Health Care Sys., Inc.* 439 F.3d 1286, 1297 (11th Cir. 2006). Because they didn't, the vacation-time claim based on special conflict military leave was not properly before the district court and is not properly before us on appeal.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 24-11946

JEREMY SORENSON, *et al.*,
AN INDIVIDUAL,

Plaintiffs,

ADAM MCLEAN, AN INDIVIDUAL,
JAMES DOYLE, AN INDIVIDUAL, ON BEHALF
OF THEMSELVES AND ALL OTHERS
SIMILARLY SITUATED,

Plaintiffs-Appellants,

versus

DELTA AIR LINES, INC.,
A DELAWARE CORPORATION,

Defendant- Appellee.

ERRATA SHEET

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:17-cv-00541-ELR

The opinion has been changed as follows:

The footnote on page 17 of the opinion toward the end of the footnote the stray quotation mark has been removed.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED MARCH 31, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

1:17-CV-00541-ELR

JEREMY SORENSON, *et al.*,

Plaintiffs,

v.

DELTA AIR LINES, INC.,
A DELAWARE CORPORATION,

Defendant.

Signed March 31, 2023

ORDER

There are several matters pending before the Court. The Court sets forth its reasoning and conclusions below.

I. Background[1]

This suit stems from employment disputes between five (5) military-affiliated pilots and their former employer, Delta Air Lines, Inc. *See generally* Compl. [Doc. 1]. Plaintiffs Jeremy Sorenson, Randal Reep, Randal Smith, James Doyle, and Adam McLean initiated this suit on behalf of themselves and a putative class of all others similarly situated against Defendant, alleging claims pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301, *et seq.* ("USERRA").[2] *See generally id.*

Plaintiff Sorenson has been employed as a pilot for Defendant since he was hired on February 14, 2017; he was also a member of the Indiana National Guard and United States Air Force Reserves at the time Defendant hired him until he retired from the armed services in April 2020. *See* Deposition of Jeremy Sorenson ("Sorenson

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1. The facts discussed herein are undisputed unless noted otherwise. The Court excludes proposed facts that are immaterial, includes facts drawn from its own review of the record, and considers all proposed facts in light of the standard for summary judgment. *See* LR 56.1(B)(2)(a)(2)(iii), NDGa.; *see also* Fed. R. Civ. P. 56(c)(3) ("The court need consider only the cited materials, but it may consider other materials in the record."); *Tomasini v. Mt. Sinai Med. Ctr. of Fla.*, 315 F. Supp. 2d 1252, 1260 n.11 (S.D. Fla. 2004) (explaining that a district court is not obligated to "scour the record" to determine whether triable issues exist).

2. For factual and procedural history beyond that included herein, the Court refers to its Orders dated February 16, 2018, and April 29, 2022. [*See* Docs. 24, 191].

Dep.") at 28:11-30:15 [Doc. 175]. Plaintiff Reep worked for Defendant as a pilot from April 16, 1998, through October 11, 2016; he was also a member of the Florida Air National Guard during that time. *See* Deposition of Randal Reep ("Reep Dep.") at 17:7-19:21 [Doc. 172]; Declaration of Jason Zawislak ("Zawislak Decl.") ¶ 12 [Doc. 178-3]. Defendant hired Plaintiff Smith as a pilot on September 3, 2007; he was a member of the United States Navy at that time and until he retired from military service on January 31, 2017. *See* Deposition of Randal Smith ("Smith Dep.") at 83:10-12, 42:15-43:2 [Doc. 174]. As explained further below, Plaintiff Smith no longer works for Defendant. Plaintiff McLean has been a member of the United States Air Force Reserves since 2009 (prior to which he was a member of the Iowa Air National Guard), and he worked for Defendant as a pilot when it merged with another airline that employed him during 2008 until he resigned on February 22, 2017. *See* Deposition of Adam McLean ("McLean Dep.") at 91:16-92:4, 115:21-24, 274:24-275:5 [Doc. 171]. Defendant employed Plaintiff Doyle as a pilot from April 16, 2007, until he resigned on September 8, 2016; he is also a member of the Air Force Reserves and was during the time he was employed by Defendant. *See* Deposition of James Doyle ("Doyle Dep.") at 30:8-12, 49:22-50:2, 61:19-24 [Doc. 170].

A. Plaintiffs' Employment Relationship with Defendant

Defendant's pilots—such as Plaintiffs—work pursuant to the terms of the Pilot Working Agreement (the "PWA"), a collective bargaining agreement between

Defendant and the relevant pilots' union. *See* Defendant's "Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment" ("Def.'s SOMF") ¶ 4 [Doc. 178-1]; Zawislak Decl. ¶ 3. Defendant's pilots are paid based on the number of flight hours they log each month—rather than a fixed salary—and each pilot has an hourly rate that varies based on seniority, the type of aircraft the pilot flies, and the routes the pilot flies (for example, Defendant's pilots receive bonus pay for certain flight routes that are more difficult to staff). *See* Def.'s SOMF ¶¶ 5-11; Zawislak Decl. ¶ 5. A pilot's monthly number of flight hours per month necessarily varies because, pursuant to the PWA, Defendant's pilots are able to use a Preferential Bidding System ("PBS") to shape their own schedules for the upcoming month. *See* Def.'s SOMF ¶ 13; Zawislak Decl. ¶ 6.

As a result of this PBS, Defendant's pilots "have significant discretion and ability to choose the number, type, and dates of [their] hours for the upcoming month[,]" although ultimately, Defendant must approve a pilot's selections (or "bids"). *See* Zawislak Decl. ¶ 6; *see also* Plaintiffs Smith, Doyle, and McLean's "Response to Defendant's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment and Statement of Additional Material Facts in Support of Opposition" ("Pls. Smith, Doyle, and McLean's Resp. to Def.'s SOMF") ¶ 16 [Doc. 206-1].[3] And even after a pilot's initial work

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3. Plaintiffs Smith, Doyle, and McLean object to nearly all of Defendant's proffered material facts. *See generally* Pls. Smith, Doyle, and McLean's Resp. to Def.'s SOMF. Almost all of their objections are argumentative (as are almost all of their responses,

schedule has been established for the upcoming month through the PBS, that schedule frequently changes as pilots swap, drop, and pick up flights according to "personal preferences[,]" or if out-of-the-ordinary events require staff and schedule changes. *See* Zawislak Decl. ¶ 8; Def.'s SOMF ¶¶ 15, 17. Regardless of seniority or role, Defendant's pilots typically are not assigned to fly (or be "on call" to fly, which is called a "reserve day") more than eighteen (18) days per month and are often scheduled to work even fewer days per month. *See* Zawislak Decl. ¶ 9; Def.'s SOMF ¶¶ 19-20. Due to the flexible nature of Defendant's work schedule system, Defendant's "pilots are effectively part-time employees who have substantial," but not total, "discretion in setting their schedules and work hours" and frequently "have other careers." *See* Zawislak Decl. ¶ 9; Def.'s SOMF ¶ 21.

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even as to those facts they do not dispute), unsupported by the record, immaterial, long-winded, or some combination of these. *E.g.*, *id.* ¶ 22 (disputing Defendant's proffered fact that Plaintiff Reep "was a practicing attorney while also flying for Delta" by responding that "Reep was a practicing attorney while he was also employed by Delta, but there is no evidence to suggest he practiced law while *flying* for Delta" (emphasis in original)). Such objections violate Local Rule 56.1(B)(2)(a), which requires a response to the movant's statement of material facts "contain . . . *concise, nonargumentative* responses[.]" *See* LR 56.1(B)(2)(a)(1), NDGa. (emphasis added). The same Local Rule provides that the Court "will deem each of the movant's facts as admitted" where a respondent fails to "directly refute[] the movant's fact with concise responses supported by specific citations to evidence[.]" *See id.* 56.1(B)(2)(a)(2). Thus, where the Court includes a proposed fact with no comment on a corresponding objection, the corresponding objection has been considered and overruled, or the proposed fact has been deemed admitted. *See id.*

At various times during their employment with Defendant, all Plaintiffs took leaves of absence to perform military duties, which, in this case, are referred to as Military Leave(s) of Absence ("MLOA"). *See* Def.'s SOMF ¶¶ 24-28. When military-affiliated pilots receive notice of upcoming military duties, they provide notice to Defendant, which notes the MLOA and does not schedule the pilots to work that same day for which MLOA is scheduled (pursuant to Defendant's "concurrent duty" policy). *See* Def.'s SOMF ¶¶ 46-47, 65. Defendant does not permit its pilots to work for Defendant or be on call for Defendant during designated MLOA days.[4] *See id.*; *see also* Zawislak Decl. ¶ 10. According to Defendant, it does not discriminate against military-affiliated pilots who take MLOA and appropriately determines all employment-related benefits for such employees so that they are in no way penalized for fulfilling their military obligations. *See, e.g.*, Def.'s SOMF ¶¶ 48, 60. Conversely, Plaintiffs claim that Defendant discriminated against them and deprived them of employment benefits because they took MLOA. *See, e.g.*, Pls. Smith, Doyle, and McLean's Resp. to Def.'s SOMF ¶¶ 48, 60.

B. Overview of USERRA and Relevant Provisions

In 1994, Congress enacted USERRA:

(1) to encourage noncareer service in the uniformed services by eliminating or

4. It is Defendant's position that it "cannot require [a] pilot to perform any duties" for Defendant on "legally mandated MLOA days[.]" *See* Zawislak Decl. ¶ 10; Def.'s SOMF ¶¶ 63, 65.

minimizing the disadvantages to civilian careers and employment which can result from such service;

(2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and

(3) to prohibit discrimination against persons because of their service in the uniformed services.

38 U.S.C. § 4301(a). To achieves these ends, USERRA makes it unlawful for any employer to deny "any benefit of employment" to any "person who . . . has an obligation to perform service in a uniformed service." 38 U.S.C. § 4311(a). Specifically, in pertinent part, USERRA states:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

Id. In addition to prohibiting discrimination against employees who perform military service, USERRA and its implementing regulations provide guidelines as to how employers must calculate employment benefits for the time such employees are on MLOA. *See* 38 U.S.C. § 4316(b)(1).

1. Seniority-based benefits

In general, an employee "who is absent from a position of employment by reason of service in the uniformed services shall be[] deemed to be on furlough or leave of absence while performing such service." 38 U.S.C. § 4316(b)(1)(A). During any MLOA, USERRA requires that an employee still accrue any seniority-based benefits as if he or she was "continuously employed" with the civilian employer and did not have any "break in employment" by virtue of taking MLOA. *See* 38 U.S.C. § 4316(a) ("A person who is reemployed under this chapter is entitled to the *seniority and other rights and benefits determined by seniority* that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed." (emphasis added)). Put differently, "the period of absence from employment due to or necessitated by [MLOA] is not considered a break in employment" for purposes of determining an employee's "seniority and seniority-based rights and benefits." *See* 20 C.F.R. § 1002.210.

2. Non-seniority-based benefits

For those employment benefits that are not seniority-based, USERRA provides that employees who take MLOA are "entitled to such . . . rights and benefits . . . as are generally provided by the employer of the person to employees having similar seniority, status, and pay[, and] who are on furlough or leave of absence[.]"[5] *See* 38 U.S.C. § 4316(b)(1)(B); *see also* 20 C.F.R. § 1002.150(a) ("The non-seniority rights and benefits to which an employee is entitled during a period of service are those that the employer provides to similarly situated employees[,]" including "those rights and benefits . . . that are provided to similarly situated employees on furlough or leave of absence."). "If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee" on MLOA "must be given the most favorable treatment accorded to any comparable form of leave[.]" 20 C.F.R. § 1002.150(b).

II. Procedural History

On February 13, 2017, Plaintiffs filed their original Complaint. *See* Compl. They subsequently amended the Complaint twice. *See* Am. Compl. [Doc. 12]; *see also* 2d Am. Compl. [Doc. 84]. In their operative pleading, Plaintiffs bring four (4) causes of action pursuant to USERRA,

5. "As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on [MLOA] only if the employer provides that benefit to similarly situated employees on comparable leaves of absence." 20 C.F.R. § 1002.150(c).

which they label: (1) pension contributions, (2) vacation time accrual, (3) profit sharing, and (4) discrimination.[6] *See generally* 2d Am. Compl. Plaintiffs purport to bring their claims on behalf of themselves and a potential class of "pilots who are or were employed by [Defendant], and were or are members of the United States Armed Services or National Guard, who took [MLOA] from April 16, 1998[,] to the present." *Id.* ¶ 98.

On December 9, 2021, Plaintiffs Smith, McLean, and Doyle submitted a "Motion for Appointment of Interim Class Counsel" seeking to have their lead attorneys, Mr. Gene Stonebarger and Mr. Charles Billy (together, "Proposed Co-Lead Class Counsel"), appointed by the Court as interim co-lead class counsel. [*See* Doc. 139]. Plaintiffs Sorenson and Reep and their lead attorney, Ms. Crystal Matter, did not join in that motion. [*See id.*] Rather, Plaintiffs Sorenson and Reep (through Ms. Matter) submitted an "*Ex Parte* Notice and Motion for Permission to File Motion for Injunctive Relief against Mr. Gene J. Stonebarger and Mr. Charles M. Billy *In Camera* or Under Seal, Also to be Heard *Ex Parte*[,]" by which they sought to be heard regarding purported misconduct by Messrs. Stonebarger and Billy. [*See* Doc. 137; 191 at 2-3]. Magistrate Judge Alan J. Baverman of this district granted that motion in part and scheduled an *ex parte* hearing with only Plaintiffs' counsel for December 13, 2021. [Doc. 140].

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6. Plaintiffs allege three (3) theories in support of their USERRA discrimination claim, which they label as "counts": (a) "general harassment," (b) "concurrent duty," and (c) "five-year limit." *See* 2d Am. Compl. ¶¶ 143-88.

On December 13, 2021, Plaintiffs and their various attorneys appeared before Magistrate Judge Baverman for the *ex parte* hearing. [Doc. 141]. During that *ex parte* hearing and in a minute order memorializing the proceedings, Magistrate Judge Baverman "reminded Plaintiffs that they must be represented in this court by a member of the Bar of the Court and not just counsel admitted *pro hac vice.*" [*Id.*]

The next day, on December 14, 2021, local counsel for all Plaintiffs, Mr. Joseph Coomes, filed a motion to withdraw from this case because "certain conflicts have arisen among . . . Plaintiffs and their counsel (the nature of which were disclosed to the Court in the context of the *ex parte* hearing conducted December 13, 2021)." [*See* Doc. 142 at 2]. In his motion to withdraw, Mr. Coomes noted that Plaintiffs Smith, Doyle, and McLean (along with their lead counsel, Messrs. Stonebarger and Billy) had already obtained substitute local counsel: Mr. Stephen Anderson, who entered his notice of appearance on December 9, 2021. [*See* Docs. 138 at 1; 142 at 2]. Further, Mr. Coomes explained in his motion that he had advised Plaintiffs Reep and Sorenson that "they are required to be represented by local counsel admitted as a regular member of this Court" and that their lead counsel, Ms. Matter, is not such an attorney as she only appears before this Court on a *pro hac vice* basis. [*See* Doc. 142 at 3]. Plaintiffs Reep and Sorenson objected to Mr. Coomes' withdrawal. [*See id.* at 2-3].

At the request of Plaintiffs Reep and Sorenson, the undersigned scheduled an *ex parte* hearing for January 27, 2022, to discuss (among other things) Mr. Coomes' motion and the issue of local counsel as it pertained to Plaintiffs Reep and Sorenson. [*See* Doc. 147]. At the January 27, 2022 hearing, the Court discussed the local counsel requirement with all Plaintiffs and their attorneys, and, later that day, issued an Order granting Mr. Coomes' motion to withdraw. [*See* Docs. 149, 150]. Thus, Ms. Matter and her clients were put on specific notice of the local counsel requirement contained in the Local Rules of this district at least three (3) times: once by Mr. Coomes prior to his withdrawal, once in a hearing before Magistrate Judge Baverman, and once in hearing before the undersigned. [*See* Docs. 141, 150]. Subsequently, Mr. Alexander Cyclone Covey entered an appearance as local counsel for Plaintiffs Reep and Sorenson on February 7, 2022. [*See* Doc. 152].

Thereafter, on February 10, 2022, Plaintiffs Sorenson and Reep filed a response in opposition to Plaintiffs Smith, Doyle, and McLean's motion to appoint interim class counsel and claimed that Messrs. Stonebarger and Billy had engaged in "gross attorney misconduct" by supposedly interfering with Ms. Matter's ability to represent them. [*See generally* Doc. 153]. In their response brief, Plaintiffs Sorenson and Reep request that Ms. Matter be appointed interim class counsel or co-lead interim class counsel alongside Messrs. Stonebarger and Billy. [*See id.*] Although Defendant had not previously challenged the motion to appoint Messrs. Stonebarger and Billy as co-lead interim class counsel, it requested leave to file a response after Plaintiffs Reep and Sorenson brought forth their allegations of attorney misconduct. [*See* Doc.

160]. In an Order dated April 29, 2022, the Court accepted Defendant's response in opposition to the interim class counsel motion attached to Defendant's motion for leave to file the same. [*See* Docs. 160-1; 191 at 11-14].

On March 14, 2022, Defendant filed its instant "Motion for Summary Judgment" seeking judgment as a matter of law on all five (5) Plaintiffs' individual claims. [Doc. 178]. On May 12 and 13, 2022, Messrs. Stonebarger and Billy timely submitted individual response briefs in opposition on behalf of all five (5) Plaintiffs, even Plaintiffs Reep and Sorenson, claiming they did so out of an "abundance of caution."[7] [*See* Docs. 191 at 23; 206; 207; 208; 209 at 1; 210 at 1]. Also on May 13, 2022, Ms. Matter filed individual response briefs in opposition to Defendant's summary judgment motion on behalf of Plaintiffs Reep and Sorenson. [*See* Docs. 211, 212].

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7. The Court notes that Messrs. Stonebarger and Billy signed the response briefs filed on behalf of Plaintiffs Reep and Sorenson as "Attorneys for Plaintiffs Randal Reep, Randal Smith, Adam Mc[L]ean, James Doyle, and the Putative Class[.]" [*See* Docs. 209 at 26; 210 at 26]. However, in the response briefs Messrs. Stonebarger and Billy submitted and signed on behalf of Plaintiffs Smith, McLean, and Doyle, Plaintiffs Sorenson and Reep's names are noticeably absent from the text beneath the attorney signature blocks. [*See* Docs. 206 at 25-26; 207 at 26; 208 at 25-26] (all indicating beneath Messrs. Stonebarger and Billy's signatures that they are "Attorneys for Plaintiffs Randal Smith, Adam Mc[L]ean, James Doyle, and the Putative Class[,]" but not Plaintiffs Sorenson and Reep). Otherwise, at no point have Messrs. Stonebarger or Billy indicated that they represent Plaintiff Sorenson individually. [*See, e.g.*, Doc. 210 at 26].

Next, on May 19, 2022, through Ms. Matter, Plaintiffs Reep and Sorenson each submitted a "Notice of Filing of Errata to [Their] Response[s] in Opposition to Motion for Summary Judgment[,]" by which they purport to "promptly" correct multiple "clerical errors" in their summary judgment response briefs. [*See* Docs. 214, 215]. And on July 7, 2022, Plaintiffs Smith, Doyle, and McLean filed a "Motion to File a Sur-Reply to Defendant's Reply Brief in Support of its Motion for Summary Judgment." [Doc. 223]. Defendant opposes Plaintiffs Smith, Doyle, and McLean's motion to file a surreply. [*See* Doc. 224]. Having been fully briefed, Defendant's motion for summary judgment and Plaintiffs Smith, Doyle, and McLean's motion to appoint interim class counsel and motion to file a surreply are ripe for the Court's review. [Docs. 139, 178, 223].

III. Defendant's Summary Judgment Motion

The Court now turns to Defendant's motion for summary judgment, which Plaintiffs Smith, Doyle, and McLean oppose (collectively, "Opposing Plaintiffs"). [*See* Docs. 178-2, 206, 207, 208, 220]. For the reasons set forth below, Defendant's motion is deemed unopposed by Plaintiffs Sorenson and Reep.[8] The Court begins with the relevant legal standard.

8. Although the Court considers Defendant's motion for summary judgment unopposed by Plaintiffs Sorenson and Reep, the Court still examine the merits of that motion as applied to Plaintiffs Sorenson and Reep's claims. *See United States v. One Piece of Real Prop. Located at 5800 SW 74th Ave., Mia.*, 363 F.3d 1099, 1101 (11th Cir. 2004).

A. Legal Standard

The Court may grant summary judgment only if the record shows "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A factual dispute is genuine if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A factual dispute is material if resolving the factual issue might change the suit's outcome pursuant to the governing law. *See id.*

At summary judgment, the moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *Brooks v. Cnty. Comm'n of Jefferson Cnty.*, 446 F.3d 1160, 1162 (11th Cir. 2006). The Court must view all evidence in the record in the light most favorable to the non-moving party and resolve all factual disputes in the non-moving party's favor. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The moving party need not positively disprove the opponent's case; rather, the moving party must show the lack of evidentiary support for the non-moving party's position. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

If the moving party meets this initial burden, it shifts to the non-moving party to present competent evidence beyond the pleadings to show that there is a genuine issue for trial. *See id.* at 324-26, 106 S.Ct. 2548. The responding party must set forth "specific facts showing that there is a genuine issue for trial." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1116 n.3 (11th Cir. 1993) (citing Fed. R. Civ. P. 56(e)). "If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." *Id.* The essential question is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52, 106 S.Ct. 2505. "The mere existence of a scintilla of evidence" supporting the non-movant's case is insufficient to defeat a motion for summary judgment. *Id.* at 252, 106 S.Ct. 2505. There must be evidence on which the jury could reasonably find for the non-moving party. *See id.*

B. Plaintiffs Sorenson and Reep's Summary Judgment Response Briefs

To clarify the scope of the summary judgment analysis herein, the Court begins by addressing the two (2) sets of summary judgment response briefs filed on behalf of Plaintiffs Sorenson and Reep, one set by Messrs. Stonebarger and Billy and a second, later set by Ms. Matter. [*See* Docs. 209, 210, 211, 212]. For the reasons set forth below, the Court finds *both* sets of response briefs—as well as the accompanying responses to Defendant's statement of material facts and statements of additional material facts [Docs. 209-1, 210-1, 211-1, 212-1]—to be improper and declines to consider the arguments advanced within them.

First, it was improper for Messrs. Stonebarger and Billy to file briefs on behalf of clients they do not represent. It is undisputed that Mr. Stonebarger represents neither Plaintiff Reep nor Plaintiff Sorenson, as they both terminated him. *See* Declaration of Jeremy Sorenson ("Sorenson Decl.") ¶ 16 [Doc. 153-2]; *see also* Declaration of Randal Reep ("Reep Decl.") ¶ 10 [Doc. 153-3]. It is further undisputed that Plaintiff Sorenson terminated Mr. Billy. *See* Sorenson Decl. ¶ 15 ("Mr. Billy is no longer my attorney."). Although it is less clear whether Plaintiff Reep terminated Mr. Billy, Plaintiff Reep offers several sworn statements that Mr. Billy "constructively abandoned" him as a client in late 2021 "because [Plaintiff Reep] terminated Mr. Stonebarger." *See* Reep Decl. ¶¶ 12, 15, 17. Plaintiff Reep further states that Ms. Matter is "our attorney" (referring to himself and Plaintiff Sorenson) and he casts various aspersions on Mr. Billy's course of conduct during this litigation. *See id.* ¶ 11.

No attorney who has appeared in this case has presented documents showing the status of their legal representation of Plaintiff Reep, such as a letter of engagement, termination, or withdrawal. However, in view of Plaintiff Reep's sworn statements to this Court, Mr. Billy's statement that he filed a summary judgment response brief on behalf of Plaintiff Reep only out of "an abundance of caution and in consideration of existing circumstances[,]" and various other materials presented to the undersigned, the Court finds that Ms. Matter is Plaintiff Reep's attorney and that he terminated Mr. Stonebarger. [*See, e.g.*, Docs. 137 at 2 (Ms. Matter stating that she represents Plaintiffs Sorenson and Reep); 191 at

7 ("Plaintiff Reep is represented by Attorneys Matter and Covey"); Doc. 209 at 1, 26]; Reep Decl. ¶ 10; *see also Est. of Nixon v. Barber*, 340 Ga.App. 103, 796 S.E.2d 489, 493 (2017) (noting that whether an attorney-client relationship exists in Georgia is determined by looking to the putative client's "reasonable beliefs" about whether an attorney represents him or her). The Court accordingly declines to consider the summary judgment filings Messrs. Stonebarger and Billy filed on behalf of Plaintiffs Reep and Sorenson.

Second, the filing of duplicate summary judgment response briefs on behalf of Plaintiffs Reep and Sorenson—one set by Messrs. Stonebarger and Billy, one set by Ms. Matter—directly violates the Local Rules of this district and the undersigned's April 29, 2022 Order. [*See* Doc. 191]; *see also* LR 56.1, NDGa. Local Rule 56.1 provides that "[i]n accordance with [Local Rule 7.1(C)], the parties shall not be permitted to file supplemental briefs and materials, with the exception of a reply by the movant, except upon order of the court." *See* LR 56.1, NDGa. The Local Rules also limit response briefs to twenty-five (25) pages. *See id.* 7.1(D). The Court did *not* give Plaintiffs Reep and Sorenson leave to file supplemental briefs or materials. And by filing two (2) sets of response briefs, Plaintiffs Reep and Sorenson far exceed this page limit. [*See* Docs. 209, 210, 211, 212].

Additionally, in its April 29, 2022 Order, the Court *expressly* directed "each individual Plaintiff, through his chosen, individual attorneys, to file a response [to Defendant's summary judgment motion] regarding only their own individual claims[.]" [*See* Doc. 191 at 10-11, 23] (reiterating the directives for "the attorneys representing . . . Plaintiffs to respond to Defendant's motion for summary judgment on behalf of their individual clients[,]" for "Plaintiffs to file individual responses [to Defendant's summary judgment motion] *through their respective counsel*[,]" and that all Plaintiffs "file their briefs in accordance with the instructions stated herein and in accordance with the Local Rules of this district" (emphasis added)). Thus, as Defendant correctly notes, the Court's April 29, 2022 Order clearly permitted "a total of 5 [summary judgment response] briefs"—one for each Plaintiff—and no more. [*See* Doc. 220 at 16]. Messrs. Stonebarger and Billy clearly flouted this Court's directives when they filed response briefs on behalf of Plaintiffs Sorenson and Reep. "Such disregard for the procedural rules of this Court will not be tolerated." *Hill v. Delta Air Lines, Inc.*, Civil Action No. 1:18-CV-05589-JPB-WEJ, 2020 WL 12182139, at *2 (N.D. Ga. June 5, 2020) (quoting *Gainor v. Douglas Cnty.*, 59 F. Supp. 2d 1259, 1297 (N.D. Ga. 1998)). Messrs. Stonebarger and Billy's disregard for this district's Local Rules and the Court's April 29, 2022 Order provides independent bases for the undersigned to disregard the response briefs they filed on behalf of Plaintiffs Reep and Sorenson even absent any question about who represents them. *See* LR 7.1(E), NDGa.

Third, even if the *only* summary judgment response briefs on behalf of Plaintiffs Sorenson and Reep were those filed by Ms. Matter, that set of briefs would still be improper because neither contains the signature of local counsel. [*See* Docs. 211, 212]. The Court discussed the local counsel requirement—and how it applied to Ms. Matter and her clients specifically—during the January 27, 2022 *ex parte* hearing. [*See* Doc. 150]; *see also* LR 83.1(B)(4), NDGa. ("Local counsel must authorize and sign all pleadings and other papers filed in the case by the attorney appearing *pro hac vice*."). Ms. Matter obtained local counsel (Mr. Covey) on February 7, 2022. [*See* Doc. 152]. Yet, Mr. Covey's signature is not present on any of the summary judgment response filings Ms. Matter made on May 13, 2022. [*See* Docs. 211 at 26-28; 212 at 26-28]. Apparently realizing this error (and several others, such as omitted exhibits, declarations labeled with the wrong declarant's name, and errors in multiple proffered statements of material fact), nearly a week later, Ms. Matter submitted "Notice[s] of Filing of Errata" which purported to "correct" the "incomplete" signature pages to add the signature of local counsel. [*See* Docs. 214, 215]. Ms. Matter's filing are untimely attempts to amend the summary judgment response briefs she filed on behalf of her clients without the leave of Court. Thus, Ms. Matter's "Notice[s] of Filing of Errata" do not correct the crucial error she made in omitting the signature of local counsel from the filings at hand. [*See* Docs. 214, 215].

The Local Rules permit this Court, in its discretion, to "decline to consider any . . . brief that fails to conform to the requirements of" the Local Rules and to sanction any party who fails to comply with the orders of the Court. *See* LR 7.1(E), NDGa.; *see also id.* 16.5 ("failure to comply with the court's pretrial instructions may result in the imposition of sanctions, including dismissal of the case”). And district courts have discretion in interpreting, enforcing, and applying their Local Rules. *See Ramion v. Brad Cole Constr. Co.*, 805 F. App’x 948, 950 (11th Cir. 2020); *see also Mann v. Taser Intern., Inc.*, 588 F.3d 1291, 1303 (11th Cir. 2009) (explaining that this district’s Local Rule 56.1 “is designed to help the court identify and organize the issues in the case”).

Therefore, the Court declines to consider the summary judgment briefs submitted by Messrs. Stonebarger and Billy on behalf of Plaintiffs Sorenson and Reep because (1) they were not authorized to make those filings and (2) the filing of the duplicate set of briefs violated both the Local Rules of this district and the express directives of this Court. [*See* Docs. 209, 210]. Additionally, the Court finds it proper to disregard the summary judgment briefs and other associated filings Ms. Matter submitted on behalf of Plaintiffs Sorenson and Reep because (1) they do not contain the signatures of local counsel in violation of both the Local Rules of this district and the express directives of this Court and (2) Ms. Matter’s “Notice[s] of Errata” amount to no more than untimely, misguided attempts to amend the pleadings she filed. [*See* Docs. 211, 212, 214, 215]. However, despite the veritable litany of failures by Plaintiffs’ counsel that necessitate these decisions, the Court is also mindful of its obligation to examine the merits of the underlying summary judgment motion and only enter summary judgment “when appropriate” (instead of automatically) even though the motion is deemed unopposed by Plaintiffs Sorenson and Reep. *See One Piece of Real Prop. Located at 5800 SW 74th Ave.*, 363 F.3d at 1101. Accordingly, the Court turns to the merits of Defendant’s motion.

C. Discussion

In the matter at hand, Defendant argues it is entitled to summary judgment on all of Plaintiffs' claims.[9] [*See generally* Docs. 178-2, 220]. The Court examines Defendant's motion with regard to each claim in turn, beginning with those claims stemming from seniority-based employment benefits.

1. Seniority-based benefits

Defendant contends it is entitled to summary judgment on both claims regarding Plaintiffs' seniority-based employment benefits: specifically, Plaintiffs' claims related to the funding of their pension plans during their periods of MLOA and their profit-sharing payments. [*See* Doc. 178-2 at 5-10]. As the Court discusses further below, the Parties dispute the lawfulness of Defendant's methodology for calculating pension contributions and profit-sharing cash awards for pilots who take MLOA. [*See* Doc. 206 at 6-12]. The Court addresses each benefit in turn.

a. Pension contributions

In their first cause of action, Plaintiffs allege that Defendant violated various provisions of USERRA by

9. Because the Opposing Plaintiffs' briefs are identical, for the most part, the Court primarily cites to the brief at Docket Entry 206 in the analysis below. When addressing any Plaintiff-specific portion of an Opposing Plaintiff's response brief, the Court provides the citation to that Opposing Plaintiff's brief.

underfunding the pension plans of pilots who take MLOA. *See, e.g.*, Am. Compl. ¶¶ 120-22. Defendant argues it is entitled to summary judgment on this claim because its methodologies for calculating Plaintiffs' pension contributions for periods of MLOA are in accordance with USERRA. [*See* Doc. 178-2 at 3-10]. Defendant further contends that it has actually provided Plaintiffs with greater pension contributions than required by law. [*See id.*]

As discussed above, when a military-affiliated pilot who works for Defendant takes MLOA, the military (but not Defendant) pays that pilot during the MLOA period. *See* 38 U.S.C. § 4331(a); *see also* 20 C.F.R. § 1002.210. However, that military-affiliated pilot is still entitled to accrue any seniority-based benefits provided by the employer or required by USERRA *as if* he or she had never been absent or had a "break in employment" due to the MLOA. *See* 38 U.S.C. § 4316(a); *see also* 20 C.F.R. § 1002.210. Contributions to pension plans are one such seniority-based benefit. *See* 38 U.S.C. § 4318(a)(2)(A) (USERRA provision specific to pension plans).

The Parties' dispute here centers on the proper method for calculating the earnings Plaintiffs would have received from Defendant "but for [their] MLOA." [*See* Docs. 178-2 at 3; 206 at 6]. This initial earnings calculation, in turn, allows Defendant to calculate the appropriate pension contributions for a given employee who has taken MLOA so that the employee receives the same pension contributions as those employees who did not take MLOA during the same time period. [*See* Docs. 178-2 at 2-3; 206 at 6]; *see also* 38 U.S.C. § 4318.

Pursuant to § 4318 of USERRA, the amount of funds an employer must contribute to an employee pension plan during the employee's "period of [military] service . . . shall be computed" either:

> (A) at the rate the employee would have received but for the period of service . . . , or
>
> (B) in the case that the determination of such rate is *not* reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

38 U.S.C. § 4318(b)(3) (emphasis added).[10] The Parties refer to the formula in 28 U.S.C. § 4318(b)(3)(B) for earnings that are not reasonably certain as the "twelve (12)-month lookback" calculation. [*See* Docs. 178-2 at 3; 206 at 8]. The Parties disagree on (1) whether Plaintiffs' compensation was "reasonably certain," and, if not, (2) whether the methodology Defendant previously used or currently uses to calculate their pension contributions comports with USERRA.[11]

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10. It is undisputed that Defendant "contributes a fixed percentage of a pilot's pensionable earnings into the pilot's individual 401k account." *See* Zawislak Decl. ¶ 18.

11. From 2005-2011, Defendant used a twelve (12)-month lookback calculation to determine the pension contributions at issue. *See id.* ¶ 19. From 2012 forward, Defendant has used the Average Line Value calculation described below. *See id.* ¶ 20.

i. Reasonably certain

Thus, the first inquiry the Court must resolve is whether Plaintiffs' regular compensation was "reasonably certain." *See id.* Defendant contends it was not. [*See* Doc. 178-2 at 3-7]. Opposing Plaintiffs appear to suggest it was. [*See* Doc. 206 at 6-8].

Defendant's pilots are paid by the flight hour, and each pilot has an hourly rate that varies based on seniority, type of aircraft, and flight route. *See* Zawislak Decl. ¶¶ 3, 5. Additionally, due to the PBS system that allows Defendant's pilots to "bid" for the schedules they want and pilots' ability to change their own schedules later, variations in monthly compensation are to be expected. *See id.* ¶¶ 6, 8; Def.'s SOMF ¶¶ 13, 15, 17. In arguing that Plaintiffs' monthly compensation is not "reasonably certain," Defendant presents evidence of the range of hours Plaintiffs worked during months when they took no MLOA. [*See* Docs. 178-2 at 5-7; 220 at 3]. Thus, any months when a Plaintiff took any MLOA are excluded from the below:

- The average monthly total pay hours for Plaintiffs was sixty-five and a half (65.5). [*See* Doc. 204-2 at 13].
- Between August 2014 and October 2020, Plaintiff Sorenson's monthly pay hours ranged from forty-two (42) to 137. *See* Zawislak Decl. ¶ 14.

Opposing Plaintiffs do not challenge Defendant's method of calculating such seniority-based benefits prior to 2005. [*See* Doc. 206].

- Between November 2008 and October 11, 2016, Plaintiff Reep's monthly pay hours ranged from zero (as was the case during five (5) months where he also took no MLOA or personal leave) to ninety-five (95). *See id.* ¶ 12; [*see also* Doc. 178-3 at 160-62].

- Between September 2007 and October 2020—during which he only worked a short time for Defendant, as he was on MLOA almost the entire time—Plaintiff Smith only surpassed twenty (20) pay hours per month a total of eight (8) times and never exceeded sixty-eight (68) pay hours in a single month. *See* Zawislak Decl. ¶ 17; [*see also* Doc. 178-3 at 165-68].

- Between April 2007 and September 1, 2016, Plaintiff Doyle's monthly pay hours ranged from zero to 104. *See* Zawislak Decl. ¶ 15.

- From January 2010 through February 22, 2017, Plaintiff McLean's monthly pay hours ranged from fifty-seven (57) to ninety-nine (99). *See id.* ¶ 16.

Additionally, Defendant's expert witness (Robert B. Speakman, Jr., Ph.D.) opines that the standard deviation of Plaintiffs' pay hours in months where they took no MLOA or other personal leave is 27.4 hours. [*See* Doc. 204-2 at 10-12]. As a comparison, according to materials from the U.S. Department of Labor ("DOL") (cited and replicated in Dr. Speakman's expert report), a standard deviation of 11.8 hours per month is sufficient to render an employee's monthly pay "not reasonably certain."[12] [*See* Doc. 204-2 at 10-12].

In their response brief, Opposing Plaintiffs contend that the volatility in Plaintiffs' monthly pay hours described above is attributable to Defendant including months where they were on MLOA. [*See* Doc. 206 at 10-11]. However, in reaching the above calculations, Defendant's expert specifically excluded from his analysis "months in which a pilot had *any* military leave days or personal leave days at *any* time during the month[.]" [*See* Doc. 204-2 at 10] (emphasis added) (copy of Dr. Speakman's expert report). And in Excel spreadsheets Defendant provided to Plaintiffs during discovery (the authenticity of which has been stipulated to by the Parties) listing the total pay hours for each of Plaintiffs by bid month, "MLOA days" and personal leave days are clearly separated out. [*See* Doc. 178-3 at 156-168]. Therefore, the Court finds that Defendant has demonstrated the absence of material fact on this issue and shown that Plaintiffs' monthly pay is not "reasonably certain" pursuant to USERRA.[13] *See* 38 U.S.C. § 4318(b)(3).

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12. "A standard deviation . . . is a measure of how dispersed the data is in relation to the mean. Low standard deviation means data are clustered around the mean, and high standard deviation indicates data are more spread out." *See Standard Deviation*, Nat'l Libr. Of Med., https://www.nlm.nih.gov/nichsr/stats_tutorial/section2/mod8_sd.html (last visited Mar. 27, 2023). Thus, here, a lower standard deviation would indicate that a Plaintiff's monthly pay hours remained fairly consistent from month to month.

13. Perplexingly, much of Opposing Plaintiffs' argument on this issue relies on citations to the sworn statement of Mr. Billy, Opposing Plaintiffs' counsel. [*See, e.g.*, Doc. 206 at 8-11;

ii. Lawfulness of calculations

Having determined that Plaintiffs' earnings were not "reasonably certain," the Court turns to assess whether the two (2) methods Defendant has used to calculate pension contributions during the relevant time period comply with the requirements of USERRA. First, from 2005 through 2011, Defendant used a twelve (12)-month lookback calculation to determine the pension contributions at issue. [*See* Doc. 178-2 at 7]. Second, since 2012, Defendant has used the Average Line Value ("ALV") calculation described below. [*See id.* at 8-9]. And, as noted, USERRA requires that if an employee's compensation is not "reasonably certain," the amount of funds an employer must contribute to an employee pension plan during the employee's "period of [military] service . . . shall be computed" based on "the employee's average rate of

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207 at 8-10, 10 n.3; 208 at 8-11] (all citing to various paragraphs of the Declaration of Charles M. Billy ("Billy Decl.") [Doc. 206-2]). However, Mr. Billy lacks personal knowledge of the evidence Opposing Plaintiffs attempt to advance through his declaration. *E.g.*, Billy Decl. ¶¶ 47, 53 (merely two (2) of the numerous examples of paragraphs concerning Plaintiffs' experiences, which could not possibly be based on Mr. Billy's own personal knowledge and contain assertions with no citations to supporting evidence). The Court declines to consider this "evidence" for this reason. See Fed. R. Civ. P. 56(e); *see also Tishcon Corp. v. Soundview Commc'ns, Inc.*, Civil Action No. 1:04-CV524-JEC, 2005 WL 6038743, at *5 (N.D. Ga. Feb. 15, 2005) (explaining that "[t]o have personal knowledge means more than to have been told that something is what it purports to be or to have collected the information from one's client" and that it is "an unnatural, if not virtually impossible, task for counsel, in his own case" to present objective testimony that can be considered on a motion for summary judgment).

compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period)." *See* 38 U.S.C. § 4318(b)(3)(B).

Opposing Plaintiffs do not rebut Defendant's argument that both methods are lawful. [*See* Docs. 206 at 6-11; 207 at 6-11; 208 at 6-11]. Instead of asserting that either method of calculation used by Defendant violates USERRA, Opposing Plaintiffs contend that their alternative proffered method of calculating these benefits is "the most accurate [and] most fair[.]" [*E.g.*, Doc. 206 at 9-11] (discussing Opposing Plaintiffs' proposed methodology of "Average Pay Hours" or "APH" to calculate monthly compensation). Standing alone, Opposing Plaintiffs' failure to respond to Defendant's lawfulness argument is sufficient for the Court to grant summary judgment in Defendant's favor on this claim. *See Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1326 (11th Cir. 2000) (finding that a party's failure to brief and argue an issue before the district court is grounds for declaring it abandoned); *Resol. Tr. Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995) ("When a party fails to respond to an argument or otherwise address a claim, the Court deems such argument or claim abandoned.").

Nevertheless, the Court evaluates this issue on the merits and finds that both methods Defendant has used to calculate pension contributions during the relevant time periods comply with the requirements of USERRA. The "12-month lookback" method that Defendant used to establish a pilot's compensation (a fixed percentage of which goes to that pilot's pension) between 2005 and 2011 looked to the pilot's average rate of compensation during the preceding twelve (12) months. *See* Zawislak Decl. ¶ 19. This method tracks the plain statutory language of 38 U.S.C.§ 4318(b)(3)(B), and thus, the Court finds it complied with USERRA.

As for the ALV method Defendant has used since 2012, that method calculates the "deemed earnings for long-term MLOAs by multiplying a pilot's hourly rate in effect during the MLOA by the ALV for each month of the MLOA." [*See* Doc. 178-2 at 8] (citing Zawislak Decl. ¶ 20). Importantly, Defendant's ALV formula assumes that a pilot works *at least* seventy-one (71) hours per month. [*See id.*] (citing Zawislak Decl. ¶ 20). Plaintiffs rarely reached—much less surpassed—this number of monthly pay hours during any non-MLOA month. [*See, e.g.*, Doc. 204-2 at 10-13]. And Defendant presents evidence that its "change to the ALV calculation resulted in much *higher* [pension] contributions for MLOA periods" than the "12-month lookback calculation" because "the ALV calculation typically includes higher hourly rates and higher pay hours than the 12-month lookback calculation." Zawislak Decl. ¶ 21. Specifically, Defendant presents evidence that the ALV method has resulted in Defendant contributing over $11 million more to military-affiliated pilots' pension plans than it would have under the twelve (12)-month lookback calculation. *See id.* "USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. . . . [A]n employer may provide greater rights and benefits than USERRA requires[.]" 20

C.F.R. § 1002.7(a). Thus, the Court finds the ALV method to be lawful pursuant to USERRA because it provided Plaintiffs with more pension contributions than they would have received pursuant to the plainly legal twelve (12)-month lookback method. Therefore, the Court grants summary judgment in Defendant's favor on Plaintiffs' first cause of action related to pension contributions.[14]

b. Profit-sharing claims

In their third cause of action, Plaintiffs claim that Defendant undercalculates "profit-sharing [payments] for pilots on MLOA" in violation of USERRA by using

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14. As Defendant notes in its instant motion, the Second Amended Complaint does not refer to "deemed earnings calculations for short-term (30 days or less) MLOAs" and Defendant "is uncertain whether Plaintiffs are claiming that [it] violated USERRA with regard to such MLOAs." [Doc. 178-2 at 10 n.8]. However, Defendant states that "when a Delta pilot takes even *one day*" of MLOA during a given month, Defendant "provides them pension contributions as if they flew either ALV or a very similar number of 'reserve monthly guarantee hours[,]'" both of which credit pilots for a higher average of monthly hours than Plaintiffs worked during non-MLOA months. [*See id.* at 10] (emphasis in original). Opposing Plaintiffs abandon any claim they have related to pension contributions for short-term MLOA by failing to address that claim in their response briefs. [*See* Doc. 206 at 8] (mentioning such a claim only in passing when asserting that using ALV "undercalculates deemed earnings" "for both short-term and long-term MLOA"); *Coal. for the Abolition of Marijuana Prohibition*, 219 F.3d at 1326; *Resol. Tr. Corp.*, 43 F.3d at 599. For the reasons explained above, even if Opposing Plaintiffs did not abandon their pension claims as it relates to short-term MLOA, the Court agrees with Defendant that any such claim would fail.

the "flawed" and "artificially low" ALV method to calculate "the deemed earnings a pilot would have earned but for MLOA[.]" [*See* Doc. 206 at 11]. Opposing Plaintiffs argue that "[p]rofit-sharing compensation is pensionable, so the undercalculation also leads to . . . pension underfunding" and is properly considered part of their annual compensation such that it must "be equal to the earnings the [pilot] would have received had the individual been" continuously and "actively employed by [Defendant]" and not on MLOA.[15] [*Id.* at 11-12].

In its instant motion, Defendant explains that its "pilots are covered by the company's Annual Profit-Sharing Plan (the 'Profit-Sharing Plan')" and that "[u]nder the Profit-Sharing Plan, a pilot may receive a cash award for each year when Delta makes profit-sharing payments." [Doc. 178-2 at 15] (citing Zawislak Decl. ¶ 22, Ex. G). "The Profit-Sharing Plan determines cash awards by a set percentage of a pilot's [a]nnual [c]ompensation." [*Id.*] (internal quotation marks omitted). Defendant further proffers:

> In general, the Profit-Sharing Plan *does not* "impute earnings" that a pilot has not actually earned during leaves of absence. (Zawislak Decl. Ex. G, Article 2.3.) There is one exception to this rule, however. The Profit-Sharing Plan *does* impute earnings for MLOA periods when determining a pilot's [a]nnual

15. Importantly, "Plaintiffs are not claiming Delta's profit-sharing plan is an ERISA plan under Section 4318." [Doc. 206 at 11].

> [c]ompensation. (*Id.* at Articles 2.3(b) and 2.6.) This is another example of [Defendant's] pro-reservist employment policies.

[Doc. 178-2 at 15] (emphasis in original). With this context in mind, Defendant argues that Plaintiffs' profit-sharing claim fails as a matter of law because (1) the pension benefits provision of USERRA (§ 4318) "does not apply to profit-sharing plans" and (2) Defendant does not "impute earnings" towards pilots' profit-sharing payments when pilots take any type of extended leave *other than* MLOA, such that Defendant essentially provides an extra benefit to military-affiliated pilots not available to civilian pilots. [*See id.* at 15-16].

It is well-established that "while USERRA requires employers to treat servicemembers equally with respect to other employees, it does not require preferential treatment." *See Case v. Judd*, No. 8:19-CV-607-T-33TGW, 2019 WL 10966204, at *3 (M.D. Fla. Oct. 23, 2019) (collecting cases); *see also Gross v. PPG Indus., Inc.*, 636 F.3d 884, 889 (7th Cir. 2011); *Crews v. City of Mount Vernon*, 567 F.3d 860, 866 (7th Cir. 2009); *Rogers v. City of San Antonio*, 392 F.3d 758, 769 (5th Cir. 2004). "While the Eleventh Circuit has not directly addressed the issue presented here, other circuits have held that USERRA does not cover benefits that are available only to military-affiliated employees." *See Judd*, 2019 WL 10966204, at *3 (citing *Crews*, 567 F.3d at 866). Where an employer's policy conveys preferential treatment to military-affiliated employees that is "not available to non-military employees, such policies are not 'benefits of employment' under USERRA" and, therefore, are not actionable pursuant to USERRA.[16] *See id.* The Court finds that this authority squarely forecloses Plaintiffs' profit-sharing claim. Indeed, in the two (2) paragraphs of their responses addressing this claim, Opposing Plaintiffs do not refute Defendant's argument that it only "imputes earnings" toward profit-sharing payments for employees who take MLOA—but not any other type of extended leave—such that military-affiliated pilots who take MLOA (like Plaintiffs) receive a "benefit" not available to other employees on extended leave. [*See* Docs. 178-2 at 15; 206 at 11-12].

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16. Further, the Court notes that Opposing Plaintiffs do not argue—nor does the Second Amended Complaint allege—that Defendant's profit-sharing payments are automatically applied to their pensions (as a type of deferred compensation) instead of paid directly to pilots (as a bonus or extra compensation). [*See* Doc. 206 at 11-12]; *see also* 2d Am. Compl. ¶¶ 136-42. Thus, although Opposing Plaintiffs characterize Defendant's profit-sharing payments as "pensionable" because they *may* elect to direct such payments to their pension plans, nothing in the record suggests that the profit-sharing payments constitute "a deferred compensation plan." *See Scanlan v. Am. Airlines Grp., Inc.*, 384 F. Supp. 3d 520, 531 (E.D. Pa. 2019); [*see also* Doc. 206 at 11]. And as at least one district court has observed, a plaintiff fails to state a claim for relief pursuant to USERRA's pension provision (§ 4318) where "employees participating in [a] [profit-sharing p]lan *may* place the lump sum payments in their retirement [or pension] plans" but the profit-sharing plan is, in essence, "an extra compensation or bonus plan where payments are awarded in addition to regular compensation" instead of "a deferred compensation plan." *See Scanlan*, 384 F. Supp. 3d at 531 (emphasis added). This independent reason supports summary judgment in favor of Defendant on Plaintiffs' profit-sharing claim.

The only argument Opposing Plaintiffs make in an attempt to save their profit-sharing claim is that Defendant should use their proposed APH to "calculate deemed earnings . . . reflecting what a pilot would earn but for MLOA." [*See* Doc. 206 at 9-11]. For the reasons explained above, the Court is not persuaded by this argument. *See supra* part III.C.1.a. Accordingly, the Court grants Defendant's motion for summary judgment as to Plaintiffs' third cause of action related to profit sharing payments.[17]

2. Non-seniority-based benefit—vacation accrual

In their second cause of action, Plaintiffs claim that Defendant violated the USERRA provision pertaining to non-seniority-based employment benefits because it did not allow them to accrue vacation time during their periods of long-term MLOA. *See* 2d Am Compl. ¶¶ 126-35 (citing 38 U.S.C. § 4316(b)(1)(B)). The Parties agree that long-term MLOA lasts thirty (30) or more days, or at least one "bid month" in the context of the monthly schedule bidding system Defendant's pilots use to create their schedules. According to Plaintiffs, Defendant allows

17. In light of the above findings, the Court need not reach Defendant's alternative argument that "Plaintiffs' profit-sharing claims are not cognizable under USERRA Section 4316 (non-seniority benefits provision) or Section 4311 (antidiscrimination provision) because the only leave for which De[fendant] provides imputed earnings toward profit-sharing payments is MLOA." [Docs. 178-2 at 15; 220 at 25].

"pilots on other forms of leave . . . [to] accrue vacation time during their leaves of absences that are longer than a bid month or greater than 30 consecutive days[,]" but excludes pilots on long-term MLOA from this same benefit. *See id.* ¶¶ 131, 133. Other forms of leave (other than long-term MLOA) during which Plaintiffs allege that Defendant permits its pilots to accrue vacation time include if the pilots are on "Association Business leave," sick leave, jury duty, "Known Personal Leaves [of Absence,] and certain personal leaves of absence[.]" *See id.* ¶ 131.

In its motion, Defendant argues that it is entitled to summary judgment on Plaintiffs' vacation accrual claim because long-term MLOA is not comparable to any of other the types of leave listed by Plaintiffs with respect to the duration of the leave, purpose of the leave, and a pilot's ability to schedule the leave. [*See* Doc. 178-2 at 11-14]. As Defendant correctly notes, USERRA entitles employees on MLOA to the same non-seniority-based benefits afforded to "employees having similar seniority, status, and pay who are on furlough or leave[.]" *See* 38 U.S.C. § 4316(b)(1)(B). The corresponding federal regulation, promulgated by DOL, instructs that "[i]f the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to *any comparable form of leave* when he or she performs service in the uniformed services." *See* 20 C.F.R. § 1002.150(b) (emphasis added); *see also id.* § 1002.150(c) ("As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on a [MLOA] only if the employer provides that benefit to similarly situated employees on comparable leaves of absence."). To determine whether MLOA is "comparable" to another form of leave, the Court should consider (1) "the duration of the leave" (which "may be the most significant factor to compare"), (2) "the purpose of the leave[,]" and (3) "the ability of the employee to choose when to take the leave[.]" *Id.* § 1002.150(b).

Defendant cites to two (2) recent federal cases that addressed this very issue and held that MLOA is not comparable to either jury duty or sick leave based on the above factors.[18] [Doc. 178-2 at 12-14] (citing *Moss v. United Airlines, Inc.*, 420 F. Supp. 3d 768 (N.D. Ill. 2019), *aff'd*, 20 F.4th 375 (7th Cir. 2021) and *Hoefert v. Am. Airlines, Inc.*, 438 F. Supp. 3d 724 (N.D. Tex. 2020)). Additionally, Defendant contends that neither "Association Business leave" nor sick leave are "leaves of absence" (or furloughs) pursuant to the PWA governing Plaintiffs' employment. [*See id.* at 13, 14 n.10]. Finally, as for Known Personal Leaves of Absence (abbreviated by the Parties as "KLOA"), Defendant maintains that it

18. Defendant cites a third case that was recently reversed and remanded—*Clarkson v. Alaska Airlines, Inc.*, No. 2:19-CV-0005-TOR, 2021 WL 2080199 (E.D. Wash. May 24, 2021), *rev'd and remanded*, 59 F.4th 424 (9th Cir. 2023)—however, that action concerned short-term MLOA, whereas the instant dispute specifically concerns long-term MLOA. [*See* Doc. 178-2 at 11-14]; *see also Clarkson*, 2021 WL 2080199, at *1 (explaining that the plaintiff in that action took three (3) periods of MLOA, each lasting thirty (30) days or less).

is not a "comparable" form of leave because (1) KLOA serves a materially different purpose than MLOA and (2) KLOA is voluntary. [*See id.* at 14 n.10]. In support, Defendant offers the sworn statement of its general manager for flying operations, Mr. Jason Zawislak, who avers that "KLOA is offered by [Defendant] for a specific bid period[] for the purposes of allowing [Defendant] to reduce labor costs during overstaffed periods" and that "a pilot cannot otherwise request or obtain a KLOA from [Defendant]." *See* Zawislak Decl. ¶ 26. And during his deposition, Zawislak testified that KLOAs are absences whereby "a pilot can choose to put in their bid [for] a period of time that they don't want to work." *See* Deposition of Jason Zawislak at 90:13-15 [Doc. 200].

Opposing Plaintiffs do not refute any of Defendant's arguments with respect to "Association Business leave[]," sick leave, or jury duty. [*See, e.g.*, Doc. 206 at 12-14]. In the last two (2) sentences of their response briefs, Opposing Plaintiffs assert that KLOA is comparable to MLOA because pilots remain "active" employees of Defendant during both types of leave and "KLOA's [sic] are typically up to 90 days in length . . . and cannot be unilaterally revoked." [*Id.* at 13]. However, Opposing Plaintiffs do not address how KLOA could be "comparable" to MLOA pursuant to any of the three (3) factors set forth by 20 C.F.R. § 1002.150(b), much less present any supporting evidence for the limited argument they make. [*Id.* at 12-14]. Therefore, the Court rejects Opposing Plaintiffs' contention that KLOA is a comparable form of leave to MLOA for purposes of their vacation accrual claim. Accordingly, the Court grants Defendant's motion for summary judgment on Plaintiffs' second cause of action related to vacation time accrual.[19]

3. Discrimination claims

Next, Defendant argues it is entitled to summary judgment on Plaintiffs' various discrimination claims pursuant to USERRA. [*See* Doc. 178-2 at 16-35]. In the Second Amended Complaint, Plaintiffs style their fourth cause of action for discrimination as encompassing three (3) theories of liability: (a) "general harassment," (b) "concurrent duty," and (c) "five-year limit."[20] *See* 2d Am. Compl. ¶¶ 143-88.

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19. Opposing Plaintiffs also assert in their response briefs—for the first time—that "Special Conflict Military Leave" ("SCML") is comparable to MLOA and should be used to assess the lawfulness of Defendant's vacation accrual policy. [*See id.* at 12-13]. The well-established precedent of this Circuit holds that a party may not "raise a claim in [its] opposition to [a] summary judgment motion" for the first time and that "[l]iberal pleading does not require that, at the summary judgment stage, defendants must infer all possible claims that could arise out of facts set forth in the complaint." *See Gilmour v. Gates, McDonald and Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004); *see also Hurlbert v. St. Mary's Health Care Sys., Inc.*, 439 F.3d 1286, 1296-97 (11th Cir. 2006) (holding that a plaintiff may not amend its complaint through a summary judgment filing). For this reason alone, Opposing Plaintiffs' SCML theory is insufficient as a matter of law to sustain their vacation accrual claim.

20. At this procedural stage, Plaintiffs' "five-year limit" theory of discrimination concerns only Plaintiff Smith and Defendant's purportedly unlawful failure to reemploy after he took multiple consecutive MLOAs that lasted approximately eight (8) years in combined length. *See* 2d Am. Compl. ¶¶ 179-88; [*see also* Docs. 178-2 at 23-25; 208 at 22-25; 220 at 45-47].

Section 4311 of USERRA provides a cause of action for discrimination. *See* 38 U.S.C. § 4311. Pursuant to § 4311, "a member of a uniformed service shall not be denied a 'promotion, or any benefit of employment by an employer on the basis of that membership [or] performance of service.'" *Annarumma v. City of High Springs*, 846 F. App'x 776, 781-82 (11th Cir. 2021) (per curiam) (internal footnote omitted and alteration in original) (quoting 38 U.S.C. § 4311(a)). "An employer violates this provision when an employee's membership or performance of service is a 'motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership . . . or service.'" *Id.* at 782 (quoting 38 U.S.C. § 4311(c)(1)).

"Section 4311 clearly mandates proof of [the employer's] discriminatory motive." *Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1238 (11th Cir. 2005) (citing *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001)). As the Eleventh Circuit has explained, the Court's analysis of a USERRA discrimination claim (even at summary judgment) must begin with whether the employee establishes the prima facie elements of the claim. *See Annarumma*, 846 F. App'x at 782. Specifically, a court looks to see whether the employee has

> [d]emonstrate[d] by a preponderance of the evidence that his military membership or service was a motivating factor in the employer's decision to take an adverse employment action covered by § 4311. [*Coffman*, 411 F.3d at 1238]. A motivating factor does not have to be

> "the sole cause of the employment action." *Id.* Rather, "it is one of the factors that a truthful employer would list if asked for the reasons for its decision." *Id.* (quotation omitted).

Annarumma, 846 F. App'x at 782. An employee's "[m]ilitary status is a motivating factor if the defendant relied on, took into account, considered, or conditioned its decision" to take an adverse employment action against the employee "on that consideration." *See Coffman*, 411 F.3d at 1238 (internal citations omitted). "Circumstantial evidence plays a critical part in these cases, 'for discrimination is seldom open or notorious.'" *Id.* (quoting *Sheehan*, 240 F.3d at 1014). For this reason,

> [a] court can infer a discriminatory motivation from a variety of considerations, such as: (1) the temporal proximity between the employee's military activity and the adverse employment action; (2) inconsistencies between the proffered reason for the employer's decision and other actions of the employer; (3) an employer's expressed hostility toward members protected by the statute combined with its knowledge of the employee's military activity; and (4) disparate treatment of similarly situated employees.

Annarumma, 846 F. App'x at 782 (citing *Coffman*, 411 F.3d at 1238).

If an employee carries his burden to establish a prima facie USERRA discrimination claim,

> the burden shifts to the employer to prove, by a preponderance of the evidence, that legitimate reasons, standing alone, would have induced it to take the same adverse action. [*Coffman*, 411 F.3d] at 1238-39. Even if prohibited discrimination was a motivating factor, the employer does not violate the statute if "the employer can prove that the action would have been taken in the absence of [the employee's military status]." 38 U.S.C. § 4311(c)(1). The standard of proof the employer must meet is "the so-called-'but for' test."[21] [*Id.*] at 1238 (quoting [*Sheehan*, 240 F.3d at 1013]).

21. In *Coffman*, the Eleventh Circuit "adopted the framework the Federal Circuit articulated in *Sheehan*, which clarified that the procedural framework and evidentiary burdens set out in [USERRA] . . . are different from those in discrimination cases under Title VII of the Civil Rights Act of 1964, which are analyzed pursuant to the burden-shifting framework described in *McDonnell Douglas*" and its progeny. *See Annarumma*, 846 F. App'x at 782 n.8 (cleaned up). Unlike the *McDonnell Douglas* test, which only allocates the burden of production of evidence, the two (2)-step *Coffman* framework "shift[s] the burden of persuasion to the employer[.]" *See id.* (internal quotation marks and citation omitted). Thus, "[p]ursuant to *Sheehan* and *Coffman*, the employer" in a USERRA discrimination case "has [a] heavier burden to prove that it would have taken the adverse action even in the absence of the employee's military status" than an employer in a Title VII. *See id.* (internal citations omitted); *see also* 38 U.S.C. § 4311(c)(1).

Annarumma, 846 F. App'x at 782. With this framework in mind, the Court clarifies one preliminary issue—whether Plaintiffs bring a "hostile work environment claim"—and then addresses in turn the Parties' arguments regarding each Plaintiff's discrimination claim.

a. Hostile work environment

Portions of Defendant's summary judgment briefs appear to assume that Plaintiffs bring a hostile work environment claim. [*See, e.g.*, Doc. 178-2 at 17 n.13; 220 at 36-40]. And the Court observes that the Second Amended Complaint contains general, conclusory allegations that Defendant fostered a hostile work environment against Plaintiffs and that this environment caused Plaintiff Doyle to resign. *See, e.g.*, 2d Am. Compl. ¶ 22 (general allegation that DOL "clarified its interpretation that a 'benefit of employment' included a freedom from workplace harassment and/or hostile work environment" in a 2010 report to Congress); *id.* ¶ 97 ("Due to the hostile work environment Doyle was experiencing at [Defendant's workplace], he resigned his employment . . . on September 8, 2016); *id.* ¶ 157 ("[Defendant's] anti-military environment caused and allows discriminatory practices against Class members with military service obligations.").

The Eleventh Circuit has previously addressed a hostile work environment claim in the USERRA context. For example, in *Annarumma*, the plaintiff specifically pled a hostile work environment claim pursuant to USERRA—in addition to a separate USERRA discrimination claim—and brought an appeal challenging the district court's grant of summary judgment in favor of the defendant as to both claims. *See* 846 F. App'x at 781-85. In its opinion, the Eleventh Circuit explained that the plaintiff "contend[ed] that the Title VII framework[] for hostile work environment . . . appl[ied] to his USERRA [hostile work environment] claim[]" and the defendant "ha[d] not disputed that contention." *See id.* at 785. Thus, as the district court in that case had, the Eleventh Circuit "assume[d] without deciding" that a hostile work environment claim "[was] actionable under USERRA and [should be] analyzed under [the] Title VII test." *See id.*

However, unlike the plaintiff in *Annarumma*, Plaintiffs here do not allege a separate claim or theory of liability based on the existence of a hostile work environment. *See* 2d Am. Compl. ¶¶ 143-88. Rather, they crafted their Second Amended Complaint to include three (3) theories of discrimination, none of which are hostile work environment. *See id.* Thus, the undersigned declines to recast their pleading as advancing such a theory (or claim). And because Plaintiffs have pled no USERRA claim based on a hostile work environment theory, the Court need not analyze whether such a claim survives Defendant's present motion for summary judgment. *See Gilmour*, 382 F.3d at 1315 ("Liberal pleading does not require that, at the summary judgment stage, defendants must infer all possible claims that could arise out of facts set forth in the complaint."); *Hurlbert*, 439 F.3d at 1296-97 (holding that a plaintiff may not amend its complaint through a summary judgment filing).

Regardless, the Court still considers Opposing Plaintiffs' arguments regarding Defendant's purported hostility towards them in its analysis below, as any evidence of such is properly encompassed by the considerations from which a court may infer a discriminatory motivation for adverse action against an employee. *See Annarumma*, 846 F. App'x at 782 (listing the third such consideration as "an employer's expressed hostility toward members protected by the statute combined with its knowledge of the employee's military activity" (citing *Coffman*, 411 F.3d at 1238)).

b. Plaintiff Sorenson

Unlike the other Plaintiffs, Sorenson still works for Defendant. [*See* Doc. 220 at 18 n.3]. Defendant argues Plaintiff Sorenson lacks standing to bring a discrimination claim because he has not alleged any cognizable injury flowing from Defendant's conduct. [*See* Docs. 178-2 at 20; 220 at 18].

Standing is a "threshold jurisdictional question of whether a court may consider the merits of a dispute." *See Elend v. Basham*, 471 F.3d 1199, 1204 (2006); *see also Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1422 (11th Cir. 1995) (explaining that a court has an "obligation . . . to examine its own jurisdiction . . . at each stage of the proceedings"). The well-trod constitutional standing requirements are (1) a "concrete and particularized injury[,]" (2) caused by the defendant's "complained-of actions," (3) that is "redress[a]ble by a favorable court decision." *Fla. State Conf. of NAACP v.*

Browning, 522 F.3d 1153, 1159 (11th Cir. 2008). Here, Plaintiff Sorenson does not allege how he was harmed by Defendant's supposed discrimination against him in violation of USERRA, going so far as to testify that he has no claim for any "economic" damages flowing from Defendant's alleged discrimination. *See* Sorenson Dep. at 157:17-22. This record evidence stands unrebutted.[22] Therefore, the Court finds Plaintiff Sorenson lacks standing to bring a USERRA discrimination claim.[23] *See Fla. State Conf. of NAACP*, 522 F.3d at 1159. Accordingly, the Court grants summary judgment in favor of Defendant on Plaintiff Sorenson's fourth cause of action for discrimination.

c. Plaintiff Reep

Next, the Court examines the merits of Plaintiff Reep's discrimination claim. *See Annarumma*, 846 F. App'x at 782. As set forth above, the Court must first

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22. Plaintiff Sorenson's own response briefs are not properly before this Court for the reasons discussed above. *See supra*, part III.B.

23. Unlike Plaintiff Sorenson, the Court finds that the other four (4) Plaintiffs have standing to bring a claim for USERRA discrimination because they all allege they were either ousted by or resigned under pressure from Defendant. [*See* Docs. 172-8; 206 at 25; 207 at 25; 208 at 23-24]. Though Defendant is correct that injunctive relief is not available to Plaintiffs Reep, Smith, Doyle, and McLean because they are not current employees, that does not affect their standing to seek damages pursuant to USERRA for any actionable discrimination they suffered. *See Dees*, 368 F. App'x at 52-53

determine whether Plaintiff Reep establishes the prima facie elements of a USERRA discrimination claim. *See id.* (setting forth the prima facie elements as showing "by a preponderance of the evidence that his military membership or service was a motivating factor in the employer's decision to take an adverse employment action covered by § 4311" (citing *Coffman*, 411 F.3d at 1238)). However, Plaintiff Reep does not present any record evidence to the Court to establish the prima facie elements of his claim.[24] The Court has examined the merits of the underlying summary judgment motion and finds that Defendant's unrebutted evidence establishes Plaintiff Reep was subject to termination for abusing Defendant's policies regarding sick leave and concurrent duty, not by virtue of his military affiliation. [*See* Doc. 172-8 at 1]; *see also Tomasini*, 315 F. Supp. 2d at 1260 n.11 (explaining that a district court is not obligated to "scour the record" to determine whether triable issues exist). Accordingly, the Court grants summary judgment in favor of Defendant on Plaintiff Reep's discrimination claim.

d. Plaintiff Doyle

Plaintiff Doyle contends Defendant falsely accused him of misconduct and pressured him to resign because of his military status.[25] [*See* Doc. 207 at 23-25]. Upon review,

24. Plaintiff Reep's own response briefs are not properly before this Court for the reasons discussed above. *See supra*, part III.B.

25. Opposing Plaintiffs all argue that Defendant discriminated against them through its supposed practice of "dissuading"

the Court finds Plaintiff Doyle has offered evidence establishing the prima facie elements of his USERRA discrimination claim by a preponderance of the evidence. Specifically, Plaintiff Doyle asserts that an April 28, 2015 email exchange between one of Defendant's supervisors, Mr. Barry Behnfeldt (who oversaw the MLOA process for at least some of Defendant's employees, including Plaintiff Doyle), and Defendant's regional director, Captain Phil Davis, shows that Defendant discriminated against him because of his military status. [*See generally* Doc. 197-16]. In that email exchange, Mr. Behnfeldt alerts Captain Davis that he "stumbled across" Plaintiff Doyle's pattern of taking a single MLOA day in a block of on-call days (or "reserve days") and that Plaintiff Doyle was "not being too kind to his primary employer." [*See id.*] Captain Davis responds: "Interesting that you raised this guy's schedule today. He hit my radar last week[;]. . . . [W]e [will] be visiting . . . him the next time he does the single

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military-affiliated pilots from taking MLOA on or around holidays (which are often the busiest travel days of the year). [*See, e.g.*, Doc. 206 at 16-19]. Specifically, Opposing Plaintiffs contend that Defendant would sometimes ask a pilot or the pilot's military commander if MLOA originally scheduled around holidays could be rescheduled. [*See, e.g.*, *id.*] The Court finds that this theory of discrimination fails on the merits because it is undisputed that Defendant never denied any Plaintiff's requested MLOA because of a holiday and because contacting individuals in a reservist employee's military chain of command is lawful pursuant to USERRA. [*See* Doc. 220 at 34]; *see also* 20 C.F.R. § 1002.104; McLean Dep. at 164:1-3. Independently, none of Opposing Plaintiffs connect this supposed practice to any adverse action taken against them, or anyone else. [*See* Doc. 206 at 16-19]. For both of these independent reasons, this theory does not support a USERRA discrimination claim. *See Coffman*, 411 F.3d at 1238.

MLOA day in the middle of a reserve days block. He has done it very blatantly over the last year." [*See id.*] The Court agrees with Plaintiff Doyle that this evidence is sufficient to establish a prima facie case of USERRA discrimination because a reasonable jury could use it to infer that Defendant pressured Plaintiff Doyle to resign from Defendant's employ because of Plaintiff Doyle's military status.

Therefore, the burden shifts to Defendant "to prove, by a preponderance of the evidence, that legitimate reasons, standing alone, would have induced it to take the same adverse action" against Plaintiff Doyle. *Annarumma*, 846 F. App'x at 782 (citing *Coffman*, 411 F.3d at 1238-39). Defendant proffers that Plaintiff Doyle's repeated abuse of its sick leave and MLOA systems gave rise to such standalone, legitimate reasons for its actions. In his deposition, Plaintiff Doyle concedes that (1) he flew military planes or performed other military duties while on call or regularly scheduled to work for Defendant, (2) that he performed military duties while on paid sick leave with Defendant, and (3) that he would sometimes have military orders but not inform Defendant of his need for MLOA until the day before—or even the day of—the military duty.[26] *See* Doyle Dep. at 214:21-215:6, 231:19-25,

26. In his deposition, Plaintiff Doyle also testified about a fellow servicemember who, according to Plaintiff Doyle, also misused MLOA, but was not penalized by Defendant. *See* Doyle Dep. at 252:5-254:6. The Court notes that this testimony appears to undercut any presumption that Defendant's actions were motivated by Plaintiff Doyle's military status rather than his individual, improper conduct.

337:15-339:8, 340:16-341:5. Defendant's counsel asked Plaintiff Doyle about his last-minute MLOA requests during his deposition, during which Plaintiff Doyle stated:

> A: I can take military leave when I need to take military leave.
>
> . . . .
>
> The company should not tell me that I have to [report planned MLOA] the month prior or even the day that I know of it because perhaps I forgot to do it.
>
> Q: So it's your view the company should not be allowed to tell you to give notice [of planned MLOA] around when you find out. You should be able to -
>
> A: No.
>
> Q: – sit on it for as long as you want –
>
> A: Yeah.
>
> Q: – and then post it at that last minute?
>
> A: I believe that when I remember I should tell the company. That might be the day prior. That might be a month prior, a week prior. But it [] should not matter according to the law.

> Q: Okay. So you would agree that it's possible that at times you had [military] orders, did not submit a leave request, and did so at the last moment?
>
> A: It is possible, yes.

See id. at 238:1-239:15. Additionally, Defendant presents unrebutted evidence of its conversations with Plaintiff Doyle regarding its concerns about his "sudden increase" in sick leave starting in 2012, his use of sick leave in combination with paid vacation days or unpaid days off to increase his time off, his "lack of productivity for the company" based on his low flight hours, and his "effect on fellow employees." [*See* Doc. 170-12 at 1].

Upon consideration, the Court finds that Defendant carries its burden to demonstrate, by a preponderance of the evidence, that it possessed standalone, legitimate reasons for the so-called "pressure" it placed on Plaintiff Doyle that ultimately led to his resignation. *See Annarumma*, 846 F. App'x at 782 (citing *Coffman*, 411 F.3d at 1238-39). Regardless of his military status, Plaintiff Doyle's admitted violations of Defendant's policies, disregard for Defendant's ability to schedule his leave (which no doubt impacted other employees), lack of productivity, and abuse or misuse of Defendant's leave systems all supported Defendant's investigation and that its actions were not motivated by animus against servicemembers. *See id.* (citing *Coffman*, 411 F.3d at 1238-39). Because there is no genuine dispute of material fact as to whether Defendant would be justified in pressuring

Plaintiff Doyle to resign even absent his military status, the Court grants summary judgment in favor of Defendant on Plaintiff Doyle's discrimination claim.

e. Plaintiff McLean

Plaintiff McLean maintains that Defendant took the adverse employment actions of wrongfully accusing him of misconduct and issuing a "Notice of Intent to Terminate" to him because of his military status. [*See* Doc. 206 at 23-25]. Similar to Plaintiff Doyle, Plaintiff McLean contends that he ultimately resigned under pressure by Defendant to do so (or else face termination). [*See id.* at 25].

In support of his prima facie claim, Plaintiff McLean cites to the deposition testimony of Captain William Underwood, one of Defendant's chief pilots and regional directors. [*See* Doc. 206 at 23]. During his deposition, Captain Underwood testified that Plaintiff McLean "basically performed no flying for [Defendant], who's his primary employer, for essentially month after month after month[.]" *See* Deposition of William Underwood ("Underwood Dep.") at 226:14-20 [Doc. 202]. This testimony supports that Defendant was, at minimum, concerned about Plaintiff Doyle's availability to Defendant due to his military status.

Therefore, the burden shifts to Defendant "to prove, by a preponderance of the evidence, that legitimate reasons, standing alone, would have induced it to take the same adverse action." *Annarumma*, 846 F. App'x at 782 (citing *Coffman*, 411 F.3d at 1238-39). To that end, Defendant presents Plaintiff McLean's own deposition testimony wherein he concedes that he violated Defendant's concurrent duty policy by performing military duties on days he was also working for Defendant, despite being warned not to do so by his supervisor, Captain Underwood. *See* McLean Dep. at 175:12-176:13, 191:24-194:5, 217:9-25, 219:2-6, 231:9-24, 237:22-239:14. Notably, Plaintiff McLean himself characterizes Captain Underwood (who is also a former military pilot) as "an honorable man" and "very pro[-military]." *See id.* at 196:3-11, 198:20-21. According to Defendant's unrebutted evidence, Plaintiff McLean violated the concurrent duty policy on no fewer than sixty-nine (69) days during the period between January 1, 2013, and March 31, 2016. [*See* Doc. 171-13 at 1-2] (copy of Notice of Intent to Terminate Letter issued to Plaintiff McLean). Additionally, Defendant points to Plaintiff McLean's concessions that he performed military duty, including flying Air Force jets, while on paid sick leave with Defendant. *See* McLean Dep. at 180:22-25, 222:1-22, 257:9-24. Defendant's unrebutted evidence purports to show that Plaintiff McLean performed military duty while on paid sick leave a minimum of thirty-one (31) days and that his "misuse" of "sick leave provide[d] an independent basis for termination" aside from his abuse of MLOA. [*See* Doc. 171-13 at 2]. Finally, Defendant highlights Plaintiff McLean's admissions that there were "periods" when he "had [MLOA] on his schedule" provided to Defendant when no such military duty was actually scheduled. *See* McLean Dep. at 215:21-216:16, 225:8-23. Defendant's unrebutted evidence maintains that Plaintiff McLean reported he was "on military orders on 25 separate days . . . when in fact [he] was not on military orders." [*See* Doc.

171-13 at 1]. Thus, according to Defendant, it intended to terminate Plaintiff McLean not because of his military status, but because of his repeated abuses or misuses of Defendant's various leave systems (conduct which Plaintiff McLean largely admits or fails to rebut) and his disregard for direct instructions from supervisors about Defendant's policies. [*See generally id.*]

Upon consideration, the Court finds that Defendant carries its burden to prove "by a preponderance of the evidence, that legitimate reasons, standing alone, would have induced it to take the same adverse action" against Plaintiff McLean. *See Annarumma*, 846 F. App'x at 782 (citing *Coffman*, 411 F.3d at 1238-39). Plaintiff McLean's admitted history of abusing or misusing Defendant's leave systems for his own benefit presents a standalone, legitimate reason for Defendant's actions regardless of Plaintiff McLean's military status that comports with Defendant's communications to Plaintiff McLean prior to his resignation. [*E.g.*, Doc. 171-13]. Therefore, no genuine dispute of material fact remains with regard to Plaintiff McLean's discrimination claim, and the Court grants summary judgment in favor of Defendant as to the same.

f. Plaintiff Smith

USERRA states, in relevant part:

> any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other

> employment benefits of this chapter if . . . the cumulative length of the [MLOA] . . . does not exceed five years[.]

See 38 U.S.C. § 4312(a)(2) (the "Five (5)-Year Limit"). By its terms, then, USERRA establishes a temporal limitation on a servicemember's right to demand statutory benefits from his non-military employer Nevertheless, an individual may serve MLOA that exceeds five (5) years in length and still be eligible for reemployment rights and other employment benefits if one of the several exemptions set forth in § 4312(c) applies. *See generally* 38 U.S.C. § 4312(c).

Defendant hired Plaintiff Smith as a pilot in 2007. *See* Smith Dep. at 83:10-12; [Doc. 174]. From August 2008 until October 2016, Plaintiff Smith was on continuous MLOA. *See* Smith Dep. at 221:24-222:5. On October 5, 2016, he requested that Defendant reemploy him and represented that his MLOA was exempt from the Five (5)-Year Limit. *See id.* at 204:5-8. Defendant ostensibly engaged in a reemployment process with Plaintiff Smith and allowed him to become "an active pilot with [Defendant] as of November 16[,]" 2016. *See id.* at 42:15-43:2. However, according to Plaintiff Smith, in early December 2016, Defendant determined that Plaintiff Smith's military documents were insufficient to support his reemployment as exempt from the Five (5)-Year Limit. *See id.*

On December 8, 2016, Plaintiff Smith was attending a simulator training event at Defendant's headquarters when, according to his own testimony, an unspecified individual "made a phone call and came down and interrupted [him] in the middle of [his] [simulator] . . . to tell [him] that [he] would have a meeting with" a supervising captain. *See id.* at 42:4-7. Upon Plaintiff Smith's "completion of [his] simulator, they sent" a member of senior management "to collect [Plaintiff Smith] from the simulator event and take [him] to that meeting." *See id.* at 189:16:-21, 220:4-5. During the meeting, Plaintiff Smith was told that he exceeded the Five (5)-Year Limit, that the military documentation he provided to exempt him from the Five (5)-Year Limit was insufficient, and that he was being placed on unpaid leave and sent home immediately. *See id.* at 208:5-11, 212:8-213:8. A meeting outline associated with the December 8, 2016 meeting shows under the heading "opening statement": "[w]e are here today primarily to discuss and clarify some questions or *concerns we have with your MLOA, [s]ick [l]eave[,] and attendance* with [Defendant]." [*See* Doc. 171-14] (emphasis added). Plaintiff Smith argues that Defendant took the adverse employment actions of (1) not reemploying or retaining him after being on MLOA for approximately eight (8) years even though his MLOA was "exempt" from the Five (5)-Year Limit and (2) subjecting to him embarrassment at the aforementioned December 8, 2016 meeting, which he describes as "a public execution designed to intimidate other military pilots." [*See* Doc. 208 at 22-24]. The Parties do not dispute that in order to be exempt from the Five (5)-Year Limit, Plaintiff Smith's "relevant military orders" *should* state the "exempt status" of the service. [*See* Doc. 178-2 at 24]; *see also* Smith Dep. at 237:2-15. Plaintiff Smith admits that his orders did not so provide, but he contends that another form of documentation he submitted—his "DD-214" document—should have been accepted as "equally . . . valid . . . proof of [exempt status] service." *See* Smith Dep. at 237:12-22. Defendant disputes that a DD-214 document is sufficient to establish that an individual's service is "exempt" from the Five (5)-Year Limit and further contends that Plaintiff Smith "coerced Navy personnel through fraud and deceit to include inaccurate language" in his DD-214 document to show an exempt status as part of a "deceptive plot." [*See* Doc. 220 at 47 & n.30].

Upon review and consideration, the Court finds that Plaintiff Smith fails to sufficiently demonstrate the prima facie elements of his discrimination claim with respect to the December 8, 2016 meeting. Although that meeting interrupted a simulator training activity, being called to a meeting is not "an adverse employment action covered by § 4311" as required to support a USERRA discrimination claim. *See Coffman*, 411 F.3d at 1238; *see also* 38 U.S.C. § 4311(a). Furthermore, the Court does not discern any basis for characterizing this event as a "public execution," as Plaintiff Smith has chosen to call it. [*See* Doc. 208 at 23]. However, the Court finds that Plaintiff Smith sufficiently demonstrates the prima facie elements of his discrimination claim with respect to his termination. The record evidence before the Court demonstrates that Plaintiff Smith was either terminated or not fully reemployed by Defendant based, at least in part, on Defendant's concerns about his military service. [*See, e.g.*, Doc. 171-14].

Thus, the burden shifts to Defendant "to prove, by a preponderance of the evidence, that legitimate reasons, standing alone, would have induced it" to terminate Plaintiff Smith. *See Annarumma*, 846 F. App'x at 782 (citing *Coffman*, 411 F.3d at 1238-39). Although Defendant argues that its decision was legitimate pursuant to the Five (5)-Year Limit, the Court finds that genuine disputes of material fact remain regarding that question, particularly around whether the military documentation Plaintiff Smith provided to Defendant was sufficient to entitle him to an exemption from the Five (5)-Year Limit and whether Plaintiff Smith engaged in "fraud and deceit" to obtain that documentation. [*See* Doc. 220 at 47]; *see also Anderson*, 477 U.S. at 255, 106 S.Ct. 2505 ("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether [s]he is ruling on a motion for summary judgment or for a directed verdict."). Accordingly, the Court grants in part and denies in part Defendant's motion for summary judgment as to Plaintiff Smith's discrimination claim.[27]

IV. Motion to Appoint Interim Class Counsel

The Court next turns to Plaintiffs McLean, Doyle, and Smith's "Motion for Appointment of Interim Class Counsel." [Doc. 139]. As noted, through that motion, Plaintiffs McLean, Doyle, and Smith seek the appointment

27. In light of the Court's above rulings, the Court denies as moot Plaintiffs Smith, Doyle, and McLean's "Motion for Leave to File a Sur-Reply to Defendant's Reply Brief in Support of its Motion for Summary Judgment." [Doc. 223].

of Messrs. Stonebarger and Billy as interim co-lead class counsel pursuant to Federal Rule of Civil Procedure 23(g).[28] [*See id.* at 1]. Both Defendant and Plaintiffs Reep and Sorenson—through their attorney, Ms. Matter—oppose this motion.[29] [*See* Docs. 153, 160-1, 192]. However, Plaintiffs Reep and Sorenson did not file a competing motion seeking to have Ms. Matter appointed as interim lead (or co-lead) class counsel. Instead, Plaintiffs Reep and Sorenson argue that if the Court chooses to appoint interim class counsel at present—and they contend it should not—then they "join the motion to appoint interim class counsel and ask that [Ms.] Matter be appointed lead or co-lead" counsel. [*See* Doc. 153 at 13]. Nonetheless, an argument contained in a response brief is not the same as a motion properly before the Court, and the Court will not construe it as such. *See* LR 7.1(A)(1), NDGa. Additionally, none of the claims brought by Ms. Matter's clients survive summary judgment, and thus, it is unnecessary to consider her as potential lead counsel for the putative class.

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28. Plaintiffs Doyle, McLean, and Smith's interim class counsel motion fails to conform to the formatting requirements of this district's Local Rules. *Compare* LR5.1(A)(2), (C)(2), [*with* Doc. 139]. The Court cautions Plaintiffs Doyle, McLean, and Smith that it will not consider any future filings that fail to conform with this district's Local Rules. *See* LR 7.1(F), NDGa. ("The court, in its discretion, may decline to consider any motion or brief that fails to conform to the requirements of these rules.").

29. Unlike the summary judgment response briefs Ms. Matter filed, the response she filed in opposition to the instant motion contains the signature of her local counsel. [*See* Doc. 153 at 25].

A. Legal Standard

Federal Rule of Civil Procedure 23(g)(3) permits the Court to "designate interim counsel to act on behalf of putative class members before determining whether to certify the action as a class action." Fed. R. Civ. P. 23(g)(3). "When appointing interim class counsel, courts generally look to the same factors used in determining the adequacy of class counsel under Rule 23(g)(1)(A)." *In re Mun. Derivatives Antitrust Litig.*, 252 F.R.D. 184, 186 (S.D.N.Y. 2008). Those factors are:

> (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources counsel will commit to representing the class[.]

Fed. R. Civ. P. 23(g)(1)(A). Further, the Court "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." *See id.* 23(g)(1)(B).

The Court's task is "to ensure that counsel appointed to leading roles are qualified and responsible, that they will fairly and adequately represent all of the parties on their side, and that their charges will be reasonable." *See Manual for Complex Litigation (Fourth)* § 10.22 (2004); *see also id.* § 21.11 (explaining that, when the various lawyers involved in a litigation stipulate to the selection of interim class counsel, the Court's role is to "determin[e] that the chosen counsel is adequate to [so] serve[,]" but "[a]bsent a stipulation, the [C]ourt may need to select interim class counsel from lawyers competing for the role and formally designate the lawyer selected"). Additionally, the Court notes that:

> [s]election of interim lead counsel facilitates "efficiency and economy without jeopardizing fairness to the parties." [*See id.* § 10.22] (noting that interim counsel "assume a responsibility to the court and an obligation to act fairly, efficiently, and economically in the interests of all parties and parties' counsel"). In matters such as this, appointing seasoned lead counsel is one of the district court's key organizational tools. [*Id.*] at §§ 10.224, 21.272. The "designation of interim class counsel clarifies responsibility for protecting the interests of the class during precertification activities, such as making and responding to motions, conducting any necessary discovery, moving for class certification, and negotiating settlement." *Id.* at § 21.11. Because lead counsel is charged with the ultimate responsibility of acting on behalf of the class throughout the entire litigation, th[e] Court must appoint lead counsel who are fully capable and qualified to fairly and adequately represent the interests of the class, including through trial if necessary. *Id.* at §§ 21.271-72.

In re: Disposable Contact Lens Antitrust Litig., No. 3:15-MD-2626-J-20JRK, 2015 WL 10818781, at *1 (M.D. Fla. Oct. 7, 2015).

B. Discussion

The Court finds the leadership structure for Plaintiffs' interim class counsel proposed by Plaintiffs Doyle, McLean, and Smith to be the "most sensible." *See Bowers v. Sioux Honey Coop. Assn.*, No. 12-21034-CIV, 2012 WL 12865846, at *3 (S.D. Fla. Dec. 14, 2012). First, Messrs. Stonebarger and Billy (together, "Proposed Co-Lead Counsel") have each done extensive work in identifying and investigating potential claims in the action over the course of the last five (5) years. [*See* Doc. 139-1 at 6]. Second, Proposed Co-Lead Counsel have significant experience handling USERRA actions against defendants in the airline industry specifically as well as class action litigation more broadly; each has served "as lead, co-lead[,] or primary [c]lass counsel" in class actions over the last twelve (12) years. [*See id.* at 7-8]. Third, based on their extensive combined experience, including other similar cases they litigated and in which they prevailed, the Court finds that Proposed Co-Lead Counsel possess knowledge of the applicable law and the federal litigation process. [*See id.*] Fourth, the Court finds that Proposed Co-Lead Counsel, through their respective firms, possess adequate resources to litigate this action and to seek a resolution of it that is in the best interests of the putative class. [*See id.* at 8-9]. Proposed Co-Lead Counsel tout their own abilities to litigate efficiently, "streamline the litigation" and "us[e] case management strategies . . . to avoid duplication and inefficiency in the" process. [*See id.* at 9]. Now is the time for them to demonstrate these abilities. The Court accordingly grants Plaintiffs McLean, Doyle, and Smith's "Motion for Appointment of Interim Class Counsel." [Doc. 139].

V. Conclusion

For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN PART** Defendant Delta Air Lines Inc.'s "Motion for Summary Judgment." [Doc. 178]. Specifically, the Court **DENIES** Defendant's motion with regard to Plaintiff Smith's discrimination claim to the extent it is based on Defendant's termination of his employment. The Court **GRANTS** Defendant's motion in all other respect and **DIRECTS** the Clerk to enter judgment in favor of Defendant on all claims except Plaintiff Smith's discrimination claim (to the extent it is based on Defendant's termination of his employment). The Court **DIRECTS** the Clerk to terminate Plaintiffs Sorenson, Reep, Doyle, and McLean as Party Plaintiffs to this matter.

The Court **DENIES AS MOOT** Plaintiffs Smith, Doyle, and McLean's "Motion for Leave to File a Sur-Reply to Defendant's Reply Brief in Support of its Motion for Summary Judgment." [Doc. 223]. The Court **GRANTS** Plaintiffs McLean, Doyle, and Smith's "Motion for Appointment of Interim Class Counsel" and **APPOINTS** Gene J. Stonebarger of Stonebarger Law, APC and Charles M. Billy of the Law Offices of Charles M. Billy, P.C. as interim co-lead class counsel. [Doc. 139].

Pursuant to the most recent Amended Scheduling Order entered by the Court, "[a]ny class certification motion shall be filed within sixty (60) days of the Court's ruling on dispositive motions, if no appeal is filed." [*See* Doc. 55 at 1]. Thus, the Court **DIRECTS** Interim

Co-Lead Counsel Stonebarger and Billy to file any class certification motion within sixty (60) days from the date this order issues.

SO ORDERED, this 31st day of March, 2023.

/s/ Eleanor L. Ross
Eleanor L. Ross
United States District Judge
Northern District of Georgia

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED JULY 24, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

1:17-CV-00541-ELR

RANDAL SMITH, AN INDIVIDUAL,

Plaintiff,

v.

DELTA AIR LINES, INC.,
A DELAWARE CORPORATION,

Defendant.

Filed July 24, 2023

ORDER

Presently before the Court are former Plaintiffs Adam McLean and James Doyle's "Motion for Reconsideration of Certain Parts of this Court's Order of March 31, 2023" [Doc. 228] and Defendant Delta Air Lines, Inc.'s "Emergency Motion for Leave to File Out of Time Motion for Reconsideration." [Doc. 234]. Both motions concern portions of the Court's March 31, 2023 Order granting in part and denying part Defendant's motion for summary judgment (the "Summary Judgment Order"). [*See* Doc. 227 at 46–57]. The Court addresses each motion in turn.

I. Former Plaintiffs McLean and Doyle's Motion for Reconsideration

Former Plaintiffs McLean and Doyle (together, the "Moving Plaintiffs") seek reconsideration of this Court's Order granting summary judgment in favor of Defendant on the discrimination claims they brought pursuant to Section 4311 of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). [*See* Doc. 228-1 at 1–2] (citing 38 U.S.C. § 4311); [*see also* Doc. 227 at 46–52] (the relevant portion of the Summary Judgment Order). The Court sets out the relevant legal standard before turning to the merits of Moving Plaintiffs' motion.

A. Legal Standard

Reconsideration is only appropriate where there is (1) newly discovered evidence, (2) an intervening development or change in controlling law, or (3) a need to correct a clear error of law or fact. *See Bryan v. Murphy*, 246 F. Supp. 2d 1256, 1258–59 (N.D. Ga. 2003); *see also Kramer v. Conway*, 962 F. Supp. 2d 1333, 1356 (N.D. Ga. 2013). Accordingly, motions for reconsideration should be filed only when "absolutely necessary." *Bryan*, 246 F. Supp. 2d at 1258; *accord* LR 7.2(E), NDGa. They should not be used "as a vehicle to present new arguments or evidence that should have been raised earlier, introduce novel legal theories, or repackage familiar arguments to test whether the Court will change its mind." *Pediatric Med. Devices, Inc. v. Ind. Mills & Mfg., Inc.*, 961 F. Supp. 2d 1241, 1243 (N.D. Ga. 2013). The decision of whether to grant reconsideration is committed to the sound discretion of the district court. *Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1216 (11th Cir. 2000).

B. Discussion

Moving Plaintiffs contend that reconsideration is warranted as to their USERRA discrimination claims based on newly discovered evidence (which they also contend reveals an "error of law and fact" in the Summary Judgement Order). [*See* Doc. 228-1 at 2–3]. Specifically, Moving Plaintiffs identify a recently revised version of Defendant's "new Military Leave policy, signed into effect on March 2, 2023[.]" [*See id.* at 2]. They claim that this policy "expressly allow[s] Concurrent Duty" that was "previously disallowed to Moving Plaintiffs and the putative Class[.]" [*See id.* at 2–3].

Moving Plaintiffs contend that Defendant's March 2023 change in policy constitutes a subsequent remedial measure that demonstrates "control or feasibility of precautionary measures" because Defendant's "conduct in expressly allowing military servicemembers to perform Concurrent Duty in 2023 establishes that [Defendant] could control the policy and that it was feasible to allow military servicemembers to perform Concurrent Duty during the prior time periods at issue in this case." [*Id.*

at 3] (citing Fed. R. Evid. 407). Thus, Moving Plaintiffs argue that the Court should reinstate their discrimination claims because (1) Defendant's prior policy, which was in effect at all times relevant to this suit, was "discriminatory and unlawful[ ] in violation of USERRA" since it did not allow service members to perform concurrent duty; (2) the March 2, 2023 revision of Defendant's concurrent duty policy demonstrates that Defendant had control over the policy and that it was feasible to change it; and (3) "[i]f this policy is found to be discriminatory and unlawful, as Moving Plaintiffs contend, then [Defendant] had no justifiable reasons to discipline Moving Plaintiffs, or even begin investigations of Moving Plaintiffs' military service." [*Id.* at 2–4]. Put differently, Moving Plaintiffs argue that, absent their admitted violations of Defendant's previous concurrent duty policy, there were no "legitimate reasons, standing alone, [that] would have induced" Defendant to "take the same adverse action[s]" against them. [*Id.* at 6] (quoting *Annarumma v. City of High Springs*, 846 F. App'x 776, 782 (11th Cir. 2021) (per curiam)). As such, Moving Plaintiffs contend that the Court's Order granting summary judgment to Defendant on Moving Plaintiffs' discrimination claims was improper and the result of a clear error of law and fact. [*See generally id.*]

Upon review, the Court finds that Moving Plaintiffs' arguments do nothing to alter the Court's analysis in the Summary Judgment Order. In that Order, with regard to former Plaintiff Doyle, upon finding he demonstrated a prima facie claim for discrimination in violation of USERRA, the Court went on to explain:

Therefore, the burden shifts to Defendant "to prove, by a preponderance of the evidence, that legitimate reasons, standing alone, would have induced it to take the same adverse action" against Plaintiff Doyle. *Annarumma*, 846 F. App'x at 782 (citing *Coffman[v. Chugach Support Servs., Inc.]*, 411 F.3d [1231,] 1238–39 [(11th Cir. 2005)]). Defendant proffers that Plaintiff Doyle's repeated abuse of its sick leave and MLOA systems gave rise to such standalone, legitimate reasons for its actions. In his deposition, Plaintiff Doyle concedes that (1) he flew military planes or performed other military duties while on call or regularly scheduled to work for Defendant, (2) that he performed military duties while on paid sick leave with Defendant, and (3) that he would sometimes have military orders but not inform Defendant of his need for MLOA until the day before—or even the day of—the military duty.

. . . .

Additionally, Defendant presents unrebutted evidence of its conversations with Plaintiff Doyle regarding its concerns about his "sudden increase" in sick leave starting in 2012, his use of sick leave in combination with paid vacation days or unpaid days off to increase his time off, his "lack of productivity for the company" based on his low flight hours, and his "effect on fellow employees." [*See* Doc. 170-12 at 1].

> Upon consideration, the Court finds that Defendant carries its burden to demonstrate, by a preponderance of the evidence, that it possessed standalone, legitimate reasons for the so-called "pressure" it placed on Plaintiff Doyle that ultimately led to his resignation. *See Annarumma*, 846 F. App'x at 782 (citing *Coffman*, 411 F.3d at 1238–39). Regardless of his military status, Plaintiff Doyle's admitted violations of Defendant's policies, disregard for Defendant's ability to schedule his leave (which no doubt impacted other employees), lack of productivity, and abuse or misuse of Defendant's leave systems all supported Defendant's investigation and that its actions were not motivated by animus against servicemembers. *See id.* (citing *Coffman*, 411 F.3d at 1238–39). Because there is no genuine dispute of material fact as to whether Defendant would be justified in pressuring Plaintiff Doyle to resign even absent his military status, the Court grants summary judgment in favor of Defendant on Plaintiff Doyle's discrimination claim.

[Doc. 227 at 47–50] (internal footnote omitted) (citing Deposition of James Doyle at 214:21–215:6, 231:19–25, 238:1–239:15; 337:15–339:8, 340:16–341:5 [Doc. 170]).

Moving Plaintiffs claim that the Court's above findings rely on the legality of Defendant's now-revised concurrent duty policy, but in doing so, Moving Plaintiffs obfuscate the issues.[1] [*See, e.g.*, Doc. 228-1 at 19] ("Even if Plaintiff Doyle did perform military duty while on sick leave at [Defendant], because pilots are not prevented from doing any other activity or any other employment, such a prohibition would be discriminatory and in violation of USERRA."). Regardless of the legality of Defendant's past or present concurrent duty policy, in the Summary Judgment Order the Court enumerated a number of other legitimate reasons independent of that policy—including "Plaintiff Doyle's admitted violations of Defendant's policies, disregard for Defendant's ability to schedule his leave (which no doubt impacted other employees), lack of productivity, and abuse or misuse of Defendant's leave systems"—to support that Defendant's "actions

1. Indeed, Moving Plaintiffs already lodged this very argument at summary judgment. [*Compare* Doc. 228-1 at 19] ("Even if Plaintiff Doyle did perform military duty while on sick leave at [Defendant], because pilots are not prevented from doing any other activity or any other employment, such a prohibition would be discriminatory and in violation of USERRA."), [*with* Doc. 207 at 20] ("This Court found that Plaintiffs have alleged a plausible claim based on [Defendant's] alleged discriminatory 'Concurrent Duty' policy whereby 'pilots may not perform any military service on the same day that they have obligations to [Defendant], but they may engage in any other activity.' It is discriminatory because it *only* prohibits employees from performing military service, but nothing else. 'Many Delta pilots have other careers,' but this policy does not prohibit pilots from engaging in *any* other activity." (emphasis in original) (internal citations and footnote omitted)). This reason independently supports denial of Moving Plaintiffs' motion for reconsideration because such motions should not be used "as a vehicle to . . . repackage familiar arguments to test whether the Court will change its mind." *Pediatric Med. Devices*, 961 F. Supp. 2d at 1243.

were not motivated by animus against servicemembers." [*See* Doc. 227 at 49]. And, as noted above, Defendant was not required to demonstrate beyond *any* doubt that it possessed legitimate, standalone reasons that would have induced it to take the same adverse action with regard to Plaintiff Doyle—Defendant's burden was only to show this by a preponderance of the evidence. *See Annarumma*, 846 F. App'x at 782; *Coffman*, 411 F.3d at 1238–39.

Similarly, in the Summary Judgment Order, the Court found that former Plaintiff McLean demonstrated a prima facie claim for discrimination in violation of USERRA and then reasoned:

> . . . the burden shifts to Defendant "to prove, by a preponderance of the evidence, that legitimate reasons, standing alone, would have induced it to take the same adverse action." *Annarumma*, 846 F. App'x at 782 (citing *Coffman*, 411 F.3d at 1238–39). To that end, Defendant presents Plaintiff McLean's own deposition testimony wherein he concedes that he violated Defendant's concurrent duty policy by performing military duties on days he was also working for Defendant, despite being warned not to do so by his supervisor, Captain Underwood. *See* [Deposition of Adam McLean ("McLean Dep.")] at 175:12–176:13, 191:24–194:5, 217:9–25, 219:2–6, 231:9–24, 237:22–239:14 [Doc. 171]. Notably, Plaintiff McLean himself characterizes Captain Underwood (who is also a former military pilot) as "an honorable

man" and "very pro[-military]." *See id.* at 196:3–11, 198:20–21. According to Defendant's unrebutted evidence, Plaintiff McLean violated the concurrent duty policy on no fewer than sixty-nine (69) days during the period between January 1, 2013, and March 31, 2016. [*See* Doc. 171-13 at 1–2] (copy of Notice of Intent to Terminate Letter issued to Plaintiff McLean). Additionally, Defendant points to Plaintiff McLean's concessions that he performed military duty, including flying Air Force jets, while on paid sick leave with Defendant. *See* McLean Dep. at 180:22–25, 222:1–22, 257:9–24. Defendant's unrebutted evidence purports to show that Plaintiff McLean performed military duty while on paid sick leave a minimum of thirty-one (31) days and that his "misuse" of "sick leave provide[d] an independent basis for termination" aside from his abuse of MLOA. [*See* Doc. 171-13 at 2]. Finally, Defendant highlights Plaintiff McLean's admissions that there were "periods" when he "had [MLOA] on his schedule" provided to Defendant when no such military duty was actually scheduled. *See* McLean Dep. at 215:21–216:16, 225:8–23. Defendant's unrebutted evidence maintains that Plaintiff McLean reported he was "on military orders on 25 separate days . . . when in fact [he] was not on military orders." [*See* Doc. 171-13 at 1]. Thus, according to Defendant, it intended to terminate Plaintiff McLean not because of his military status, but because of

> his repeated abuses or misuses of Defendant's various leave systems (conduct which Plaintiff McLean largely admits or fails to rebut) and his disregard for direct instructions from supervisors about Defendant's policies. [*See generally id.*]
>
> Upon consideration, the Court finds that Defendant carries its burden to prove "by a preponderance of the evidence, that legitimate reasons, standing alone, would have induced it to take the same adverse action" against Plaintiff McLean. *See Annarumma*, 846 F. App'x at 782 (citing *Coffman*, 411 F.3d at 1238–39). Plaintiff McLean's admitted history of abusing or misusing Defendant's leave systems for his own benefit presents a standalone, legitimate reason for Defendant's actions regardless of Plaintiff McLean's military status that comports with Defendant's communications to Plaintiff McLean prior to his resignation. [*E.g.*, Doc. 171-13].

[Doc. 227 at 50–52]. Thus, just as with former Plaintiff Doyle, the Court's Summary Judgment Order clearly set forth various reasons Defendant satisfied its burden at summary judgment with regard to former Plaintiff McLean, some of which are wholly unrelated to the concurrent duty policy.

In sum, a change in Defendant's concurrent duty policy does not affect the correctness of any of the Court's previous rulings in the Summary Judgment Order. [*See id.* at 46–52]. Moving Plaintiffs' arguments fail to reveal any error of law or fact in the same, and the supposed "new evidence" they proffer is irrelevant. [*See generally* Doc. 228]. Accordingly, the Court denies Moving Plaintiffs' motion for reconsideration.[2]

II. Defendant's Emergency Motion for Leave to File Out of Time Motion for Reconsideration

As noted, Defendant filed its motion seeking leave to file an untimely motion for reconsideration on July 18, 2023. [Doc. 234]. Defendant attaches a copy of its proposed motion for reconsideration to its motion for leave to file the same. [Docs. 234-1, 234-2]. In its motion for leave to file, Defendant concedes that its proposed request for reconsideration—which concerns the portion of the Summary Judgment Order analyzing Plaintiff Smith's discrimination claim—is untimely because it comes "more than twenty-eight days from the date of the Court's [S]ummary [J]udgment Order[.]" [*See* Doc. 234 at 5–6]; *see also* LR 7.2(E), NDGa. However, Defendant represents that "[a]s [its] counsel was re-reviewing the Court's [S]ummary [J]udgment [O]rder in preparation for drafting motions in limine, counsel became aware for the first time that the Court inadvertently made a[n] . . . error of fact . . . in denying [Defendant] summary judgment on

2. The Court declines to consider any arguments Moving Plaintiffs attempt to advance that are based on so-called factual disputes that the Court previously deemed admitted due to Moving Plaintiffs' failure to comply with Local Rule 56.1. [*See* Doc. 227 at 4 n.3].

[Plaintiff] Smith's termination claim," and that, in light of this recent discovery, Defendant should be allowed to file a motion for reconsideration of the Summary Judgment Order now. [*Id.* at 2–3]. Although the deadline for Plaintiff Smith to respond to Defendant's motion has not yet expired, the Court finds it appropriate to pronounce its ruling on the same now. *See* LR 7.1(B), NDGa.

Local Rule 7.2(E) provides that motions for reconsideration of an order or judgment "shall be filed . . . within twenty-eight (28) days after entry of the order or judgment." *Id.* 7.2(E). Pursuant to Federal Rule of Civil Procedure 6, when an act must be done within a specified time, the Court may extend the deadline after its expiration only upon a motion from the party seeking the extension that shows both that (1) good cause exists to extend the deadline and (2) "the party failed to act because of excusable neglect." *See* Fed. R. Civ. P. 6(b)(1)(B). Absent "any showing of excusable neglect" on the part of the proponent, a district court is entitled to "enforce[e] strict compliance with the deadlines prescribed by [its] local rules." *See McDuffie v. Broward Cnty.*, 654 F. App'x 408, 412 (11th Cir. 2016); *see also Ramion v. Brad Cole Constr. Co.*, 805 F. App'x 948, 950 (11th Cir. 2020) (noting the discretion district courts have in interpreting, enforcing, and applying their local rules). This rule exists because the Court "must enforce its deadlines to ensure fairness to all sides[,] . . . to all litigants," *Mangham v. Westin Hotel Mgmt., LP*, Civil Action No. 1:16-CV-03725-WSD, 2017 WL 4540712, at *5 (N.D. Ga. Oct. 11, 2017) (internal quotation omitted), and "to the public, including those persons affected by the [C]ourt's increasingly crowded docket." *Young v. City of Palm Bay*, 358 F.3d 859, 864 (11th Cir. 2004).

Here, the Court issued its Summary Judgment Order on March 31, 2023. [Doc. 227]. Defendant filed its instant motion 109 days after that date, on July 18, 2023. [Doc. 234]. Defendant does not provide any reason for seeking to file a motion for reconsideration regarding the Summary Judgment Order eighty-one (81) days late other than that its counsel recently noticed a purportedly incorrect fact. [*See id.* at 2–3]. Instead, Defendant urges the Court to exercise its "discretion to consider and rule on" its proposed untimely motion for reconsideration. [*See id.*] Defendant further contends that Plaintiff "Smith will not be prejudiced by the Court" taking this action "(and instead will avoid a trial where [Defendant] will be entitled to Judgment as a Matter of Law), and [Defendant] will suffer manifest injustice if the Court chooses not to exercise its discretion in this circumstance." [*See id.* at 6].

Upon review and consideration, the Court declines to allow Defendant to file its months-late motion for consideration. Plaintiff Smith's discrimination claim was the only claim to survive summary judgment. [*See* Docs. 227 at 53–57]. And the Court's analysis of Plaintiff Smith's sole surviving claim spanned less than four (4) pages of its sixty-two (62)-page Summary Judgment Order. [*See id.*] The Court cannot speculate as to why defense counsel failed to adequately scrutinize this small handful of pages for more than 100 days after receiving them. Neither can the Court understand defense counsel's failure to even mention the Rule 6 standards governing requests for extensions of expired deadlines in its present motion for leave to file. Given Defendant's complete lack of explanation for both of these failures, the Court finds Defendant's failure to timely move for reconsideration of the summary judgment was not because of excusable neglect and that no good cause exists for the Court to extend the Local Rules' deadline for the filing of motions for reconsideration. *See* Fed. R. Civ. P. 6(b)(1)(B); LR 7.2(E), NDGa. Thus, the Court denies Defendant's motion. Any "manifest injustice" Defendant might suffer is entirely of its own making. [*See* Doc. 234 at 6].

III. Conclusion

For the foregoing reasons, the Court **DENIES** former Plaintiffs Adam McLean and James Doyle's "Motion for Reconsideration of Certain Parts of this Court's Order of March 31, 2023" [Doc. 228] and **DENIES** Defendant Delta Air Lines, Inc.'s "Emergency Motion for Leave to File Out of Time Motion for Reconsideration." [Doc. 234]. Pursuant to this Court's July 7, 2023 Order, the pretrial conference in this matter remains set for September 12, 2023, with trial to begin on September 26, 2023. [Doc. 233].

SO ORDERED, this 24th day of July, 2023.

/s/ Eleanor L. Ross
Eleanor L. Ross
United States District Judge
Northern District of Georgia

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JUNE 10, 2026

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 24-11946

JEREMY SORENSON, *et al.*,
AN INDIVIDUAL,

Plaintiffs,

ADAM MCLEAN, AN INDIVIDUAL,
JAMES DOYLE, AN INDIVIDUAL, ON
BEHALF OF THEMSELVES AND ALL
OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

versus

DELTA AIR LINES, INC.,
A DELAWARE CORPORATION,

Defendant-Appellee.

Filed June 10, 2026

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Appendix D

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:17-cv-00541-ELR

Before William Pryor, Chief Judge, and Luck and Brasher, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 40. The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 40, 11th Cir. IOP 2.

APPENDIX E — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JUNE 26, 2026

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 24-11946

JEREMY SORENSON, *et al.*,
AN INDIVIDUAL,

Plaintiffs,

ADAM MCLEAN, AN INDIVIDUAL,
JAMES DOYLE, AN INDIVIDUAL, ON
BEHALF OF THEMSELVES AND ALL
OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

versus

DELTA AIR LINES, INC.,
A DELAWARE CORPORATION,

Defendant-Appellee.

Filed June 26, 2026

JUDGMENT

Appendix E

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:17-cv-00541-ELR

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: April 22, 2026

For the Court: DAVID J. SMITH, Clerk of Court

ISSUED AS MANDATE: June 26, 2026

APPENDIX F — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED SEPTEMBER 8, 2023

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:17-CV-00541-ELR

JEREMY SORENSON, RANDAL REEP, RANDAL SMITH, ADAM MCLEAN AND JAMES DOYLE,

Plaintiffs,

vs.

DELTA AIR LINES, INC.,

Defendant.

Filed September 8, 2023

JUDGMENT

This action having come before the court, Honorable Eleanor L. Ross, United States District Judge, for consideration of Defendant's Motion for Summary Judgment, and the ourt having granted in part and denied in part said motion, it is

Ordered and Adjudged that judgment is hereby entered in favor of Defendant on all claims except Plaintiff Smith's discrimination claim, and that Plaintiffs Sorenson, Reep, Doyle, and McLean be dismissed from this matter.

Dated at Atlanta, Georgia, this 8th day of September, 2023.

Kevin P. Weimer
Clerk of Court

By: s/ Ciarra Steede
Deputy Clerk

APPENDIX G — DELTA DEALS MEETING AGENDA (D. CT. DOC. 194-6, FILED MAY 11, 2022)

Case #	Deals Start	Pilot	Incident(s)	Status	Action Items	Pay Code	Days in Deals
ATLANTA							
1.1	5/19/15	Reep, Randal, 273605, ATL/031	Suspected MLOA abuse	Reviewing new findings on the legal front.	Second NOI delivered. Termination pending.	CADM/ MLOA	464
1.2	8/24/16	Hanna, Stacey, 348436, ATL/030	Pilot accused of theft from passenger's purse	NEW	NEW	CADM	1
CENTRAL							
2.1	4/21/16	McLean, Adam, 258900, MSP/030	MLOA abuse manipulation concurrent duty	Preparing for termination.	JZ/GC compacting interview notes; intend to call pilot in for secondary interview	CADM	126

Appendix G

Case #	Deals Start	Pilot	Incident(s)	Status	Action Items	Pay Code	Days in Deals
2.2	6/23/16	Myhre, John, 207805, MSP/030	Excessive sick while flying airplane for personal business.	Awaiting next steps	Continue to monitor through Labor Day	FLY	63
DETROIT							
NEW YORK							
4.1	2/29/16	Huston, Robert, 412956, NYC/031	RTW exceeding 5 year USERRA limit	Progress being made; PLOA extension approved through August 14	PLOA has expired. Awaiting next steps from JG and OC.	PLOA	178

Appendix G

Case #	Deals Start	Pilot	Incident(s)	Status	Action Items	Pay Code	Days in Deals
WEST							
5.1	1/27/16	Seuring, Karl, 290759, SEA/031	Conflict of interest; Improper access to TOC; Nonrev for business purposes	PD/JZ have completed review and interview packet. Intend to schedule visit in SEA on 8/24	Meeting scheduled in SEA for 8/24	FLY	211
5.2	2/2/16	Blume, Darrin, 705715, SEA/031	Nonrev/ jumpseat while sick, out of place RES, sick abuse	Awaiting decision	PD to draft NOI to terminate.	CADM	205

Case #	Deals Start	Pilot	Incident(s)	Status	Action Items	Pay Code	Days in Deals
5.3	3/28/16	Terrell, Michael, 858466, LAX/031	Misuse of MLOA	Awaiting decision	LOW to be issued in 2 weeks	FLY	150
5.4	3/28/16	Doyle, James, 665315, SLC/031	MLOA abuse	Pending termination	LR working with PD to respond	CADM	150

APPENDIX H — DOYLE INVESTIGATION TRIGGER EMAIL (D. CT. DOC. 197-16, FILED MAY 11, 2022)

Date: Tuesday, April 28 2015 05:36 PM
Subject: RE: MLOA ACTIVITY DOYLE, JAMES 665315
From: Davis, Philip T
To: Behnfeldt, Barry W <Barry.W.Behnfeldt@delta.com >;
Attachments: image001.jpg

Barry,

Interesting that you raised this guy's schedule today. He hit my radar last week and I briefed Alex this morning that we would be visiting with him the next time he does the single MLOA day in the middle of a reserve days block. He has done it very blatantly over the last year.

If you have a minute, would you give me a call please.

Phil

Capt. Phil Davis
Regional Director and Chief Pilot-West Region
Delta Flight Operations
(801)-744-4486 (O)
(404)-291-4376 (M)

From: Behnfeldt, Barry W
Sent: Tuesday, April 28, 2015 3:16 PM
To: Davis, Philip T
Subject: MLOA ACTIVITY DOYLE, JAMES 665315

Phil,
FO Doyle is another one I stumbled across that has the same behavior as FO Klingensmith. Maybe not to the

same degree, but same pattern. This guy is going to be a squadron DO and appears to be not being too kind to his primary employer.

Yours to manage sir as you see fit.

Vr,
Barry

AME: DOYLE, J S 0665315 LOCKER: SLC- 984
04/28/15 16:38:12 OT: 0511 SLC 7ER B 01AUG14 / 30AUG14 SECND-CAT: / U:
DTE OR DES OFF STAT ROT1 D R1 STAT ROT2 D R2 DTE
RPT1 RPT2 E/L R CALL BLKN

01F		RES							.1996	01P
02S		RES								02S
03S		RES			.0139		0950			03S
04W		RES							0953	04M
05T		RES	XX							05T
06W		RES	XX							06W
07T		RES								07T
08F		RES		MLOA						08F
09S		RES							1100	09S
10S		RES								10S
11M		RES	XX							11M
12T		RES	XX							12T
13W		RES	XX							13W
14T		RES			.0508		1015			14T
15F		RES							0553	15F
16S		RES							.0630	16S
17S		RES							0500	17S
18M		RES	* *							18M
19T		RES	* *							19T
20W		RES	XX							20W
21T		RES		SICK						21T
22F		RES		SICK						22F
23S		RES		SICK						23S
24S		RES		OK						24S
25M		RES	* *							25M

APPENDIX I — DELTA INTERNAL FOLLOW-UP EMAIL RE DOYLE INVESTIGATION, RECORD EXHIBIT (D. CT. DOC. 197-17, FILED MAY 11, 2022)

EXHIBIT 17
Phil Davis
8/30/2021

Date: Monday, November 9 2015 08:14 PM
Subject: RE: Doyle
From: Davis, Philip T
To: Cimos, Alex <Alex.Cimos@delta.com>;
CC: Behnfeldt, Barry W <Barry.W.Behnfeldt@delta.com>; Zawislak, Jason E <Jason.E.Zawislak@delta.com>;

Attachments: image001.jpg

Greetings BB,

This is the guy at Hill AFB that I mentioned to you. Jason and I are already doing background work on him, and I am following his schedule on a daily basis. He will at the very least be coming in to explain this.

Phil

Capt. Phil Davis
Regional Director and Chief Pilot-West Region
Delta Flight Operations
(801)-744-4486 (O)
(404)-291-4376 (M)

From: Cimos, Alex
Sent: Monday, November 09, 2015 1:55 PM
To: Davis, Philip T
Subject: FW: MLOA EATON, TIMOTHY 627481

Email thread begins with Eaton but ends with Doyle. BB's rant, below, refs Doyle. We probably need to call Doyle in for an ass-kicking.

From: Behnfeldt, Barry W
Sent: Monday, November 09, 2015 1:34 PM
To: Cimos, Alex
Subject: RE: MLOA EATON, TIMOTHY 627481

Roger.

Doyle,

It really annoys me when a guy places MLOA to take himself out of the 3 day trip bucket!!! He did it three months in a row. Also look at the timing of placing the MLOA on his RES on call days. As the squadron DO, I would almost bet that he is doing military duty on those one/two RES days between MLOA and violating our double dipping policy.

I would maybe talk with Phil because we have talked about individuals in the past with this behavior. I think it may be time to call these guys out and ask them for a "point credit summary" for the periods we're interested in. That report would show if they were performing duty in those periods, thereby violating our double dipping policy.

Vr,
Barry

AME: DOYLE, J S 0665315 LOCKER: SLC- 984 11/09/15 15:10:5
OT: 0509 SLC 7ER B 01AUG15 / 30AUG15 SECND-CAT: /
U:

DTE	OR	DES	OFF	STAT	ROT1	D R1	STAT	ROT2	D R2	DTE
					RPT1	RPT2	E/L R	CALL	BLKN	
01S		RES	* *							01S
02S		RES	XX							02S
03M		RES	XX							03M
04T		RES	XX							04T
05W		RES	XX	OKNF						05S
06T		RES			.0217			1935		06T
07F		RES			———					07F
08S		RES			———					08S
09S		RES			.0338			1920		09S
10M		RES			———					10M
11T		RES	* *							11T
12W		RES	* *							12W
13T		RES	* *							13T
14F		RES	* *							14F
15S		RES	* *							15S
16S		RES	XX							16S
17M		RES	XX							17M
18T		RES								18T
[redacted]										
20T		RES								20T
[redacted]										
22S		RES								22S
23S		RES								23S
24M		RES								24M
25T		RES		MLOA						25T
26W		RES		MLOA						26W
27T		RES		MLOA						27T

APPENDIX J — DELTA EMAIL CIRCULATING MEME RE MILITARY LEAVE (D. CT. DOC. 198-19, FILED MAY 11, 2022)

Date:	Wednesday, September 2 2015 10:58 AM
Subject:	RE: MLOA 30 CLIFFORD, GEORGE 886756
From:	Behnfeldt, Barry W
To:	Holmes, Barry P <Barry.P.Holmes@delta.com>: Goedeke, Christopher W <christopher.goedeke@delta.com>:
Attachments:	image002.jpg; image004.jpg; image005.jpg

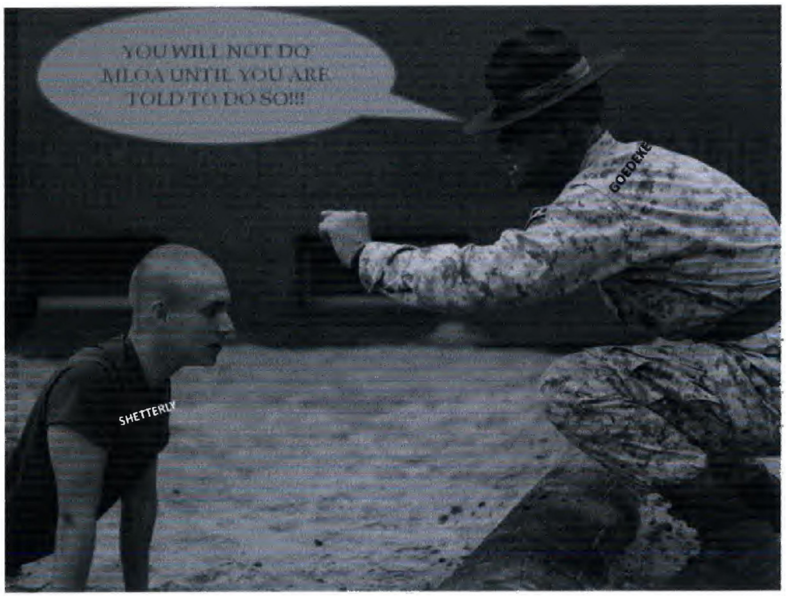
I NEEDED THAT THIS MORNING!!!

Barry Behnfeldt | Special Assignment Supervisor | Flying operations | O:404.715.1534 | M:404.725.8393
[LOGO] **DELTA**

From: Holmes, Barry P
Sent: Wednesday, September 02, 2015 10:58 AM
To: Behnfeldt, Barry W; Goedeke, Christopher W
Subject: RE: MLOA 30 CLIFFORD, GEORGE 886756

CG is an MLOA friggin genius!

Appendix J



From: Behnfeldt, Barry W
Sent: Wednesday, September 02, 2015 10:56 AM
To: Goedeke, Christopher W; Holmes, Barry P
Subject: RE: MLOA 30 CLIFFORD, GEORGE 886756

Got it. I actually have both MLOA logs which is why I wanted y'all to talk to him. This is a win. Just didn't roll over . . . had a conversation . . . behavior hopefully modified for the future . . . motherhood.

I will submit his log starting on 1 Oct for now unless he changes the dates a little on the front.

Coming your way.

APPENDIX K — DELTA CHIEF PILOT EMAILS RE MILITARY PILOTS (D. CT. DOC. 199-2, FILED MAY 11, 2022)

Date:	Tuesday, October 13 2015 02:54 PM
Subject:	RE: MLOA 30 COGGIN, PATRIC 898876
From:	Frederick, Chris
To:	Behnfeldt, Barry W <Barry.W.Behnfeldt@delta.com>;
Attachments:	image001.jpg

Yep, that will be the attitude until they don't have pilots to fly anymore. The 125th in JAX is 5 or 6 pilots short, and they've resorted to sponsoring new guys in pilot training, betting they will be able to get their Fighter/Attack/Recce qual and also able to hack F-15 RTU. Time was, they had a good pool of F-15 experienced guys wanting in. I think 20 years of constant deployments and long-term orders and the environment of airlines hiring is going to change the game.

Captain Chris Frederick
Director and Chief Pilot – ATL
404-7141595

From: Behnfeldt, Barry W
Sent: Tuesday, October 13, 2015 2:47 PM
To: Frederick, Chris
Subject: RE: MLOA 30 COGGIN, PATRIC 898876

Agreed. Mangle has been to the pentagon several times. Not sure if he's getting any traction or how long it will take. My guess is they could give a crap about us. They have jets to put in the air and missions to fly.

Barry Behnfeldt | Special Assignment Supervisor | Flying Operations | O: 404.715.1534 | M: 404.725.8393 [LOGO] **DELTA**

From: Frederick, Chris
Sent: Tuesday, October 13, 2015 2:44 PM
To: Behnfeldt, Barry W
Subject: RE: MLOA 30 COGGIN, PATRIC 898876

I think an Industry level issue to discuss. This is a case of the airlines subsidizing the military/government. Cooperation is one thing, but this has a direct impact on operations. It will make us start looking at whether to hire these guys or not to. Then, when we show intent to be more discriminatory, they start leaving the reserve/guard in droves. Cause and effect.

Captain Chris Frederick
Director and Chief Pilot – ATL
404-7141595

From: Behnfeldt, Barry W
Sent: Tuesday, October 13, 2015 2:27 PM
To: Frederick, Chris
Subject: RE: MLOA 30 COGGIN, PATRIC 898876

We're having a MLOA summit next month and It will be a topic of discussion for sure. Not sure if we're going to be able to move the needle as long as the guard/reserve are being HUGE enablers with $$$$. Really makes you wonder the state of our military these days!!

Vr,
Barry

Barry Behnfeldt | Special Assignment Supervisor | Flying Operations | O: 404.715.1534 | M: 404.725.8393
[LOGO] **DELTA**

From: Frederick, Chris
Sent: Tuesday, October 13, 2015 2:16 PM
To: Behnfeldt, Barry W
Subject: RE: MLOA 30 COGGIN, PATRIC 898876

Geezzz . .

This is the kind of thing that makes one think twice about hiring Res and Guard guys. 6 days off probation and going out for 3 years.

Geezzz . .

Captain Chris Frederick
Director and Chief Pilot
404-7141595