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

PATRICK HALEY and RANDAL REEP, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

DELTA AIRLINES, INC.,

Defendant.

CIVIL ACTION FILE

NO. 1:21-cv-1076-TCB

O R D E R

I. Background

This is a class action brought against Defendant Delta Airlines, Inc. for violations of The Uniformed Service Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4301 et seq.

Plaintiffs Patrick Haley and Randal Reep, former Delta employees, served in the U.S. Armed Forces while employed at Delta. Until October 2020, Haley served in the Air Force Reserve, and Reep

currently serves in the Florida Air National Guard. At times throughout their employment with Delta, Plaintiffs took short-term military leave (thirty days or fewer) to fulfill their military obligations.

When a Delta employee is on leave from employment for a brief period of time for certain non-military reasons—such as sick leave, bereavement leave, or jury duty—Delta continues to pay the employee's normal wages or salary during his or her absence up to a specified period of days. However, Delta does not offer employees paid leave during periods of military leave.

On March 16, 2021, Haley filed this action alleging that Delta violates § 4316 of USERRA by failing to provide paid leave to employees who take short-term military leave. On June 25, Plaintiffs filed a consolidated amended complaint. They bring suit on behalf of all current and former Delta employees who took military leave of thirty consecutive days or fewer and did not receive their regular wages or salary during their military leave.

Delta now moves to dismiss the amended complaint for failure to state a claim upon which relief can be granted. [33].

II. Legal Standard

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" This pleading standard does not require "detailed factual allegations," but it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

To survive a 12(b)(6) motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Chandler v. Sec'y of Fla. Dep't of Transp.*, 695 F.3d 1194, 1199 (11th Cir. 2012) (quoting *id.*). The Supreme Court has explained this standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Iqbal, 556 U.S. at 678 (citation omitted) (quoting *Twombly*, 550 U.S. at 556); *see also Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324–25 (11th Cir. 2012).

Thus, a claim will survive a motion to dismiss only if the factual allegations in the complaint are "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555–56 (citations omitted). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (citation omitted). While all well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff, *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011), the Court need not accept as true the plaintiff's legal conclusions, including those couched as factual allegations, *Iqbal*, 556 U.S. at 678.

Accordingly, evaluation of a motion to dismiss requires two steps: (1) eliminate any allegations in the pleading that are merely legal conclusions, and (2) where there are well-pleaded factual allegations, "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

III. Discussion

USERRA was enacted to (1) encourage noncareer military service by "eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service"; (2) minimize disruption by providing for the prompt reemployment of those who engage in noncareer military service; and (3) prohibit employment discrimination on the basis of military service. 38 U.S.C. § 4301(a); *Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1234 (11th Cir. 2005) (citing § 4301(a)).

In furtherance of these goals, USERRA requires that an employee on military leave be "deemed to be on furlough or leave of absence while performing such service, and; . . . entitled to such other rights and benefits not determined by seniority as are generally provided by the employer" to similarly situated employees on furlough or leave. 38 U.S.C. § 4316(b)(1)(A)–(B). Essentially, this provision mandates that "employees who take military leave from their jobs . . . receive the same 'rights and benefits' provided to employees absent for other reasons." *Travers v. Fed. Express Corp.*, 8 F.4th 198, 202 (3d Cir. 2021).

Moreover, "[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." 20 C.F.R. § 1002.150(b).

The term "rights and benefits" is defined by the Act as

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

38 U.S.C. § 4303(2).

In their amended complaint, Plaintiffs allege that Delta's failure to provide paid leave to employees on short-term military leave violates USERRA's requirement that employers provide employees on military leave the same rights and benefits as are provided to employees on comparable, non-military leave.

Delta argues that Plaintiffs' claim fails a matter of law for three independent reasons: (1) USERRA does not require preferential treatment for reservists; (2) USERRA protects only existing rights and benefits—it does not require the creation of new ones; and (3) USERRA's statutory language confirms that Congress did not intend to require employers to pay reservists during military leave. The Court will address each argument in turn.

First, Delta contends that providing Plaintiffs paid military leave would amount to preferring reservists over other employees, and USERRA requires only that employers treat reservists equally. The Court is unpersuaded.

"USERRA does not allow employers to treat servicemembers differently by paying employees for some kinds of leave while exempting military service." *Travers*, 8 F.4th at 209. Rather, "[e]qual treatment exists only if those employees on short-term military leave have the same rights and benefits as employees in comparable situations." *Scanlan v. Am. Airlines Grp., Inc.*, 384 F. Supp. 3d 520, 528 (E.D. Pa. 2019).

Here, Plaintiffs seek employment benefits—wages, salaries, and compensation—during military leave that are generally provided to employees who take comparable leave. They do not seek an added benefit unavailable to other workers, as Delta suggests. *Cf. Crews v. City of Mt. Vernon*, 567 F.3d 860, 865 (7th Cir. 2009) (finding that the plaintiff had no right under § 4316(b)(1) to a flexible scheduling benefit not offered to non-reservist employees).[1] Thus, they plausibly allege that they "have not been afforded equal treatment with other employees in comparable situations." *Scanlan*, 384 F. Supp. 3d at 528 (citing *Brill v. AK Steel Corp.*, No. 2:09-cv-534, 2012 WL 893902, at *4–8 (S.D. Ohio Mar. 14, 2012)); *see also Travers*, 8 F.4th at 202–03 (explaining that the comparator for a USERRA differential treatment claim is something the employer denies to employees who are absent from work for military service but offers to employees who are absent from work for any other reason).

[1] Delta also cites *Gross v. PPG Industries, Inc.*, 636 F.3d 884, 888 (7th Cir. 2011), and *Welshans v. U.S. Postal Service*, 550 F.3d 1100, 1104 (Fed. Cir. 2008), which are distinguishable: those courts analyzed the plaintiffs' claims under USERRA's anti-discrimination provision, § 4311. Moreover, in *Gross*, the plaintiff sought a differential pay calculation that was not provided to any employee, military or otherwise.

Delta next argues that USERRA does not support Plaintiffs' request for the new right or benefit of paid short-term military leave, which is not an existing right or benefit offered to Delta employees. This argument also fails.

USERRA guarantees absent reservists the same rights and benefits provided to employees on similar leaves of absence, which are those privileges of employment that accrue by reason of an employment contract, agreement, policy, plan, or practice. 38 U.S.C. § 4303(2). Delta attempts to characterize the right or benefit at issue as "paid short-term military leave," which is not an existing right or benefit that Delta generally provides under an employment contract, agreement, policy, practice, or plan. [33-1] at 15. Thus, according to Delta, Plaintiffs are inappropriately asking for a new right or benefit not guaranteed under USERRA. But Delta's argument ignores the allegations of the amended complaint, which define the right or benefit at issue as "paid leave." *See, e.g.*, [22] ¶¶ 15, 45–46, 63.

Delta contends that Plaintiffs' claim cannot be one for "paid leave" because they do not allege that Delta generally provides paid leave to

employees under an employment contract, agreement, policy, practice, or plan. But that is exactly what Plaintiffs allege—that Delta has a policy or practice of failing to provide pay to employees on short-term military leave while providing pay to similarly-situated employees on comparable, non-military leave. [22] ¶¶ 37, 63–66. Thus, Plaintiffs have plausibly alleged the deprivation of a right or benefit to which they are entitled under USERRA. *See also Travers*, 8 F.4th at 203–04 (explaining that the case is not a dispute about whether USERRA guarantees "paid leave" or "paid military leave" but whether USERRA allows the plaintiff to allege that the defendant "extends a right and benefit in the form of pay to the group of employees who miss work for non-military reasons, but then denies pay to the group absent for military service," and answering in the affirmative).

Finally, Delta argues that paid military leave is not a right or benefit under USERRA's statutory language. But the Court does not agree. Instead, it joins the growing number of courts that have denied motions to dismiss similar claims on the grounds that paid leave is a right or benefit under § 4303(2) that must be offered equally under

§ 4316(b)(1)(B). *See Travers*, 8 F.4th at 208–09; *White v. United Airlines, Inc.*, 987 F.3d 616, 619, 623 (7th Cir. 2021); *Scanlan*, 384 F. Supp. 3d at 526, 528; *see also Clarkson v. Alaska Airlines, Inc.*, No. 2:19-CV-0005-TOR, 2019 WL 2503957, at *7 (E.D. Wash. June 17, 2019) (denying the defendant's motion to dismiss because the Court was unable to decide the issue on the pleadings alone); *Huntsman v. Sw. Airlines Co.*, No. 4:19-cv-83-PJH (N.D. Cal. Nov. 27, 2019), ECF Nos. 59, 62 at 24–25 (denying the defendant's motion for judgment on the pleadings and finding that paid leave is a benefit under § 4303(2)).

Delta cites three USERRA provisions and one additional federal statute to support its statutory construction argument. It primarily relies on § 4303(2)'s definition of "rights and benefits," asserting that paid leave is not included in the definition and thus not a right or benefit to which Plaintiffs are entitled under USERRA.

The Court must interpret the words of the statute consistent with their best ordinary meaning at the time the statute was enacted. *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). Federal courts have uniformly

determined that paid leave—i.e., compensation at the normal rate during leave—is a "term[], condition[], or privilege[] of employment" and thus a right or benefit under the ordinary meaning of § 4303(2). *See White*, 987 F.3d at 621; *accord Travers*, 8 F.4th at 205–06 (concluding that under the best reading of USERRA, payment during leave is included in § 4303(2)'s list of benefits); *Scanlan*, 384 F. Supp. 3d at 526 (same). This Court concurs.

Section 4303(2)'s definition of "rights and benefits" is "extremely broad." *Scanlan*, 384 F. Supp. 3d at 526; *see Travers*, 8 F.4th at 205; *White*, 987 F.3d at 621; *Carder v. Cont'l Airlines, Inc.*, 636 F.3d 172, 182 (5th Cir. 2011) (quoting *Monroe v. Standard Oil Co.*, 613 F.2d 641, 645 (6th Cir. 1980)). The provision defines "rights and benefits" as "terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed)." 38 U.S.C. § 4303(2). "The words 'any' and 'including' mean the list explains, without exhausting." *Travers*, 8 F.4th at 205; *see also White*, 987 F.3d at 621 (citations omitted); *Scanlan*, 384 F. Supp. 3d at 526. Under the plain meaning of the statute, this list

"easily reaches a wide range of benefits, including payment during leave." *Travers*, 8 F.4th at 205 (citing Merriam-Webster's Collegiate Dictionary (10th ed. 1993)); *accord White*, 987 F.3d at 621 ("When Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule." (alteration adopted) (quoting *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020))).[2]

Delta focuses on the "including wages or salary for work performed" parenthetical, arguing that it implicitly excludes wages or salary for work *not* performed. Not only does this interpretation contradict the plain meaning of the text, *see Travers*, 8 F.4th at 206; *White*, 987 F.3d at 621 (citing *Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001); *United States v. Coscia*, 866 F.3d 782, 792 (7th Cir. 2017)), it also ignores the statute's history.

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[2] The legislative history also indicates that this list is "illustrative and not intended to be all inclusive." H.R. Rep. 103-65, pt. 1, at 21 (1993). Moreover, when describing § 4316(b)(1)(B), Congress stated that it intended to affirm the decision of *Waltermyer v. Aluminum Co. of America*, 804 F.2d 821, 822 (3d Cir. 1989), such that the most favorable treatment accorded any non-military leave would also be accorded military leave. *Id.* at 33–34. In *Waltermyer*, the court held that employees on military leave are entitled to holiday pay if employees on comparable leaves receive holiday pay. Holiday pay is clearly wages for work not performed, further suggesting that § 4303(2)'s definition of rights and benefits includes pay for work not performed. *Scanlan*, 384 F. Supp. 3d at 526.

As originally written, the parenthetical read "(other than wages or salary for work performed)." *Travers*, 8 F.4th at 206 (quoting H.R. 995, 103rd Cong. § 2(a) (1994)). When Congress provides an exception in a statute, the proper inference is that it considered and rejected other exceptions. *United States v. Johnson*, 529 U.S. 53, 58 (2010). Thus, this version of § 4303(2) included paid leave in the list of rights and benefits. Accordingly, when Congress replaced the words "other than" with "including" in 2010, it expanded—rather than restricted—§ 4303(2)'s definition of rights and benefits. *Travers*, 8 F.4th at 206 (declining "read in what Congress has taken out"); *see also White*, 987 F.3d at 622.[3]

Delta also argues that two additional USERRA provisions are evidence of a congressional intent not to require private employers to pay reservists while on military leave: (1) § 4316(d), which permits employees on a period of military service to use any accrued vacation, annual, or similar leave; and (2) § 4318(b)(3)(A), which, for purposes of

[3] Relatedly, Delta seems to argue that because § 4316(b)(1)(B) refers to "pay" in the phrase, "other rights and benefits . . . generally provided . . . to employees having similar seniority, status, and pay," if Congress had wanted to include "pay" in "rights and benefits," it would have used "pay" in § 4303(2). This argument also lacks merit. The reference to "pay" in § 4316(b)(1)(B) is merely used to describe similarly situated non-reservist employees. *Travers*, 8 F.4th at 202

calculating pension contributions, provides that the employee's compensation during the period of military service may be computed "at the rate the employee would have received but for the period of service."

Beginning with § 4316(d), Delta argues that this provision is superfluous if the employer is otherwise required to pay an employee on military leave regular wages or salary. Similarly, it asserts that the statutory language "would have received" in § 4318(b)(1)(A) is rendered irrelevant if the employer is expected to pay the employee's regular wages or salary during military leave.

USERRA must be liberally construed in favor of the reservist. *Coffman*, 411 F.3d at 1238 (quoting *Leib v. Ga.-Pac. Corp.*, 925 F.2d 240, 245 (8th Cir. 1991)). With this principle in mind, the Court does not interpret these provisions to conflict with a determination that paid leave is a right or benefit under § 4303(2) that must be offered equally under § 4316(b)(1)(B). Importantly, § 4316(b)(1)(B) does not require that all reservists receive pay for all types of military leave. Instead, the language of the statute requires employees on military leave to be provided only those rights and benefits (such as pay) to which

employees on comparable, non-military absences are entitled. In other words, if paid leave is not provided to similarly situated employees on non-military leave, it is not due the employee on military leave.

Finally, Delta points out that prior to enacting USERRA, Congress specifically provided for paid leave for federal employees at a rate of fifteen days per year for military duties. 5 U.S.C. § 6323(a). This statute is separate from statutes providing paid sick leave and paid jury duty leave for federal employees. *Id.* §§ 6307, 6322. According to Delta, this suggests that if Congress had intended to create such an obligation for private employers under USERRA, it could have done so.

The Third and Seventh Circuits have rejected similar arguments, finding that reading § 4316(b)(1) to include paid leave does not "contradict, negate, or nullify 5 U.S.C. § 6323(a)." *Travers*, 8 F.4th at 208; *see White*, 987 F.3d at 624. The Court finds these cases instructive. Section 6323(a) provides an additional benefit, and at most, it may eliminate the need for federal-employee reservists to show that a period

of military leave is comparable to non-military leave that is accorded a benefit. *Travers*, 8 F.4th at 208–09; *White*, 987 F.3d at 624.[4]

Delta expresses concern over the implications of Plaintiffs' requested relief, suggesting that employees could take a virtually unlimited amount of paid military leave. But the Court must interpret the plain language of USERRA without engaging in speculation about collateral consequences. *Scanlan*, 384 F. Supp. 3d at 527.

Accordingly, the Court finds that Plaintiffs have plausibly alleged a violation of § 4316(b)(1) of USERRA.

IV. Conclusion

For the foregoing reasons, Delta's motion [33] to dismiss is denied.

IT IS SO ORDERED this 29th day of March, 2022.

Timothy C. Batten, Sr.
Chief United States District Judge

[4] Moreover, USERRA's opening section provides, "It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter." 38 U.S.C. § 4301(b). Thus, that Congress has provided paid military leave for most federal employees may in fact bolster Plaintiffs' claim.