**ANNOTATIONS AND COMMENTS**

38 U.S.C. § 4311 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…

An employer shall be considered to have engaged in actions prohibited –

under subsection , 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…

38 U.S.C. § 4311.

The term “uniformed services” means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.

38 U.S.C. 4303.

The term “benefit of employment” is defined as “any advantage, profit, privilege, gain, status, [or] account… that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes… vacations, and the opportunity to select work hours or location of employment.” 38 U.S.C. § 4303.

The term “service in the uniformed services” means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by [10 U.S.C. § 12503 or 32 U.S.C. § 115].

38 U.S.C. § 4303.

The Eleventh Circuit has stated that § 4311 clearly mandates proof of discriminatory motive. A motivating factor does not mean that it had to be the sole cause of the employment action. Instead, “it is one of the factors that a truthful employer would list if asked for the reasons for its decision.” *Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1238 (11th Cir. 2005) (internal quotation marks omitted). “Indeed, [m]ilitary status is a motivating factor if the defendant relied on, took into account, considered, or conditioned its decision on that consideration.” *Id*. (alteration in original) (internal quotation marks omitted).

USERRA provides that a court may award three kinds of relief: an injunction requiring an employer to comply with USERRA’s provisions; compensation for lost wages or benefits suffered by reason of the employer’s failure to comply with USERRA, and liquidated damages in an amount equal to lost wages or benefits if the employer’s failure to comply with USERRA was willful. 38 U.S.C. § 4323(A)-(C).

USERRA does not allow damages for mental anguish or emotional distress, nor does it allow recovery of punitive damages. *Dees v. Hyundai Motor Mfg. Ala., LLC* 605 F. Supp. 2d 1220, 1229 (M.D. Ala. 2009), aff’d 368 F. App’x 49 (11th Cir. 2010) (per curiam).

Section 4324 of USERRA applies where the employer is a “Federal executive agency.” Section 4324 does not authorize a private USERRA action against the Federal Government, as an employer, in federal district court; rather, it confers jurisdiction upon the Merit Systems Protection Board (“MSPB”). *See* 38 U.S.C. § 4324. For the definition of “Federal executive agency,” see 38 U.S.C. § 4303.

Where relevant, apply the Cat’s Paw instruction for employment cases. *See* Pattern Instruction 4.5, *supra*.