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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 CASEY CLARKSON,

8 Plaintiff,

9 v.

10 ALASKA AIRLINES, INC.,  
11 HORIZON AIR INDUSTRIES, INC.,  
and ALASKA AIRLINES  
12 PENSION/BENEFITS  
ADMINISTRATIVE COMMITTEE,

13 Defendants.

NO. 2:19-CV-0005-TOR

ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT

14 BEFORE THE COURT is Defendants' Motion for Summary Judgment

15 (ECF No. 136). This matter was submitted for consideration without oral  
16 argument. The Court has reviewed the record and files herein, and is fully  
17 informed. For the reasons discussed below Defendants' Motion for Summary  
18 Judgment (ECF No. 136) **GRANTED**. The parties' remaining motions are  
19 **DENIED** as moot; the trial and all hearings are **VACATED** as moot.

20  
ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT ~ 1

## BACKGROUND

This matter arises from Plaintiff Casey Clarkson’s class action filed against Defendants Alaska Airlines, Inc. (“Alaska”) and Horizon Air Industries, Inc. (“Horizon”) on January 7, 2019. ECF No. 1. The following facts are not in dispute except where noted. Plaintiff was employed as an airline pilot for Horizon from November 2013 to November 2017, and thereafter was employed by Alaska. ECF No. 161 at 3, ¶¶ 2–3. During Plaintiff’s employment with both Horizon and Alaska, he was an active member of the Washington Air National Guard. *Id.* at ¶ 4. Plaintiff typically performed military duty for approximately 10–12 days per month from November 2013 through June 2018. *Id.* at 3, ¶ 5.

While employed by Horizon, Plaintiff took the following periods of military leave: June 8–July 8, 2017; September 9–14, 2017; and October 1–26, 2017. *Id.* at 56, ¶ 97; at 56–57, ¶¶ 99–102. Before taking military leave in June 2017, Plaintiff was employed as a turboprop Captain; upon return from leave in July 2017, Plaintiff was once again employed as a turboprop Captain. *Id.* at 56, ¶ 98. There is no evidence in the record that Horizon employed Plaintiff in any position other than a turboprop Captain during the relevant time period.

For each of the months Plaintiff took military leave while employed by Horizon, he received 2.45 flight credit hours per day for each day he was on leave pursuant to Horizon’s Virtual Credit policy, which was implemented in May 2017.

1 *Id.* at ¶ 97; at 57, ¶¶ 99–102. The Virtual Credit policy applied to all forms of  
2 leave, military or otherwise. ECF No. 161 at 56, ¶ 97. Plaintiff’s virtual credits  
3 were combined with his earned credits to determine his flight schedules, which  
4 were built and assigned using a Preferential Bidding System (“PBS”). *Id.* at 49–  
5 50, ¶¶ 91–92. Plaintiff generated the minimum required credit hours to be assigned  
6 a Line Holder schedule for each month he took military leave, with the exception  
7 of July 2017; in that month, he was assigned a Reserve schedule. *Id.* at 58, ¶ 103.<sup>1</sup>

8         The schedule to which a pilot was assigned was based, in part, on a pilot’s  
9 ability to meet a certain threshold of credit hours. *Id.* at 52, ¶ 95. Line Holder  
10 schedules required at least 70 credit hours. *Id.* If a pilot could not meet the 70-  
11 credit hour minimum, a pilot would be assigned a Reserve schedule. *Id.*  
12 Pilots assigned to Line Holder schedules fly specific trips whereas pilots assigned  
13 to Reserve schedules are on call for specific days. *Id.* at 28, ¶ 53. According to the  
14 Collective Bargaining Agreements (“CBAs”), a turboprop pilot assigned to a Line  
15 Holder schedule was guaranteed a minimum pay of 70 credit hours. *Id.* at 50, ¶ 93;

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16  
17 <sup>1</sup> Plaintiff claims, without explanation, his Line Holder status for the months  
18 of June, September, and October was “of lesser status” than it would have been  
19 had he not taken military leave. ECF No. 161 at 38, ¶ 103. Plaintiff’s assertion is  
20 not supported by the record.

1 ECF No. 138-8 at 12. Reserve schedules were guaranteed a minimum pay of 73  
2 credit hours. *Id.* In addition to provisions governing scheduling and  
3 compensation, the CBAs also governed leaves of absence, specifically for jury  
4 duty, sick leave, bereavement leave, military leave, and personal leave, and any  
5 compensation awarded during those leave periods. ECF No. 161 at 4–14, ¶¶ 7–28;  
6 49–50, ¶¶ 91–92.

7         The parties dispute whether Defendants’ compensation practices for the  
8 covered forms of leave, including Horizon’s Virtual Credit policy, comply with the  
9 Uniformed Services Employment and Reemployment Rights Act (“USERRA”), 38  
10 U.S.C. § 4301 *et seq.* Plaintiff alleges Defendants practices violate USERRA by  
11 continuing to pay employees who take comparable non-military leave their full  
12 wages but failing to pay employees who take military leave their full wages. ECF  
13 No. 31 at 14, ¶ 37; at 16, ¶ 41. Plaintiff also alleges Defendant Horizon’s Virtual  
14 Credit policy forced Plaintiff into a lesser status than he held prior to his military  
15 leave, thereby denying Plaintiff certain seniority-based rights and benefits that  
16 would have accrued but for his military leave. *Id.* at 15, ¶ 39–40. Defendants  
17 argue they are not required to pay employees who take military leave nor do they  
18 provide any rights or benefits to employees who take non-military leave that are  
19 not also provided to employees who take military leave. ECF No. 136 at 7–8.

1 **DISCUSSION**

2 **I. Legal Standard**

3 The Court may grant summary judgment in favor of a moving party who  
4 demonstrates “that there is no genuine dispute as to any material fact and that the  
5 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In ruling  
6 on a motion for summary judgment, the court must only consider admissible  
7 evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764 (9th Cir. 2002). The  
8 party moving for summary judgment bears the initial burden of showing the  
9 absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S.  
10 317, 323 (1986). The burden then shifts to the non-moving party to identify  
11 specific facts showing there is a genuine issue of material fact. *See Anderson v.*  
12 *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). “The mere existence of a scintilla  
13 of evidence in support of the plaintiff’s position will be insufficient; there must be  
14 evidence on which the jury could reasonably find for the plaintiff.” *Id.* at 252.

15 For purposes of summary judgment, a fact is “material” if it might affect the  
16 outcome of the suit under the governing law. *Id.* at 248. Further, a dispute is  
17 “genuine” only where the evidence is such that a reasonable jury could find in  
18 favor of the non-moving party. *Id.* The Court views the facts, and all rational  
19 inferences therefrom, in the light most favorable to the non-moving party. *Scott v.*  
20 *Harris*, 550 U.S. 372, 378 (2007). Summary judgment will thus be granted

1 “against a party who fails to make a showing sufficient to establish the existence of  
2 an element essential to that party’s case, and on which that party will bear the  
3 burden of proof at trial.” *Celotex*, 477 U.S. at 322.

#### 4 **II. Count IV—Paid Leave Claim**

5 Count IV alleges Defendants fail to provide Plaintiff and other members of  
6 the Paid Leave Class the same rights and benefits for military leave that Defendant  
7 provides to other employees who take non-military leave in violation of 38 U.S.C.  
8 § 4316(b). ECF No. 31 at 28–29. Defendants move for summary judgment as to  
9 Count IV on the grounds that neither USERRA nor its federal regulations require  
10 employers to pay employees who take military leave. ECF No. 136 at 12.

11 Specifically, Defendants argue there are no “rights and benefits” as defined by the  
12 applicable CBAs that are provided to employees who take non-military leave that  
13 are not also provided to employees who take military leave. *Id.* Defendants  
14 further argue military leave is not comparable to any other forms of leave provided  
15 in the applicable CBAs for the purposes of determining entitlement to “rights and  
16 benefits” under USERRA. *Id.* at 18.

17 Plaintiff asserts employees who take non-military leave are provided the  
18 benefit of Loss of Pay protection while employees who take military leave are not  
19 afforded the same, resulting in lost wages. ECF No. 150 at 18. Plaintiff also  
20 argues there are genuine issues of material fact as to whether other forms of non-

1 military leave are comparable to military leave in terms of duration, purpose, and  
2 flexibility. *Id.* at 21–22.

3 **A. Rights and Benefits**

4 USERRA provides that a person who is absent from employment due to  
5 military service is entitled to the same non-seniority rights and benefits that are  
6 generally provided to other employees who take leave as provided in an  
7 employment contract, agreement, policy, practice, or plan. 38 U.S.C. §  
8 4316(b)(1)(B). The statute defines “rights and benefits”, “benefit”, and “benefit of  
9 employment” as:

10 the terms, conditions, or privileges of employment, including any  
11 advantage, profit, privilege, gain, status, account, or interest  
12 (including wages or salary for work performed) that accrues by reason  
13 of an employment contract or agreement or an employer policy, plan,  
14 or practice and includes . . . vacations, and the opportunity to select  
15 work hours or location of employment.

16 38 U.S.C. § 4303(2). The Department of Labor (“DOL”), which promulgated final  
17 regulations to implement USERRA, further clarified “non-seniority rights and  
18 benefits . . . are those that the employer provides to similarly situated employees by  
19 an employment contract, agreement, policy, practice, or plan.” 20 C.F.R. §  
20 1002.150(a). The parties dispute the scope of the statute’s definition of “rights and  
benefits.”

While this issue is not widely litigated, there seem to be two competing

1 views among the courts as to whether the definition of “rights and benefits”  
2 includes a requirement for paid military leave. Some courts have found “the  
3 definition of ‘rights and benefits’ under USERRA embraces paid leave.” *White v.*  
4 *United Airlines, Inc.*, 987 F.3d 616, 621 (7th Cir. 2021). Other courts have  
5 concluded “the text of the [USERRA] Act unambiguously excludes paid military  
6 leave from its definition of ‘rights and benefits.’” *Travers v. FedEx Corp.*, 473 F.  
7 Supp. 3d 421, 426 (E.D. Pa. 2020). The disagreement among the courts centers on  
8 statutory interpretation.

9 Both the *Travers* and *White* courts addressed the “rights and benefits” issue  
10 on motions to dismiss. Notably, the *White* court concluded an “important inquiry”  
11 for remand was whether the plaintiff could demonstrate that his military leave was  
12 comparable to any other leave of absence for which his employer provided paid  
13 leave, which would be a question of fact. *White*, 987 F.3d at 625. In this case,  
14 Plaintiff’s claims survived a motion to dismiss because the Court was unable to  
15 decide the “rights and benefits” issue without further evaluation of evidence  
16 outside the pleadings. ECF No. 30 at 19–20. The present motion for summary  
17 judgment provides the evidence needed.

18 Here, Defendants argue Plaintiff’s claim should be dismissed as a matter of  
19 law, following the holding in *Travers*. ECF No. 136 at 13. They further argue  
20 Plaintiff’s claims cannot survive the factual inquiry implied by the *White* court



1 because the CBAs do not provide the benefit Plaintiff seeks: the right to receive  
2 pay while on military leave. *Id.* Plaintiff alleges the benefit is the “Loss of Pay”  
3 protection that is provided for other comparable non-military leave. ECF No. 150  
4 at 18. Plaintiff argues this protection establishes the continued receipt of wages  
5 while on leave, a benefit provided to non-military employees and denied for  
6 military employees. *Id.* at 20.

7 Both parties’ arguments would require the Court to adopt an interpretation of  
8 the “rights and benefits” definition. However, the Court need not make such a  
9 determination. As the *White* court indicated, a factual inquiry as to whether the  
10 military leave is comparable to other forms of covered leave is also required for a  
11 claim under § 4316(b). *White*, 987 F.3d at 625; *see also* 20 C.F.R. § 1002.150.  
12 Therefore, the Court will limit its ruling to the facts of this particular case and  
13 declines to adopt a specific interpretation of the “rights and benefits” definition.

#### 14 **B. Comparable Forms of Leave**

15 The Department of Labor has identified several factors to assist in evaluating  
16 whether non-military leave is comparable to military leave. 20 C.F.R. §  
17 1002.150(b). Those factors include the duration of the leave, the purpose of the  
18 leave, and the ability of the employee to choose when to take the leave. *Id.* Of  
19 those factors, the duration of the leave “may be the most significant.” *Id.*

20 Here, Defendants argue the other forms of non-military leave covered by the

1 relevant CBAs—jury duty, bereavement, and sick—are not comparable to military  
2 leave. ECF No. 136 at 18. Plaintiff alleges there are issues of fact as to whether  
3 any of the other non-military leaves are comparable. ECF No. 150 at 21.

4 *i. Duration*

5 As an initial matter, the parties dispute whether there are distinct categories  
6 of military leave. Defendants argue that neither USERRA nor the relevant CBAs  
7 contemplate different categories of military leave based on duration. ECF No. 136  
8 at 23. Thus, the Court should consider military leave as a general category of  
9 leave. Plaintiff claims that the CBAs and USERRA do, in fact, distinguish  
10 between short-term military leave (30 days or less) and long-term military leave  
11 (31 days or more). ECF No. 150 at 24–24. Therefore, the Court should take more  
12 individualized approach and consider each specific military leave period as either  
13 long-term or short-term based on its length. *Id.* at 23.

14 With regard to whether the CBAs distinguish between short-term and long-  
15 term military leave, Plaintiff cites to deposition testimony from both Alaska and  
16 Horizon representatives, and a Letter of Agreement between Defendants and the  
17 pilots’ union. *Id.* at 24–25. Alaska’s representative stated it was her understanding  
18 that “short-term leave would be something under 30 days.” ECF No. 150-2 at 19.  
19 She went on to say other forms of leave, such as sick and personal, could also fall  
20 under the category of short-term leave. ECF No. 138-2 at 10–11. Horizon’s

1 representative stated she had seen the term “short-term military leave” on crew  
2 members’ schedules, specifically pilots’ schedules. ECF No. 138-3 at 7. She also  
3 stated there were two different codes used to differentiate between short-term and  
4 long-term military leaves, but she could not recall what the duration difference was  
5 between the two. *Id.* Her personal understanding was short-term leave generally  
6 applied to leave of less than a week and anything longer would be considered long-  
7 term leave. *Id.* She further clarified there was no policy to differentiate between  
8 general short-term and long-term. *Id.* The Letter of Agreement between  
9 Defendants and the pilots’ union defines “extended military service” as “a period  
10 of 31 days or more consecutive leave.” ECF No. 150 at 25.

11 Plaintiff also argues the DOL regulations contemplate a comparison of  
12 individual military leaves by emphasizing the statute’s use of “a” and “an” in its  
13 illustrative examples of comparator leaves. The relevant portion of the statute  
14 states: “For instance, a two-day funeral leave will not be ‘comparable’ to an  
15 extended leave for service in the uniformed service.” 20 C.F.R. § 1002.150(b).  
16 Plaintiff cites to three other sections within USERRA, which include distinctions  
17 between short-term and long-term military leave. ECF No. 150 at 25. This is a  
18 curious argument given Plaintiff’s advocacy for the *White* holding, which  
19 specifically declined to read unwritten words into a specific statutory provision.  
20 *See White*, 987 F.3d at 624 (declining to compare different but related titles of

1 federal law to avoid inconsistency and accepting the language Congress chose  
2 when drafting the statute rather than reading “extratextual considerations” into the  
3 law).

4 Finally, Plaintiff cites to caselaw from the Seventh, Fifth, and Federal  
5 Circuits to support his position. As the Court previously stated, it is not inclined to  
6 apply the Seventh Circuit’s *White* holding to this case, as the Ninth Circuit has not  
7 yet spoken on the issue. In Plaintiff’s Fifth Circuit case, *Rogers v. City of San*  
8 *Antonio*, the court did not reach the issue of comparability under § 4316, but  
9 instead remanded the issue for further proceedings. *Rogers v. City of San Antonio*,  
10 392 F.3d 758, 771–72 (5th Cir. 2004). Insofar as the holding contains the phrase  
11 “comparable to each plaintiff’s military leaves,” this Court does not read the phrase  
12 so narrowly as to create a particular standard that must be applied when evaluating  
13 comparability of leaves. *See id* at 772. Moreover, the following sentence in the  
14 holding refers to military leave more generally rather than an individualized  
15 analysis. *Id.* (“ . . . there is a disputable issue as to whether sick leave . . . is  
16 comparable to military leave.”). The Court reads the holding to be more  
17 illustrative of the factual inquiry required for the comparability analysis rather than  
18 a particular standard that should be applied.

19 In *Tully v. Department of Justice* out of the Federal Circuit, a single service  
20 member’s two and a half year-long leave of absence was held incomparable to the

1 typically brief duration of absence for court duty, notably because the duration  
2 factor “reflects a significant difference in the *character* of the two forms of leave.”  
3 *Tully v. Dep't of Just.*, 481 F.3d 1367, 1371 (Fed. Cir. 2007) (emphasis added).  
4 That court’s reference to the “character” of the two forms of leave implies a more  
5 categorical comparison rather than the individualized analysis that Plaintiff would  
6 prefer. Finally, analyzing military leave durations on an individualized basis  
7 contravenes Plaintiff’s own argument on class certification. *See* ECF No. 73 at  
8 26–27 (stating the comparability factors “do not require individualized  
9 determinations as to specific class members”) (citation omitted). Thus, the Court  
10 finds the more generalized approach the appropriate standard, particularly when  
11 the issue is presented as a class claim.

12 In support of their comparability arguments, Defendants provided data from  
13 the class period regarding the duration of leaves. ECF No. 136 at 21–22.  
14 Defendants also provided data for leave frequency with its duration analysis. *Id.*  
15 Plaintiff objects to the frequency analysis, arguing the DOL regulations compare  
16 only length of leave. ECF No. 150 at 23. However, the DOL regulations are not  
17 an exhaustive list. Furthermore, while the Court agrees duration and frequency are  
18 separate measures, frequency is useful in the duration analysis, particularly in a  
19 class setting.

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1 a. Bereavement and Jury Duty Leave

2 Bereavement and jury duty leave are two categories of leave covered by the  
3 CBAs. ECF No. 161 at 4–14, ¶¶ 7–28. During the relevant class period,  
4 Defendant Alaska’s CBA section on Leaves of Absence provided up to seven days  
5 for bereavement leave (unpaid or using accrued paid sick days), and Defendant  
6 Horizon’s CBA provided up to three days of bereavement leave. *Id.* at 19, ¶ 32.  
7 Defendant Horizon’s CBA covers jury duty under Leaves of Absence, while  
8 Defendant Alaska’s CBA covers jury duty as a separate section. ECF No. 136 at  
9 20.

10 The data reflects the short-term duration of both bereavement leave and jury  
11 duty. From October 2008 through December 2020, the longest period of jury duty  
12 leave at Horizon (excluding leaves above the 95th percentile of leave length) was  
13 five days and the longest period of bereavement leave was three days. ECF NO.  
14 161 at 25–26, ¶ 47. The average length of jury duty and bereavement leave at  
15 Horizon was four days. *Id.* at 24, ¶ 44. From October 2004 through December  
16 2020, the longest jury duty leave at Alaska was six days (excluding leaves above  
17 the 99th percentile). *Id.* at 26, ¶ 48. The same is true for bereavement leave. *Id.*

18 Conversely, the longest military leave at Alaska from October 2004 through  
19 December 2020 (excluding leaves above the 99th percentile) was 185 days. *Id.* at  
20 24–25, ¶ 45. At Horizon, the longest military leave between October 2008 and

1 December 2020 was 70 days (excluding leaves above the 95th percentile). *Id.* at  
2 25, ¶ 46. For Alaska, the 90th percentile duration for military leave between  
3 October 2004 and December 2020 was nine days. *Id.* at 26, ¶ 49. Only 25 separate  
4 bereavement leaves and four jury duty absences at Alaska exceed nine days. *Id.*  
5 At Horizon, the 90th percentile duration of military leave between October 2008  
6 and December 2020 was 24 days. ECF No. 161 at 27, ¶ 51. Not a single jury duty  
7 absence or bereavement leave exceeded 11 days. *Id.*

8       Regarding frequency, of the Alaska pilots who took military leave in the  
9 relevant class period, the average total number of military leaves was 47 and the  
10 average number of military leave days was 511. *Id.* at 23, ¶ 40. Of the Horizon  
11 pilots who took military leave in the relevant class period, the average total number  
12 of military leaves was 17 and the average number of military leave days was 560.  
13 *Id.* at 24, ¶ 43. Conversely, of the Alaska pilots who took jury duty leave, over  
14 half only took such leave once. *Id.* at 23, ¶ 41. Of the Alaska pilots who took  
15 bereavement leave, over a quarter only took such leave once. *Id.* Similarly, two-  
16 thirds of the Horizon pilots who took jury duty or bereavement leave during the  
17 class period did so only once. *Id.* at 24, ¶ 44. Plaintiff himself has never taken any  
18 jury duty or bereavement leave. *Id.* at 3, ¶ 6. On the other hand, he estimated  
19 taking 10–12 days of military leave per month from November 2013 through June  
20 2018. *Id.* at 2, ¶ 5.

1                   b. Sick Leave

2                   Sick leave is another category of non-military leave covered by the CBAs.

3 *Id.* at 44–45, ¶ 76. Sick leave is paid to the extent a pilot has accrued paid sick  
4 days to cover the leave of absence; otherwise, sick leave is unpaid. *Id.* at 45, ¶ 78.

5 The longest sick leave at Alaska between September 2013 and December 2020,  
6 excluding leave above the 99th percentile, was five days. ECF No. 161 at 46, ¶ 80.

7 During the same timeframe, the longest period of military leave, excluding leave  
8 above the 99th percentile was, 122 days. *Id.* at 45–46, ¶ 79. For Horizon, the

9 longest sick leave between February 2010 and December 2020, excluding leave  
10 above the 95th percentile, was four days, compared to the longest military leave,

11 excluding leave above the 95th percentile, was 58 days. *Id.* at 46–47, ¶¶ 81–82.

12 The average number of sick days per pilot between February 2010 and December  
13 2020 was 33, compared to an average of 359 days per pilot for military leave. *Id.*

14 at 47, ¶ 83.

15                   Given the significant differences in duration and frequency, military leave is  
16 not comparable to jury duty, bereavement leave, and sick leave. *See also Hoefert*

17 *v. Am. Airlines, Inc.*, 438 F. Supp. 3d 724, 741 (N.D. Tex. 2020) (citing *Moss v.*

18 *United Airlines, Inc.*, 420 F. Supp. 3d 768, 774 (N.D. Ill. 2019)).

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1            *ii. Purpose*

2            Defendants argue the purpose of military leave under the CBAs is not  
3 comparable to the purposes of other forms of leave under the CBAs because pilots  
4 who serve as reservists in the military do so to fulfill a “parallel career.” ECF No.  
5 136 at 28. Plaintiff disagrees, asserting the purpose of military leave is to allow  
6 employees to serve the public and to fulfill a public safety function. ECF No. 150  
7 at 29–31. Plaintiff argues jury duty, bereavement leave, sick leave, and vacation  
8 leave also fulfill a public service and public safety function. *Id.*

9            Very few courts have addressed the issue of leave purposes. In terms of sick  
10 leave, one court found military leave differed in purpose “because military  
11 absences are forward looking, whereas sick leave is backward looking.” *Hoefert*,  
12 438 F. Supp. 3d at 739. Stated another way, military leave is provided as the need  
13 arises; sick leave is accrued or earned for work already performed. *Id.*  
14 Additionally, the court found sick leave differed because the employer could buy  
15 back unused sick days and because sick days were capped at a certain number, but  
16 military leave was not. *Id.*

17            Another court came to a different conclusion regarding an employer’s jury  
18 duty leave policy. That court held an employer’s *policies* for military leave and  
19 jury duty leave were comparable in purpose where the employer provided pay for  
20 both types of leave, albeit at different rates; the purpose behind the policies was to

1 make an employee whole after taking leave. *See Brill v. AK Steel Corp.*, No. 2:09-  
2 CV-534, 2012 WL 893902, \*6 (S.D. Ohio Mar. 14, 2012). However, the court did  
3 not address the general purposes of military leave and jury duty leave themselves.

4 Here, the evidence supports Defendants’ position that a significant purpose  
5 of military leave under the CBAs is to allow employees to pursue parallel careers.  
6 Several employees at Horizon and Alaska, including Plaintiff, acknowledged  
7 having “parallel careers” was common. ECF No. 161 at 36–39, ¶¶ 66, 68. In  
8 addition to military careers, other careers included “engineers, consultants, [and]  
9 lawyers.”<sup>2</sup> *Id.* at 37–39, ¶ 68. The ability to pursue parallel careers affords  
10 Defendants’ employees the opportunity to fulfill other professional careers and  
11  
12

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13 <sup>2</sup> If an employee takes time off to pursue a non-military parallel career, they  
14 must use unpaid personal leaves of absence or accrued vacation days. ECF No.  
15 161 at 37–38, ¶ 68. Plaintiff does not allege personal leave is comparable to  
16 military leave. However, Plaintiff disputes the fact that employees must use  
17 personal leave to pursue parallel careers; he asserts they can use sick leave or  
18 vacation leave as well. *Id.* Vacation days can be used to the extent they have  
19 accrued; Plaintiff’s citation to the record does not support his assertion that sick  
20 days may be used to pursue parallel careers. *Id.*

1 earn additional income. The same cannot be said of the other forms of leave  
2 provided in the CBAs.

3 a. Jury Duty

4 Jury duty is also incomparable to military leave for the same reason. The  
5 purpose of jury duty is to fulfill a compulsory duty to the courts; it is not a parallel  
6 career. *Id.* at 41–42, ¶ 73. To the extent a servicemember’s duty is also  
7 compulsory when called to serve, the compensation and frequency of jury duty is  
8 not comparable to military leave. In particular, any compensation provided by the  
9 government for jury duty is not comparable to the pay received for military  
10 service. ECF No. 161 at 41–42, ¶ 73. Under the Horizon CBA, employees who  
11 receive compensation from a court for jury duty are required to forfeit the pay to  
12 receive their regular salary. *Id.* at 42–44, ¶¶ 74–75. Alaska’s CBA does not  
13 contemplate jury duty under its leaves of absence; rather, it is covered under the  
14 CBA’s “General” provisions, which indicates Alaska intended to treat jury duty  
15 leaves differently than any other forms of leave. *Id.* at 21, ¶ 37.

16 b. Bereavement Leave

17 Bereavement leave is not comparable to military leave either in terms of  
18 purpose. The purpose of bereavement leave is to allow an employee time to grieve  
19 following the death of a loved one. ECF Nos. 136 at 29–30; 150 at 30–31.  
20 Granting employees time to grieve, particularly pilot employees, helps ensure they

1 will be mentally prepared to safely operate an aircraft upon their return to work.  
2 ECF No. 161 at 39, ¶ 69. Plaintiff's argument that this safety concern shares a  
3 common purpose with military leave because both serve public interests is  
4 attenuated, at best. ECF No. 150 at 30.

5 c. Sick Leave and Vacation Leave

6 Plaintiff's arguments regarding sick leave and vacation leave fail for the  
7 same reason. A purpose of sick leave is to protect passengers and other employees  
8 from illness and to ensure the pilot is mentally and physically fit to fly. ECF No.  
9 161 at 45, ¶ 77. Employees take sick leave to recover and rest. *Id.* Similarly,  
10 employees take vacation leave do so for rest and recuperation to avoid burnout.  
11 ECF No. 150 at 31. The same is certainly not true of military leave, which is  
12 physically and mentally demanding. Again, Plaintiff's attempt to anchor public  
13 safety concerns as the comparable function of military leave, sick leave, and  
14 vacation leave is unpersuasive.

15 The significantly different purposes between military leave and other forms  
16 of leave covered by the CBAs leave no genuine dispute of material fact as to  
17 comparability.

18 *iii. Ability to Choose When to Take Leave*

19 Defendants argue the flexible nature of a reservist's schedule supports a  
20 finding of incomparability because reservists have the ability, to a certain degree,

1 to choose when to take leave; they do not have such flexibility with other forms of  
2 leave. ECF No. 136 at 24. Plaintiff argues Defendants overstate the amount of  
3 flexibility in a pilot's military duty schedule. ECF No. 150 at 32.

4 Pilots at Horizon and Alaska do not work traditional Monday–Friday  
5 schedules; instead, they are scheduled to fly certain trips (Line Holder schedules)  
6 or are on-call for specific days (Reserve schedules). ECF No. 161 at 28, ¶¶ 52–53.  
7 Their flight schedules are released in advance of each month and they typically end  
8 up flying around half the days of any given month. ECF No. 161 at 28–29, ¶¶ 52–  
9 54. Whether a pilot is scheduled for Line Holder assignment or Reserve  
10 assignment depends on the pilot's seniority and bid preferences. *Id.* at 28, ¶ 54.  
11 Pilots submit their bid preferences well in advance of each flying month. *Id.* The  
12 CBAs require pilots to provide notice of any known absences. *Id.* at 29, ¶ 55.  
13 Defendants' scheduling systems then schedules pilots' flights around those  
14 absences. *Id.* at ¶ 56.

15 This system of bidding for preferred schedules, paired with the  
16 nontraditional work schedule, lends itself well for reservists. Reservists typically  
17 receive their military duty schedules months in advance. *Id.* at 30, ¶ 58. To the  
18 extent there is any scheduling conflict, pilots can then work with the bidding  
19 system and other pilots to ensure their flight schedules for Defendants  
20 accommodate their military leave schedules. *Id.* at 30, ¶ 57; at 31, ¶ 60. Jury duty,

1 bereavement, and sick leave tend to occur with little to no notice, which makes  
2 advance planning for those leaves more difficult.

3         Additionally, reservists have a certain degree of control over their military  
4 duty schedules. ECF No. 136 at 26. For example, if a pilot's training flight  
5 conflicted with his own squadron, he could switch to a different squadron  
6 performing the same training. *Id.* Reservists can also work with their military unit  
7 scheduler to accommodate scheduling preferences, to a certain degree. ECF No.  
8 161 at 31, ¶ 60. The degree of flexibility depends on the type of training, nature of  
9 the missions, availability of instructors, and other factors. ECF No. 150 at 32.

10 Jury duty, bereavement, and sick leave do not typically allow for such flexibility.

11 While certain deaths may be foreseeable (e.g., a person suffering a terminal illness)  
12 and some medical appointments can be scheduled with flexibility, it is more likely  
13 that death and illness will occur unexpectedly. Similarly, jury duty also arises  
14 without significant notice. While pilots can sometimes be excused from jury duty,  
15 they have far less control over that rescheduling process than they do over the  
16 process to schedule their reservist and flight duties. ECF No. 136 at 27.

17         Finally, military leave is automatically granted. ECF No. 161 at 32–33, ¶  
18 61. This is not true of bereavement, sick leave, and vacation. Bereavement leave  
19 is granted with discretion or may be taken using unpaid personal leave or accrued  
20 sick days. *Id.* at 39–40, ¶¶ 70–71. Likewise, sick leave and vacation are not

1 automatically granted, but can be taken using accrued paid days or by taking  
2 unpaid personal leave. *Id.* at 45, ¶ 78; at 47, ¶ 84.

3 Because pilots have a greater degree of control over their ability to take  
4 military leave and schedule around such leave, military leave is not comparable to  
5 other forms of leave covered by the CBAs.

6 Based on the foregoing, there are no genuine issues of material fact as to  
7 whether military leave is comparable to other forms of leave covered by the CBAs;  
8 they are not comparable. Therefore, Defendants are entitled to summary judgment  
9 with respect to Count IV.

### 10 **III. Counts I–III—Virtual Credit Claims**

11 Counts I–III pertain to Defendant Horizon’s Virtual Credit policy. Plaintiff  
12 seeks relief in his individual capacity for these claims. Count I alleges Defendant’s  
13 Virtual Credit policy provided Plaintiff with fewer credit hours than he would have  
14 received but for his military leave, thereby failing to properly reemploy Plaintiff  
15 upon his return, in violation of 38 U.S.C. §§ 4312(a), 4313(a)(1). ECF No. 31 at  
16 23–24. Count II alleges Defendant’s Virtual Credit policy failed to treat military  
17 leave as continuous employment, thereby denying Plaintiff his seniority-based  
18 rights and benefits, in violation of 38 U.S.C. § 4316(a). *Id.* at 25. Count III alleges  
19 the application of Defendant’s Virtual Credit policy led to Plaintiff’s demotion  
20 following his return from military leave in violation of 38 U.S.C. § 4316(c). *Id.* at

1 26.

2 **A. Counts I and III**

3 Defendants move for summary judgment on Counts I and III on the grounds  
4 that Plaintiff was never “demoted” or “discharged,” he has no damages, and  
5 because he lacks standing<sup>3</sup> as he is no longer employed by Horizon. ECF No. 136  
6 at 35–36. Plaintiff argues the Virtual Credit policy forced Plaintiff to take Reserve  
7 schedule status, which he alleges is a lesser position than the Line Holder schedule  
8 he previously held, and that Plaintiff was harmed by being forced to work  
9 additional hours to achieve Line Holder status. ECF No. 150 at 40.

10 USERRA §§ 4312 and 4313 apply at the time a service member returns from  
11 military leave and seeks reemployment. *Butts v. Prince William Cty. Sch. Bd.*, 844  
12 F.3d 424, 430 (4th Cir. 2016). Section 4312 guarantees reemployment if the  
13 returning service member satisfies the criteria set forth in that section. *Id.*; 38  
14 U.S.C. § 4312(a)(1)–(3). Section 4313 then sets forth the rights to which the  
15 service member is entitled upon reemployment, specifically, the right to  
16 reemployment in the same position previously held prior to the military leave. 38  
17 U.S.C. § 4313(a)(1)–(4).

18 \_\_\_\_\_  
19 <sup>3</sup> Neither party briefed the issue of standing. Therefore, the Court will not  
20 address the issue.



1           The parties dispute whether Reserve schedule assignment is an inferior  
2 employment position to Line Holder schedules and whether Reserve assignment  
3 has lesser rights and benefits. ECF Nos. 136 at 35; 150 at 40. Defendants contend  
4 Plaintiff was reemployed in his same position as a turboprop Captain upon his  
5 return from military leave. ECF No. 136 at 36. Plaintiff does not dispute he was a  
6 turboprop Captain both before and after his military leave but argues the Reserve  
7 schedule assignment he received in July 2017 was an inferior status than Line  
8 Holder assignment. ECF No. 150 at 39.

9           The applicable CBA defines “POSITION” as a “Pilot’s classification as  
10 either a Captain or First Officer in an Equipment Type.” ECF No. 136 at 35. The  
11 CBA describes a “DOWNGRADE” as occurring when a “Pilot is Reduced from  
12 his Seat as a Captain and is awarded as a First Officer.” *Id.* Line Holder and  
13 Reserve Line refer to the type of schedule a pilot receives during a Bid Period,  
14 which is the “time frame in Calendar Days that coincides with a Pilot’s schedule.”  
15 ECF Nos. 161 at 28, ¶ 53; 138-8 at 4; at 5; at 10. Line Holder or line flying refers  
16 a pilot who is assigned specific trips during the Bid Period. ECF Nos. 161 at 28, ¶  
17 53; 138-8 at 7. Reserve Line or reserve flying refers to pilots who are on call for  
18 flight assignments. *Id.* The type of schedule a pilot receives is based on seniority  
19 and bidding preferences. ECF No. 161 at 28, ¶ 54.

20           Pilots submit their bidding preferences (e.g., a preferred location, specific

1 days off, specific flights, etc.) in advance of the next Bid Period using Defendant's  
2 Preferential Bidding System ("PBS"). *Id.* at 29, ¶ 55. The PBS scheduler then  
3 creates a flight schedule for each pilot by taking into account each pilot's  
4 preferences and any known absences. *Id.* at ¶ 56. If the PBS scheduler can build a  
5 schedule for a pilot with at least 70 combined hours (actual flight hours and virtual  
6 credit hours), the pilot is assigned Line Holder status. ECF No. 136 at 34. If the  
7 PBS scheduler cannot build a schedule with at least 70 combined hours, the pilot  
8 may be assigned Reserve status. *Id.* Pilots can also bid to take Reserve status  
9 during the bidding process. ECF No. 161 at 53, ¶ 96.

10 Defendant's Virtual Credit Policy provided pilots who needed to take leave,  
11 whether for military duty or otherwise, with 2.45 hours of Virtual Credit to count  
12 toward the combined flight hours. *Id.* at 56, ¶ 97. Alternatively, pilots could  
13 adjust their assigned schedule to accommodate absences by trading with other  
14 pilots or through an open system that allowed pilots to pick up or drop trips, as  
15 necessary. *Id.* at 30, ¶ 57.

16 Generally, USERRA supersedes a CBA that limits or eliminates any rights  
17 provided by USERRA. *See* 38 U.S.C. § 4302. However, to the extent a CBA does  
18 not directly contradict USERRA, the CBA should be considered when determining  
19 an employee's appropriate reemployment position. *Hogan v. United Parcel Serv.*,  
20 648 F. Supp. 2d 1128, 1142–43 (W.D. Mo. 2009) (citing *Fishgold v. Sullivan*

1 *Drydock & Repair Corp.*, 328 U.S. 275 (1946)). In fact, the regulations  
2 contemplate CBAs when analyzing whether a reemployment position includes the  
3 same seniority, status, and rate of pay. 20 C.F.R. § 1002.193(a). In relevant part,  
4 the regulations state, “[t]he seniority rights, status, and pay of an employment  
5 position include those established (or changed) by a collective bargaining  
6 agreement, employer policy, or employment practice.” *Id.* The parties here do not  
7 argue the CBAs directly contradict USERRA; therefore, they are relevant  
8 considerations.

9       The parties dispute the relative merits of being assigned Line Holder or  
10 Reserve schedules. Plaintiff argues Line Holder schedules are more predictable  
11 and provide greater certainty of days off and were “usually provided a 74–80 hour  
12 schedule in 2017 and thus made more money than reserve pilots.” ECF No. 150 at  
13 40. Defendant argues Reserve schedules provide a greater minimum pay guarantee  
14 and more flexibility. ECF No. 136 at 36.

15       The Court finds a pilot’s assignment to a Reserve schedule is not a demotion  
16 as contemplated by the statute and regulations. Plaintiff generally retained the  
17 same “opportunities for advancement, working conditions, job location, shift  
18 assignment[,] . . . responsibility, and geographic location” upon reemployment.  
19 *Serricchio v. Wachovia Sec. LLC*, 658 F.3d 169, 183 (2d Cir. 2011). Plaintiff was  
20 a Captain of a turboprop aircraft when he left for military leave and he was

1 reemployed as a Captain of a turboprop aircraft when he returned. ECF No. 161 at  
2 56, ¶ 98. The evidence shows Plaintiff did not experience a significant change in  
3 job duties or responsibilities. His pay remained the same based on the number of  
4 flight hours Plaintiff flew during a bid period. Plaintiff does not allege he was  
5 forced to relocate, that his working conditions changed, or that he was denied  
6 opportunities for advancement. Plaintiff's subjective preference for a certain flight  
7 schedule cannot overcome the evidence that he was reemployed in the same  
8 position he held prior to his military leave. Thus, Defendants are entitled to  
9 summary judgment as to Counts I and III.

10 Plaintiff's arguments regarding loss of pay or loss of credit hours due to  
11 receiving a Reserve schedule are not relevant under §§ 4312 and 4313, which  
12 apply only at the instant of reemployment; Plaintiff's alleged damages are better  
13 addressed under § 4316, which applies to actions or conditions after successful  
14 reemployment. *Lisdahl v. Mayo Found. for Med. Educ. & Rsch.*, 698 F. Supp. 2d  
15 1081, 1104 (D. Minn. 2010).

16 **B. Count II**

17 Defendants seek summary judgment as to Count II on the grounds that the  
18 benefit Plaintiff seeks—Line Holder assignment—is not a seniority-based benefit  
19 under the statute and because he was not disadvantaged by Horizon's Virtual Credit  
20 policy. ECF No. 136 at 37. Plaintiff argues Line Holder assignment is a seniority-

1 based benefit because it provides a greater minimum pay guarantee and a more  
2 predictable schedule, which is not provided to Reserve Line assignments. ECF No.  
3 150 at 42.

4 Section 4316 requires that employees who are reemployed following  
5 military service must be provided the same “seniority and other rights” that the  
6 employee was provided prior to the military service, plus any additional “seniority  
7 and other rights and benefits” the employee would have attained had the employee  
8 been continuously employed. 38 U.S.C. § 4316(a). USERRA defines “seniority”  
9 as “longevity in employment together with any benefits or employment which  
10 accrue with, or are determined by, longevity in employment.” 38 U.S.C. §  
11 4303(12). The USERRA regulations similarly define a “seniority-based right or  
12 benefit” as “one that accrues with, or is determined by, longevity in employment.”  
13 20 C.F.R. § 1002.212.

14 The regulations set forth three factors to consider when assessing whether a  
15 right or benefit is seniority-based: (1) whether the right or benefit is a reward for  
16 length of service rather than a form of short-term compensation for work  
17 performed; (2) whether it is reasonably certain the employee would have received  
18 the right or benefit had the employee remained continuously employed during the  
19 military service; and (3) whether it is the employer’s custom or practice to provide  
20

1 or withhold the right or benefit as a reward for length of service. *Id.* A CBA is not  
2 controlling if the employer’s practice or custom differs from the written policy. *Id.*

3       Prior to the enactment of USERRA, the Supreme Court analyzed seniority-  
4 based rights and benefits under the predecessor statutes and indicated the  
5 determination of a whether right or benefit was seniority-based was best assessed  
6 by understanding the “true nature” of the benefit rather than looking only to an  
7 employee’s longevity with an employer. *Hoefert*, 438 F. Supp. 3d at 735 n.7  
8 (citing *Alabama Power Co. v. Davis*, 431 U.S. 581, 592 (1977)). In that context, if  
9 the “true nature” of the benefit is a future-oriented longevity benefit, it is seniority-  
10 based. *Id.* For example, a pension plan that is tied to an employee’s longevity  
11 with a company can be viewed as “an exchange of financial security for an  
12 employee’s long-term commitment to an employer.” *Id.* If it is a backward-  
13 looking compensation for work already performed, like vacation accrual, it is not  
14 seniority-based because those benefits “do not incentivize longevity of  
15 employment, but rather compensate for . . . the effort an employee has expended in  
16 the past.” *Id.*; see also *Huhmann v. Fed. Express Corp.*, 874 F.3d 1102, 1111 (9th  
17 Cir. 2017) (finding a signing bonus for a new collective bargaining agreement was  
18 a seniority-based benefit because the award amount was determined by an  
19 employee’s longevity with the company).

20       Here, the parties dispute whether the assignment of Line Holder was a

1 seniority-based benefit. The Court finds the “true nature” analysis helpful, despite  
2 its application under the USERRA predecessor. As previously discussed,  
3 Defendant assigns pilot schedules using the monthly PBS scheduler. ECF Nos.  
4 161 at 49, ¶ 91; 138-8 at 24. Several weeks prior to the issuance of schedules,  
5 pilots submit their schedule preferences, including any known absences. ECF No.  
6 161 at 29, ¶ 55. Pilots are then assigned to a Reserve or Line flying schedule based  
7 on their availability to fly during a Bid Period, as indicated by their bidding  
8 preferences, and their seniority with the company. *Id.* at 50, ¶ 92. Turboprop  
9 pilots are assigned to Line Holder schedules if the PBS system can create a flight  
10 schedule with at least 70 credit hours. *Id.* at 53, ¶ 96. If the PBS system cannot  
11 create a schedule with at least 70 credit hours, a turboprop pilot is assigned to  
12 Reserve flying. *Id.* A pilot’s seniority, calculated from the first calendar day a  
13 pilot reports for initial ground school training, contributes to a pilot’s ability to bid  
14 for certain schedules. *Id.* at 50, ¶ 92; ECF No. 150-9 at 3.

15       Based on the evidence, the true nature of an assignment to a Line Holder  
16 schedule is based on a work requirement, not seniority. While a pilot’s seniority is  
17 a contributing factor to the bidding process and subsequent assignment, there is no  
18 evidence to suggest a particular schedule is awarded as a financial incentive in  
19 exchange for a pilot’s long-term commitment to employment with Defendant.  
20 Rather, the determinative factor is whether a pilot is able to meet the minimum 70

1 credit hour requirement for Line Holder status. Notably, a pilot's schedule as  
2 either a Reserve or Line Holder is not permanent but subject to adjustment for each  
3 Bid Period based on the pilot's availability, which supports a finding that the  
4 schedules are based on a work requirement. *See* ECF No. 138-8 at 22–39.

5 Moreover, pilots can adjust their schedules once they are issued by adding or  
6 dropping trips, as necessary, to meet the minimum requirement or to accommodate  
7 a leave of absence. ECF No. 161 at 30, ¶ 57. For example, Plaintiff took military  
8 leave in June, July, September, and October 2017. *Id.* at 58, ¶ 103. He was  
9 assigned a Reserve schedule in July 2017 but was able to pick up additional flights  
10 in the other months to achieve the minimum number of hours required for Line  
11 Holder assignment. *Id.* Thus, the award of a Line or Reserve schedule is based on  
12 the ability to complete the requisite amount of work, which supports the conclusion  
13 that the award of a particular schedule is not a seniority-based right or benefit. *See*  
14 *id.* at 53, ¶ 96.

15 Considering the factors set forth in the regulations also supports a finding  
16 that the assignment of Line Holder is not a seniority-based benefit. Plaintiff claims  
17 the first factor is satisfied because he does not seek compensation for hours  
18 worked, but rather the “rights and benefits” to which he is entitled, specifically the  
19 higher in-practice pay guarantee of 74–80 hours and the more predictable schedule.  
20 ECF No. 150 at 42. However, as with the assignment of Line Holder itself, there is



1 no evidence to suggest the Line Holder minimum pay guarantee, whether 70 hours  
2 or 74–80 hours, and the more predictable schedule are awarded based on a pilot’s  
3 longevity with the company. Rather, these “rights and benefits” are merely  
4 characteristics of the Line Holder schedule. Moreover, there is evidence to suggest  
5 a pilot’s assignment to a particular schedule may also be more subjective rather  
6 than an objective award based on length of service. *See* ECF No. 161 at 51–52, ¶  
7 94.

8 As to the second factor, Plaintiff does not specifically argue, or offer any  
9 evidence, that he was “reasonably certain” to achieve Line status had he not taken  
10 military leave. Rather, Plaintiff argues he was required to work on his days off or  
11 to take longer trips in order “to maintain my monthly minimum pay guarantee for  
12 Regular Line Holders.” ECF Nos. 150 at 43; 73-22 at 3, ¶ 6. First, Plaintiff’s  
13 argument implies he is entitled to the minimum pay for Line Holders, which  
14 mischaracterizes any minimum pay guarantee outlined in the CBA. The CBA  
15 provides that a turboprop Line pilot who is available to fly for an entire Bid Period  
16 will be guaranteed a minimum 70 credit hour pay, while a turboprop Reserve pilot  
17 who is available to fly for an entire Bid Period will be guaranteed a minimum 73  
18 credit hour pay. ECF No. 138-8 at 12. A pilot is entitled to the Line Holder  
19 minimum pay guarantee *if* a pilot is assigned to that flight schedule; a pilot is not  
20 otherwise guaranteed, much less entitled to, the Line Holder minimum pay

1 guarantee. ECF No. 161 at 53, ¶ 96. Plaintiff’s argument regarding the higher in-  
2 practice pay guarantee of 74–80 hours is not relevant to the inquiry; if Plaintiff  
3 cannot achieve the 70-hour minimum for Line Holder, he is not entitled to the Line  
4 Holder minimum, regardless of the in-practice amount.

5 Second, even if Plaintiff had to fly on his days off to make up for lost hours,  
6 the Virtual Credit policy allowed Plaintiff to average fewer hours per day to make  
7 up those losses. ECF No. 136 at 38–39. Additionally, the Virtual Credit policy did  
8 not deny Plaintiff those benefits because Plaintiff did, in fact, receive Line Holder  
9 status for three out of the four months when he took military leave by making up  
10 the lost hours. ECF No. 161 at 58, ¶ 103. Thus, it is difficult to see how Plaintiff  
11 was harmed by the application of the Virtual Credit policy.

12 Regarding the third factor, Plaintiff claims Defendant withholds the rights  
13 and benefits (i.e., the Line Holder minimum pay-guarantee and predictable  
14 schedule) from pilots placed on Reserve status. ECF No. 150 at 42. Plaintiff’s  
15 contention is not supported by the evidence. Defendant does not “withhold” the  
16 Line Holder minimum pay guarantee or more predictable schedules from Reserve  
17 Status pilots; again, pay and flight days or routes are simply characteristics of a  
18 particular schedule assignment. Schedules are primarily allotted based on a pilot’s  
19 availability to perform work within a Bid Period, not a pilot’s length of service  
20 with Defendant.

1 Finally, the Court is unpersuaded by Plaintiff’s letter from the Department of  
2 Labor (“DOL”) concluding that Defendant’s Virtual Credit policy violated  
3 USERRA, and that Plaintiff was entitled “to damages at his premium rate.” ECF  
4 Nos. 150 at 43–44; 73-25 at 3. The investigator’s legal conclusions are not  
5 supported by the evidence nor are they supported by the purpose of USERRA. *See*  
6 20 C.F.R. §§ 1002.7(a) (“USERRA establishes a floor, not a ceiling, for the  
7 employment and reemployment rights and benefits of those it protects.”);  
8 1002.7(c) (“ . . . USERRA does not require an employer to pay an employee for  
9 time away from work performing service . . .”). Moreover, the DOL does not have  
10 authority to enforce compliance with USERRA. 20 C.F.R. § 1002.290. Rather, if  
11 a complainant’s dispute with his or her employer cannot be resolved by the DOL  
12 after it concludes its investigation, the complainant may then initiate his or her own  
13 civil action in district court. 38 U.S.C. § 4323(a)(3); *see also Int’l Longshore &*  
14 *Warehouse Union v. Solis*, No. C 11-1939 SI, 2011 WL 3667474, at \*1 (N.D. Cal.  
15 Aug. 22, 2011).

16 The “notes and conclusions of a single USDOL investigator” contained in an  
17 investigative letter do not rise to the level of an opinion letter or policy statement  
18 issued by the agency. *Koellhoffer v. Plotke-Giordani*, 858 F. Supp. 2d 1181, 1191  
19 (D. Colo. 2012). Therefore, Plaintiff’s DOL letter is not entitled to any deference.  
20 The investigation letter outlines the relief to which the DOL believed Plaintiff was

1 entitled, including a recalculation of Plaintiff's military leave of absence during  
2 June and July 2017 at 3.0 credits per day or a 4.2 daily minimum but not less than  
3 the value of trips dropped for those months, and \$3,190.14 in pay differential at  
4 150% "as if he had picked the time up as overtime or 'premium pay'." ECF No.  
5 73-25 at 3. This is precisely the type of compensation and differential pay the  
6 DOL expressly does not require employers to provide. *See* 70 Fed. Reg. 75246-01,  
7 75,292 (Dec. 19, 2005) (to be codified at 20 C.F.R. pt. 1002) ("employees absent  
8 from employment for military service are not required to be compensated by their  
9 civilian employer during that service"); *id.* at 75,249 ("The term 'differential pay'  
10 refers to payments by employers to their employees absent to perform military  
11 service, and this pay is neither required by nor addressed in USERRA.").

12 Granting Plaintiff an increased recalculation and "premium pay" would  
13 effectively allow Plaintiff to earn double income for his military service from both  
14 the United States military and Defendant. USERRA requires only equal, but not  
15 preferential treatment of employees who take military leave. *Crews v. City of Mt.*  
16 *Vernon*, 567 F.3d 860, 865 (7th Cir. 2009). Thus, Plaintiff is not entitled to  
17 compensation from Defendant beyond what is already provided by the Virtual  
18 Credit policy.

19 Based on the foregoing, the Court finds there are no genuine issues of  
20 material facts as to whether the assignment of Line Holder status is a seniority-

1 based right or benefit. No reasonable fact finder could conclude the assignment of  
2 a pilot's schedule, based primarily on availability to fly in a Bid Period, was  
3 anything other than a bona fide work requirement. Therefore, Defendants are  
4 entitled to summary judgment as to Count II.

#### 5 **IV. Liquidated Damages**

6 Defendants seek summary judgment on Plaintiff's claim for liquidated  
7 damages. ECF No. 136 at 40. Plaintiff contends there is sufficient evidence to  
8 support a finding that Defendants willfully violated USERRA. ECF No. 150 at 44.  
9 A court may require an employer to pay liquidated damages if the court determines  
10 the employer willfully failed to comply with the USERRA provisions. 38 U.S.C. §  
11 4323(d)(1)(C). Having determined Defendants did not violate the USERRA  
12 provisions at issue, Plaintiff's arguments for liquidated damages are moot.  
13 Defendants are entitled to summary judgment on Plaintiff's claim for liquidated  
14 damages.


#### 15 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 16 1. Defendant's Motion for Summary Judgment (ECF No. 136) is  
17 **GRANTED.**
- 18 2. The parties remaining motions are **DENIED** as moot; the trial and all  
19 other hearings and deadlines are **VACATED** as moot.

1           The District Court Executive is directed to enter this Order, enter Judgment  
2 for Defendants, furnish copies to counsel, and **CLOSE** the file.

3           **DATED** May 24, 2021.



5             
6           THOMAS O. RICE  
7           United States District Judge