IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

MARK BELTON, Plaintiff, v. PAGE COUNTY, VIRGINIA, Defendant.	NO. 5:13-CV-24

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO STRIKE

The plaintiff, Mark Belton, by counsel, submits this Memorandum in Support of Motion to Strike Defendants' purported Affirmative Defenses pursuant to Fed. R. Civ. P. 12(f), as well as Defendants attempt to reserve the right to raise additional affirmative defenses, and respectfully shows the Court:

I. FACTS AND PROCEDURE

Mark Belton ("Belton") seeks the remedies provided for by the Uniformed Services Reemployment Rights Act of 1994 ("USERRA") for the violation of his rights and to purge the discrimination foisted upon him by Page County, Virginia, including equitable relief, compensatory damages, reasonable attorney fees, expert fees and costs arising out of his claim, as well as liquidated (double) damages arising from the willful violation of his USERRA rights.

Belton filed his Verified Complaint and supporting records on March 11, 2013. Defendants were served on March 19, 2013 and Defendants' counsel entered a notice of appearance on April 4, 2013. Defendants requested, and were granted an (11) day extension to answer the Complaint. On April 19, 2013, Defendants filed their Answer. Therein Defendants assert certain alleged defenses which are insufficient as a matter of law and do not otherwise

satisfy the minimal standards of Rule 8 of the Federal Rules of Civil Procedure.[1] Those alleged defenses are stated as:

> **SECOND AFFIRMATIVE DEFENSE**
>
> Plaintiff fails to state a claim against the County for damages and injunctive relief because he has suffered no damage, he requested to leave his position with the County early to start employment elsewhere, and he is not seeking to have his contract reinstated.
>
> **THIRD AFFIRMATIVE DEFENSE**
>
> Plaintiff lacks standing to bring this claim against County because he has not suffered a "concrete and particularized injury" that can be redressed by this Court. Plaintiff has not suffered any lost wages or benefits, he left employment with the County to work elsewhere for considerably more money; and he is not seeking to have his contract with the County reinstated. Dees v. Hyundai Motor Mfg. Alabama, LLC, 368 Fed.Appx. 49 (11th Cir. 2010).[2]

II. ARGUMENT

Rule 12(f) allows a court to strike "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). A Rule 12(f) motion "is the primary procedure for objecting to an insufficient defense."[3] In reviewing a motion to strike such defenses, courts "view the pleading under attack in a light most favorable to the pleader,"[4] and have strike a defense only when it has "no possible relation to the controversy."[5]

A court has broad discretion to strike defenses that are insufficient as a matter of law,[6]

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[1] ECF Nos. 1-13.
[2] ECF No. 13 at 4.
[3] 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1380 (3d ed. 2004).
[4] *Clark v. Milam*, 152 F.R.D. 66, 71 (SDWVa, 1993)(*citing Lirtzman v. Spiegel, Inc.*, 493 F. Supp. 1029, 1031 n.1 (ND Ill, 1980).
[5] *Brown & Williamson Tobacco Corp. v, United States*, 201 F.2d 819, 822 (6th Cir. 1953) (*citing Samuel Goldwyn, Inc., v. United Artists Corp.*, 35 F. Supp. 633 (SDNY, 1940); and *Wooldridge Mfg. Co. v. R. G. La Tourneau, Inc.*, 79 F. Supp. 908 (NDCal. 1948)).
[6] *See FDIC v. Martini*, 1995 U.S. Dist. LEXIS 4420, *3 n.2 (DMd. 1995).

that potentially serve only to cause delay,[7] that have no possible relation to the controversy,[8] require "unnecessary time and money . . . litigating invalid, spurious issues";[9] or fail to meet the pleading requirements of Rules 8 and 9.[10] To satisfy the standard of Rule 8(c) Defendants must "plead matters extraneous to the plaintiff's prima facia case…which deny the …right to recover, even if the allegations of the complaint are true."[11]

Defendants second and third Defenses assert that Belton has "failed to state a claim…" and "lacks standing…" because "he has suffered no damage." Disregarding the fact that Page County, admittedly, "terminated Mr. Belton's contract,"[12] these two Defenses are insufficient as a matter of law. And, both are in fact contrary to the precedent of the Fourth Circuit and the law of USERRA. Mr. Belton has suffered financial damages as a result of Defendants' discriminatory conduct, and he alleges those damages, even though an action pursuant USERRA does not require any such allegation.

With regard to the failure to state a claim Defense, as noted by the Fourth Circuit Court of Appeals, even if an employee cannot establish that he or she suffered any monetary damages, that does not mean that there is no relief to which the employee might be entitled if there was a violation of the USERRA.[13] USERRA authorizes the district court to "require the employer to

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[7] *See Hcri Trs Acquirer, LLC v. Iwer,* 708 F. Supp. 2d 687, 2010 U.S.Dist. LEXIS 41552, *3 (N.D. Ohio 2010) (*citing Heller Fin., Inc. v. Midwhey Powder Co.,* 883 F.2d 1286, 1294 (7th Cir. 1989)).

[8] *See Moore v. Prudential Ins. Co.,* 166 F. Supp. 215, 218 (MDNC 1958).

[9] *See Spell v McDaniel,* 591 F. Supp. 1090, 1112 (EDNC 1984) (*quoting Anchor Hocking Corp. v. Jacksonville Elec. Auth.,* 419 F. Supp. 992, 1000 (M,D.Fla. 1976))

[10] *See McLemore v. Regions Bank,* 2010 U.S. Dist. LEXIS 25785, *45-46 (M.D.Tenn, 2010) (defenses must meet Rule 8(b) and (c) pleading requirements); *Stowe Woodward, L.L.C. v. Sensor Prods.,* 230 F.R.D. 463, 466-470 (W.D.Va, 2005) (when applicable defenses must meet the heightened pleading requirements of Rule 9).

[11] *Fed. Dep. Ins. Corp. v. Main Hurdman,* 655 F. Supp. 259, 262 (E.D.Cal. 1987).

[12] ECF No. 13 at 3.

[13] *See Hill v. Michelin North America, Inc.,* 252 F.3d 307, 316 (4th Cir. 2001).

comply with the provisions of this chapter,"[14] and to "use its full equity powers . . . to vindicate fully the rights or benefits of persons under this chapter."[15] As noted above, Belton's complaint alleges both compensatory damages and equitable relief, including injunctive relief.

With regard to the lack of standing Defense, again this defense is contrary to Fourth Circuit precedent in that it relies upon the erroneous presumption that Belton has not suffered, or alleged, compensatory damages.[16] Further, Defendants reliance upon authority from the Eleventh Circuit is questionable at best. In *Dees v. Hyundai*[17] the Eleventh Circuit reviewed the granting of summary judgment in a harassment claim where the evidence presented is opposite to the allegations and supporting documents in Belton's Verified Complaint. The plaintiff in *Dees* "admitted that he has no direct evidence that his military status motivated his termination, and denied knowing that a termination committee meeting even took place or who was involved in the decision."[18] Belton's Verified Complaint provides direct evidence that his military status was specifically considered by the Page County Board of Supervisors, and a determinative factor in their adverse employment decisions.[19]

Notably, at the time of the *Dees* decision, the validity of a harassment complaint under USERRA was speculative.[20] In 2011, however, USERRA was amended to clarify that the term "benefit of employment" encompassed the right *not* to suffer harassment of a hostile work environment by expanding the definition of benefit in employment at § 4303(2) of the Act to

[14] 38 U.S.C. § 4323(d)(1)(A).
[15] § 4323(e).
[16] *Hill v. Michelin North America, Inc.*, 252 F.3d at 316.
[17] *Dees v. Hyundai Motor Mfg. Alabama LLC*, 368 Fed.Appx. 49 (11th Cir. 2010).
[18] *Id.* at 52.
[19] ECF No. 1 at 4-6; Nos. 1-1 through 1-4.
[20] *Dees v. Hyundai Motor Mfg. Alabama LLC*, 368 Fed.Appx. at 53.

include "the terms, conditions, or privileges of employment."[21] More importantly, the *Dees* decision turned upon the fact that the plaintiff's admitted "that he has not suffered any lost wages or employment benefits resulting from the alleged harassment."[22]

Here, Belton alleges a simple discrimination claim pursuant to 38 U.S.C. § 4311, provides direct evidence that his military status motivated Defendants' decisions, and alleges his damages.[23]

Furthermore, Belton has standing. Standing to bring a claim pursuant to USERRA is governed by 38 U.S.C. § 4323(f):

> An action under this chapter [38 USCS §§ 4301 *et seq*.] may be initiated only by a person claiming rights or benefits under this chapter under subsection (a) […]

Here, Belton asserts a denial of his right to be free from discrimination in employment, § 4311, and Belton has not sought to exercise his right to seek assistance from agencies of the U.S. Government pursuant to § 4323(a).

As for "the minimum constitutional requirements for standing, a plaintiff must establish three elements: (1) that the plaintiff has sustained an injury in fact; (2) that the injury is traceable to the defendants' actions; and (3) that the injury likely can be redressed by a favorable judicial decision."[24]

Here, Belton's complaint alleges:

> Mr. Belton's obligation to perform service in the uniformed service, and/or because he took action to enforce a protection

[21] Pub. L. No 112-56, Title II, § 51, Nov. 21, 2011, 125 Stat. 729 (amending 38 U.S.C.A. § 4303(2). *See* 157 Cong. Rec. H7652, H7657 (daily ed. Nov. 16, 2011) (statement of Rep. Stutzman and joint explanation of compromise agreement on amendment of § 4303(2)); H.R. Rep. No. 112-242, pt. 1, at 15-16 (2011), *available at* 2011 WL 4837273, *17-18 (leg.Hist.).
[22] *Dees v. Hyundai Motor Mfg. Alabama LLC*, 368 Fed.Appx. at 53.
[23] ECF No. 1 at 7.
[24] *Daniels v. Arcade, L.P.*, 477 Fed. Appx. 125, 128 (4th Cir. 2012).

> afforded him under USERRA or to exercise a right provided by USERRA, was a motivating factor in Page County's decision to deny Mr. Belton benefits of employment.
>
> Page County unlawfully discriminated against Mr. Belton, among other ways, by denying Mr. Belton employment and benefits of employment on the basis of his membership, service, or obligation to perform service in the uniformed service, and/or because he took action to enforce a protection afforded him under USERRA or to exercise a right provided by USERRA.

Belton also seeks relief in the form of:

> Compensation, in the amount to be proven at trial, for all damages suffered by Mr. Belton including, back pay, front pay, lost benefits of employment, pre and post judgment interest, negative tax consequences and liquidated damages pursuant to 38 U.S.C. § 4323(d). […]
>
> For such other and further relief as this Court deems just and equitable, including injunctive relief enjoining future violations of the USERRA pursuant to 38 U.S.C. § 4323(d). [25]

Belton's complaint satisfies each of the constitutional requirements for standing.[26]

Lastly, at ¶ 26 of the Answer the Defendants attempt to reserve the right to raise additional affirmative defenses. This is not a proper affirmative defense.[27] The docket shows that Page County has not moved for, or requested a More Definite Statement as allowed under the civil rules. Further, Defendants cannot avoid the requirements of Rule 15 simply by "reserving the right to amend or supplement their affirmative defenses."[28]

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[25] ECF No 1. at 6-8 ¶¶ 37-38; ¶¶ A and C.
[26] *Daniels v. Arcade, L.P.*, 477 Fed. Appx. at 128.
[27] *See Reis Robotics U.S.A., Inc. v. Concept Indus., Inc.*, 462 F.Supp.2d 897, 907 (N.D. Ill. 2006).
[28] *Id.*

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully asks this Court to strike Defendants' second and third Affirmative Defenses which are insufficient as a matter of law,[29] will only cause delay[30], have no possible relation to the controversy,[31] and which will prejudice Belton by requiring him to expend "unnecessary time and money . . . litigating invalid, spurious issues."[32] Further that the court strike Defendants' improper attempt to reserve future defenses in contravention of the civil rules.

Respectfully submitted,

PLAINTIFF MARK BELTON
By Counsel:

Dated: April 30, 2013

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[29] *See FDIC v. Martini*, 1995 U.S. Dist. LEXIS 4420, at n.2.
[30] *See Hcri Trs Acquirer, LLC v. Iwer*, 2010 U.S.Dist. LEXIS 41552 at 3.
[31] *See Moore v. Prudential Ins. Co.*, 166 F. Supp. at 215.
[32] *See Spell v McDaniel*, 591 F. Supp. at 1112.

CERTIFICATE OF SERVICE

I certify that on April 30, 2013 I will electronically file the Plaintiff's Memorandum in Support of Motion to Strike with the Clerk of Court using the CM/ECF system which will give electronic notice to:

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