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14 **IN THE UNITED STATES DISTRICT COURT**
15 **IN AND FOR THE EASTERN DISTRICT OF WASHINGTON**

16 LYLE WIXOM,

17 Plaintiff,

18 v.

19 IMCO GENERAL CONSTRUCTION,
20 INC., a Washington Corporation,
21 FRANK IMHOF, an individual,

22 Defendants.

NO. CV- 12-413-LRS

**PLAINTIFF’S COMPLAINT FOR
INJUNCTIVE RELIEF, DAMAGES,
AND JURY TRIAL FOR
VIOLATIONS OF THE UNIFORMED
SERVICES EMPLOYMENT AND
REEMPLOYMENT RIGHTS ACT**

**EXEMPT FROM FILING FEES
UNDER TO 38 U.S.C. 4323(h)(1)**

23 **COMES NOW** Plaintiff LYLE WIXOM, by and through his attorneys, and
24 alleges:

25 **I. INTRODUCTION**

26 Mr. Wixom seeks injunctive relief designed to prevent Defendants from
27 further injuring Mr. Wixom, or any other member of the U.S. Military, through
28 willful violations of the Uniformed Services Employment and Reemployment
Rights Act, USERRA 38 U.S.C. §§ 4301, et seq.

1 Plaintiff's complaint also seeks damages for the injuries resulting from
2 Defendants' willful discrimination against Plaintiff for his membership in the U.S.
3 Military, *inter alia*.

4 **II. PARTIES**

5 1. Plaintiff, LYLE WIXOM (hereinafter "Mr. Wixom" or "Plaintiff") resided
6 in the state of Washington, at all times pertinent hereto.

7 2. Defendant, IMCO GENERAL CONSTRUCTION, INC., (hereinafter
8 "IMCO" or "Defendant") is a Washington Corporation licensed to conduct
9 business within the State of Washington pursuant to UBI No. 600320655, and
10 Washington Contractor Number IMCOGI*215R1, and IMCO's principal
11 headquarters is located at 2116 Buchanan Loop, Ferndale, WA 98248-9801,
12 which is located in Whatcom County, Washington.

13 3. Defendant, FRANK IMHOF, owns the above corporation and was the
14 primary decision maker regarding Defendants' refusal to hire and eventual firing
15 Mr. Wixom.

16 4. Mr. Wixom was an employee of IMCO at all times pertinent hereto.

17 5. For the purposes of 38 U.S.C. § 4303(4), Defendant, IMCO is a private
18 employer operating within the state of Washington.

19 **III. JURISDICTION AND VENUE**

20 6. Jurisdiction and Venue in the United States District Court, Eastern District
21 of Washington, are appropriate where this dispute involves predominant issues of
22 federal law, and where all acts at issue and described herein occurred in this
23 district, and where the injury to Plaintiff occurred in this district, and where
24 Plaintiff is a resident of this district, and where the Defendants conduct substantial
25 business in this district. (38 U.S.C. § 4323(b); 28 U.S.C. §1331; 28 U.S.C. §1332;
26 28 U.S.C. §1391(b)).

1 7. Defendants are liable unto Plaintiff pursuant to the provisions of the
2 Uniformed Services Employment and Reemployment Rights Act (USERRA), 38
3 U.S.C. §§ 4301, et. seq., as well as other applicable federal and state laws.
4 Defendant is also liable unto Plaintiff pursuant to the laws of the State of
5 Washington, which claims may be brought under the Supplemental Jurisdiction of
6 this Court. 28 U.S.C. 1367, et seq.

7 **IV. FACTS**

8 8. Plaintiff re-alleges paragraphs 1 through 7, inclusive as though fully set
9 forth herein.

10 9. Mr. Wixom is a veteran of the United States Military Reserve.

11 10. All of Mr. Wixom's military records reflect honorable military service.

12 11. Mr. Wixom's applicable military service periods do not exceed 5 years.

13 12. Mr. Wixom began working for Defendants in January of 2008.

14 13. Mr. Wixom informed Defendants, through its agent, Ron Eilers, that he is a
15 member of the U.S. Military Reserves.

16 14. On May 27, 2008, Mr. Wixom received written notice that his unit was
17 deploying to Iraq.

18 15. Mr. Wixom immediately shared the notice with his supervisor, informed his
19 supervisor that he would be receiving official written orders shortly, and that he
20 intended to take military leave of absence in conjunction with the orders.

21 16. On June 12, 2008, Mr. Wixom received the official written orders and
22 presented a copy of the orders to his supervisor, Ron Eilers.

23 17. Ron Eilers gave Mr. Wixom his blessing and signed the orders.

24 18. Mr. Wixom started active duty on July 12, 2008.

25 19. During Mr. Wixom's absence, Defendants replaced his position, and work,
26 with other employees.
27
28

1 20. While his unit was preparing for deployment, Mr. Wixom experienced
2 medical issues.

3 21. These medical issues prevented Mr. Wixom from deploying to Iraq with his
4 unit.

5 22. Therefore, Mr. Wixom gave Defendants notice of his intent to return to
6 work in August of 2008.

7 23. However, rather than retrain and reemploy Mr. Wixom as required by
8 federal statute, Defendants denied Mr. Wixom reemployment.

9 24. To this day, Defendants continues to deny Mr. Wixom a salary and other
10 benefits of employment.

11 25. Upon information and belief, Defendants continues to deny Mr. Wixom the
12 opportunity to participate in a USERRA protected retirement plan and other
13 benefits of employment.

14 26. From September 2008, to present, Mr. Wixom made repeated requests for
15 Defendants to reemploy him and repeatedly informed Defendants of his protected
16 status and rights under USERRA, but these efforts led nowhere.

17 27. Upon information and belief, from September 2008, to present, Defendants
18 have hired numerous other persons to positions similar to Mr. Wixom's former
19 position.
20

21 28. In July of 2011, Defendants made a final decision to deny Mr. Wixom
22 reemployment.

23 29. On September 23, 2011, Mr. Wixom filed his complaint with the
24 Department of Labor, Veterans Employment and Training Service
25 ("DOL/VETS"). DOL/VETS began an investigation, contacted Defendant IMCO,
26 and Defendant obtained legal representation.

27 30. On November 2, 2011, through the DOL/VETS investigator, legal counsel
28 for IMCO offered Mr. Wixom position of employment.

1 31. On November 3rd and 4th 2011, Mr. Wixom requested information from
2 both IMCO directly, and DOL/VETS, via e-mail, about the specific details of the
3 alleged position.

4 32. The position of employment was alleged to last “into 2012” (two months)
5 and would require Mr. Wixom to move to Kettle Falls, WA, (190 miles from
6 home). Mr. Wixom was given three days to respond.

7 33. On December 22, 2011 DOL/VETS issued its closing letter, authorizing
8 Mr. Wixom to seek Department of Justice or private representation.

9 34. In addition to substantial economic and non-economic damages, Mr.
10 Wixom has suffered severe emotional distress as a result of Defendants’ actions.

11 **V. CAUSES OF ACTION**

12 35. Plaintiff re-alleges paragraphs 1 through 34, inclusive as though fully set
13 forth herein.

14 36. Defendants violated Mr. Wixom’s rights as guaranteed by the USERRA 38
15 U.S.C. §§ 4301 to 4335, including but not limited to: 38 U.S.C. § 4311
16 discrimination and retaliation in employment; 38 U.S.C. §§ 4312, 4313
17 reemployment rights; § 4316, and 20 C.F.R. § 1002.247, rights and benefits of
18 persons absent from employment for service in the armed forces; and § 4318, and
19 20 C.F.R. § 1002.262(a), employee pension and benefit plans.

20 37. Defendants also violated Mr. Wixom’s state rights against discrimination
21 and retaliation in employment. RCW 73, et seq.; and RCW 49.60, et seq.

22 38. Plaintiff was injured by Defendants’ actions.

23 39. Defendants’ actions were a direct and proximate cause of Plaintiff’s injuries
24 and damages.

25 40. Defendants’ actions were intentional, willful, wanton, unfair,
26 unconscionable, and outrageous.

27 41. Defendants’ actions illustrate why an injunction is necessary to protect
28 Plaintiff and other uniformed service members from similar harm.

1 **(CAUSE OF ACTION NO. 1 – VIOLATION OF 38 U.S.C. §4311)**

2 42. Plaintiff re-alleges paragraphs 1 through 41, inclusive as fully set forth
3 herein.

4 43. 38 U.S.C. §4311(a) states in pertinent part:

5
6 Any person who is a member of, applies to be a member of, performs,
7 has performed, applies to perform, or has an obligation to perform
8 service in a uniformed service shall not be denied initial employment,
9 reemployment, retention in employment, promotion, or any benefit of
10 employment by an employer on the basis of that membership,
11 application for membership, performance of service, application for
12 service, or obligation.

13 44. 38 U.S.C. §4311(c) states in pertinent part:

14
15 An employer shall be considered to have engaged in actions
16 prohibited – (1) under section (a), if the person’s membership,
17 application for membership, service, application for service, or
18 obligation for service in the uniformed services is a motivating factor
19 in the employer’s action...

20 45. Defendants violated 38 U.S.C. § 4311 of USERRA, among other ways, by
21 discriminating against Mr. Wixom when Defendants denied him employment
22 benefits, including pay, promotion and training, because of his membership,
23 service, or obligation to perform military service.

24 46. Plaintiff was injured by Defendants’ actions.

25 47. Defendants’ actions were a direct and proximate cause of Plaintiff’s injuries
26 and damages.

27 48. Defendants’ actions were intentional, willful, wanton, unfair,
28 unconscionable, and outrageous.

49. Defendants’ actions illustrate why an injunction is necessary to protect
Plaintiff and other uniformed service members from similar harm.

1 **(CAUSE OF ACTION NO. 2 – VIOLATION OF 38 U.S.C. §§4312&4313)**

2 50. Plaintiff re-alleges paragraphs 1 through 49, inclusive as though fully set
3 forth herein.

4 51. 38 U.S.C. §4312(a) states in pertinent part:

5 ...any person whose absence from a position of employment is
6 necessitated by reason of service in the uniformed services shall be
7 entitled to the reemployment rights and benefits and other
8 employment benefits of this chapter...

9 52. 38 U.S.C. §4312(a) states in pertinent part:

10 ...a person entitled to reemployment under section 4312, upon
11 completion of a period of service in the uniformed services, shall be
12 promptly reemployed in a position of employment...

13 53. Defendants violated 38 U.S.C. §§ 4312 & 4313, among other ways, by
14 failing to retrain and promptly reemploy Mr. Wixom in a position of seniority
15 with other rights and benefits determined by seniority plus the additional seniority,
16 and rights, and benefits, or other position that Mr. Wixom would have attained
17 had he remained continuously employed.

18 54. Plaintiff was injured by Defendants' actions.

19 55. Defendants' actions were a direct and proximate cause of Plaintiff's injuries
20 and damages.

21 56. Defendants' actions were intentional, willful, wanton, unfair,
22 unconscionable, and outrageous.

23 57. Defendants' actions illustrate why an injunction is necessary to protect
24 Plaintiff and other uniformed service members from similar harm.

25 **(CAUSE OF ACTION NO. 3 – VIOLATION OF 38 U.S.C. §4316)**

26 58. Plaintiff re-alleges paragraphs 1 through 57, inclusive as though fully set
27 forth herein.
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1 59. 38 U.S.C. §4316(a) states in pertinent part:

2 A person who is reemployed under this chapter is entitled to the
3 seniority and other rights and benefits determined by seniority that the
4 person had on the date of the commencement of service in the
5 uniformed services plus the additional seniority and rights and
6 benefits that such person would have attained if the person had
7 remained continuously employed.

8 60. Defendants violated 38 U.S.C. § 4316, among other ways, by denying Mr.
9 Wixom the rights and benefits determined by seniority and such other rights and
10 benefits not determined by seniority Mr. Wixom would have attained if he had
11 remained continuously employed at IMCO.

12 61. Plaintiff was injured by Defendants' actions.

13 62. Defendants' actions were a direct and proximate cause of Plaintiff's injuries
14 and damages.

15 63. Defendants' actions were intentional, willful, wanton, unfair,
16 unconscionable, and outrageous.

17 64. Defendants' actions illustrate why an injunction is necessary to protect
18 Plaintiff and other uniformed service members from similar harm.

19 **(CAUSE OF ACTION NO. 4 – VIOLATION OF 38 U.S.C. §4318)**

20 65. Plaintiff re-alleges paragraphs 1 through 64, inclusive as though fully set
21 forth herein.

22 66. 38 U.S.C. §4318(a)(2)(A) states in pertinent part:

23 ...A person reemployed under this chapter shall be treated as not
24 having incurred a break in service with the employer or employers
25 maintaining the plan by reason of such person's period or periods of
26 service in the uniformed services.

27 67. Defendants violated 38 U.S.C. § 4318, among other ways, by denying Mr.
28 Wixom the right to make contributions to a retirement plan, by failing to give

1 timely and adequate notice to the plan administrator as required under the
2 USERRA, and by denying Mr. Wixom the opportunity to fully participate in his
3 retirement plan.

4 68. Plaintiff was injured by Defendants' actions.

5 69. Defendants' actions were a direct and proximate cause of Plaintiff's injuries
6 and damages.

7 70. Defendants' actions were intentional, willful, wanton, unfair,
8 unconscionable, and outrageous.

9 71. Defendants' actions illustrate why an injunction is necessary to protect
10 Plaintiff and other uniformed service members from similar harm.

11 **(CLAIM FOR LIQUIDATED DAMAGES – 38 U.S.C. §4323)**

12 72. Plaintiff re-alleges paragraphs 1 through 71, inclusive as though fully set
13 forth herein.

14 73. Plaintiff is entitled to liquidated damages under USERRA because the
15 Defendants knew, or showed reckless disregard for whether its conduct was
16 prohibited under USERRA.

17 74. Defendants' conduct was willful as defined by §4323(d), 20 C.F.R. §
18 1002.312(c), because Mr. Wixom gave Defendant multiple notices that its actions
19 violated USERRA and Defendant showed reckless disregard for the matter.

20 75. To the extent that Defendants allege application of any agreement that
21 constitutes any limitation on Mr. Wixom's rights under USERRA, it is illegal, null
22 and void, inapplicable and of no force or effect pursuant to 38 U.S.C. § 4302.

23 **(CAUSE OF ACTION NO. 5 – VIOLATION OF RCW 73, et seq.)**

24 76. Plaintiff re-alleges paragraphs 1 through 75, inclusive as though fully set
25 forth herein.

26 77. RCW 73.16.032(1) states in pertinent part:
27
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1 A person who is a member of, applies to be a member of, performs,
2 has performed, applies to perform, or has an obligation to perform
3 service in a uniformed service shall not be denied initial
4 employment, retention in employment, promotion, or any benefit of
5 employment by an employer on the basis of that membership,
6 application for membership, performance of service...

7 78. Defendants violated the above-referenced statute by unlawfully
8 discriminating against Mr. Wixom in employment because of Mr. Wixom's
9 membership in, performance of service for, and obligations to the U.S. Military.

10 79. Mr. Wixom has fulfilled the administrative prerequisites to bring a cause of
11 action under the above-referenced statute pursuant to RCW 73.16.061.

12 80. Plaintiff was injured by Defendants' actions.

13 81. Defendants' actions were a direct and proximate cause of Plaintiff's injuries
14 and damages.

15 82. Defendants' actions were intentional, willful, wanton, unfair,
16 unconscionable, and outrageous.

17 83. Defendants' actions illustrate why an injunction is necessary to protect
18 Plaintiff and other uniformed service members from similar harm.

19 **(CAUSE OF ACTION NO. 6 – VIOLATION OF RCW 49.60, et seq.)**

20 84. Plaintiff re-alleges paragraphs 1 through 83, inclusive as though fully set
21 forth herein.

22 85. Washington's Law Against Discrimination (WLAD) states in pertinent part
23 that it is an unfair practice for any employer to discriminate on the basis of
24 military status. RCW 49.60.180(3).

25 86. Defendants violated the statute by refusing to reemploy Mr. Wixom
26 following his military service.

27 87. Plaintiff was injured by Defendants' actions.

28 88. Defendants' actions were a direct and proximate cause of Plaintiff's injuries
and damages.

1 89. Defendants' actions were intentional, willful, wanton, unfair,
2 unconscionable, and outrageous.

3 90. Defendants' actions illustrate why an injunction is necessary to protect
4 Plaintiff and other uniformed service members from similar harm.

5 **(CAUSE OF ACTION NO. 7 – WRONGFUL DISCHARGE)**

6 91. Plaintiff re-alleges paragraphs 1 through 90, inclusive as though fully set
7 forth herein.

8 92. There exists a clear public policy against discrimination and/or retaliation
9 against on an employee based on membership or service in the uniformed
10 services.

11 93. In this case, Defendants violated that clear public policy by refusing to
12 reemploy and eventually terminating Mr. Wixom for his membership and service
13 in the uniformed services.

14 94. Plaintiff was injured by Defendants' actions.

15 95. Defendants' actions were a direct and proximate cause of Plaintiff's injuries
16 and damages.

17 96. Defendants' actions were intentional, willful, wanton, unfair,
18 unconscionable, and outrageous.

19 97. Defendants' actions illustrate why an injunction is necessary to protect
20 Plaintiff and other uniformed service members from similar harm.

21 **V. PRAYER FOR RELIEF**

22 Plaintiff respectfully prays for the following relief:

23 A. For an Injunction preventing Defendants from ever again discriminating or
24 retaliating against any employee based on that employee's membership or service
25 in the uniformed services, pursuant to 38 U.S.C. §4323(d)(1)(A) and 38 U.S.C.
26 §4323(e);

27 B. For an Order directing Defendants to reemployment Plaintiff, pursuant to
28 38 U.S.C. §4323(d)(1)(A) and 38 U.S.C. §4323(e);

1 C. For an Order directing Defendants to disclose the allegations of this
2 complaint to the state or federal contracting agency when submitting bids for any
3 state or federal contracts, in an effort to further police Defendant's discriminatory
4 practices, pursuant to 38 U.S.C. §4323(d)(1)(A) and 38 U.S.C. §4323(e);

5 D. For Compensation for all injury and damages suffered by Mr. Wixom
6 including, but not limited to, both economic and non-economic damages, in the
7 amount to be proven at trial including back pay, front pay, pre and post judgment
8 interest, lost benefits of employment, negative tax consequences of any award,
9 liquidated damages, exemplary damages, and punitive damages as provided by
10 law;

11 E. For an Award of Plaintiff's reasonable attorney fees, expert fees, and other
12 costs and disbursements, pursuant to 38 U.S.C. § 4323, and as otherwise provided
13 by law;

14 F. For leave to amend this complaint as justice requires, including seeking
15 Fed. R. Civ. P. 23 relief if discovery proves that such relief is necessary and just;
16 and

17 G. For such other and further relief as this Court deems just and equitable.

18
19 Respectfully submitted this ____ day of June, 2012.

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VI. JURY DEMAND

Pursuant to Fed. R. Civ. P. 38 or any similar rule of law, Plaintiff demands a trial by jury for all causes of action and issues for which trial by jury is available.

DATED this 21st day of June, 2012.

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