

**IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE EASTERN DISTRICT OF VIRGINIA
(ALEXANDRIA DIVISION)**

MICHAEL SILVA,

Plaintiff,

v.

NO. CV 1:12-cv-22-TSE-TRJ

STUDLEY PROFESSIONAL STAFFING,
LLC., a/k/s SPS CONSULTING, LLC., AND
TOBY STUDLEY ,

Defendants.

**PLAINTIFF MICHAEL SILVA'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT RE LIABILITY**

I. INTRODUCTION & SUMMARY OF ARGUMENT

Plaintiff Michael Silva ("Mr. Silva") worked as the "Vice President for Finance and Development" for Studley Professional Staffing, LLC and Toby Studley (collectively "SPS") beginning in June 2005. On May 13, 2006, Mr. Silva, who was also a member of the U.S. Army Reserve, was mobilized for military duty in Iraq. Mr. Silva returned from his military duty, was honorably discharged, and, in September 2007, requested that SPS re-employ him.

Although required to do so by federal law, SPS refused to re-employ Mr. Silva because a low-level U.S. Department of Homeland Security ("DHS") employee named Carol Payne threatened to terminate a services contract (hereinafter the "Contract") - - of which Mr. Silva had been working on - - between DHS and SPS should SPS re-hire Mr. Silva. Notwithstanding the facts that: (a) the Contract did not give DHS the authority to terminate the Contract under such circumstances; and, (b) Phil Davis, Ms. Payne's supervisor, supported Mr. Silva's re-employment and admonished Ms. Payne for her rogue threat, SPS took no meaningful steps to find Mr. Silva work elsewhere in the company or retrain Mr. Silva for other positions.

Mr. Silva, having no other recourse, filed a complaint with the U.S. Department of Labor (“DOL”) in October 2007 in which Mr. Silva sought reinstatement at SPS. In February 2008 SPS claims it offered Mr. Silva his pre-deployment job back but that offer was no offer at all as the offer did not specify that Ms. Silva would receive his pre-deployment job back and SPS refused to pay Mr. Silva the lost wages from the September 2007 - February 2008 timeframe. SPS admits the same.

Mr. Silva sued SPS alleging violations of the Uniformed Services Employment and Re-employment Rights Act (“USERRA”), specifically 38 U.S.C. §§4311, 4312, 4313, 4316, and 4318. Summary judgment adjudication of each of Mr. Silva’s USERRA claims as to the issue of liability is proper because:

1. SPS’s defense that it could not re-employ Mr. Silva because the government allegedly would not allow it fails as a matter of fact and as a matter of law under USERRA’s re-employment statute, 38 U.S.C. §§4312 & 4313.

2. SPS's failure to re-employ Mr. Silva was motivated, in part, by Mr. Silva's exercise of his USERRA re-employment rights and by Mr. Silva's attempt to enforce those rights through the DOL - - - a violation of USERRA's anti-discrimination statute, 38 U.S.C. §4311(c)(2).

3. SPS’s refusal to re-employ Mr. Silva violated Mr. Silva’s rights under 38 U.S.C. §§4316 & 4318 by (a) depriving Mr. Silva of the post-military service job protection and re-employment benefits enumerated in 38 U.S.C § 4316; and, (b) depriving Mr. Silva of his benefits enumerated in 38 U.S.C. § 4318 by failing to allow Mr. Silva to receive the retirement benefits Mr. Silva would have been entitled to under the law.

4. SPS’s actions constituted a willful violation of Mr. Silva’s rights under USERRA

as SPS was made aware three separate times (once orally, twice in writing) that Mr. Silva was protected under USERRA but recklessly disregarded Mr. Silva's rights by failing to re-employ Mr. Silva when all SPS had to do was pick up the telephone, call Mr. Davis, and confirm that Ms. Payne's threats were unsupported by the Contract or the DHS.

II. FACTS

A. SPS hires Mr. Silva as its Vice President for Finance and Business Development.

1. SPS hired Mr. Silva on June 7, 2005 to serve as the company's "Vice President for Finance and Business Development for Government Operations" and assigned Mr. Silva with, *inter alia*, "working at the Company and client sites" and "performing accounting and auditing tasks." (Jarrard Decl. at Ex. A. *citing* Studley Depo. Exs. 3 & 8) Mr. Silva and SPS memorialized the employment agreement on October 27, 2005. *Id.* at Ex. 8.

B. SPS and the U.S. Department of Homeland Security – U.S. Customs and Border Protection enter into a services contract.

2. On or about June 5, 2005, SPS and DHS entered into a contract (hereinafter the "Contract") in which SPS agreed to perform varied accounting services for the DHS. (Jarrard Decl. at Ex. A *citing* Studley Depo. Exs. 5 & 6).

3. The Contract gave SPS the authority to choose the personnel necessary to execute the Contract. (Jarrard Decl. at Ex. A *citing* Studley Depo. Ex. 5 ¶9.4 - SPS000570) The Contract allowed SPS to replace personnel so long as SPS notified the "Contracting Officer's Technical Representative" (COTR) the day after the replacement occurred. *Id.* SPS utilized the provisions of ¶9.4 of the Contract in November 2005 in which it, via Toby Studley – SPS's president – notified Carol Payne, the COTR, that SPS had replaced an employee charged with working the Contract. (Jarrard Decl. at Ex. A *citing* Studley Depo. Ex. 10) In addition to serving

as SPS's Vice President for Finance and Business development, Mr. Silva also served as the "Accounting Policy Expert" under the Contract. (Silva Decl. at ¶3)

C. Mr. Silva receives deployment orders to Iraq and promptly notifies SPS of the deployment.

4. In addition to serving as SPS's Vice President for Finance and Business Development, Mr. Silva was a member of the U.S. Army Reserve. *Compare* ECF 1, ¶10 with ECF 15, ¶10.

5. In February 2006 Mr. Silva received notification that he would be deployed to Iraq. (Jarrard Decl. at Ex. A *citing* Studley Depo. Ex. 11). Mr. Silva promptly notified Mr. Studley of the deployment, discussed the deployment with Mr. Studley in person, and sent a confirmatory email to Mr. Studley that memorialized the conversation, including representations from Mr. Studley that Mr. Silva would serve as SPS's president or as an officer of SPS upon return from deployment. *Id.* at Ex. A *citing* Studley Depo. Ex. 11. Mr. Studley did not object, in writing or orally, to that email or the contents thereof. (Silva Decl. at ¶5) During the above-referenced discussion Mr. Silva also discussed his re-employment rights under USERRA with Mr. Studley. (Silva Decl. at ¶5)

6. In addition to preparing to go to war, where Mr. Silva would be charged with the safety and welfare of 4,000 servicemen and women, Mr. Silva recruited Ellen Pfeiffer to work at SPS during his military-related absence as the Accounting Policy Expert. (Silva Decl. at ¶6; Jarrard Decl. at Ex. A *citing* Studley Depo. Ex. 13) Although Mr. Silva generated Ms. Pfeiffer as a possible replacement, Mr. Studley, after consulting with SPS employee Dottie Louder, made the decision to hire Ms. Pfeiffer to replace Mr. Silva as the Accounting Policy Expert. (Jarrard Decl. at Ex. A. *citing* Studley Depo. Exs. 13 & 15) On March 31, 2006, SPS's administrative staff informed Mr. Studley of the procedures SPS needed to follow in order to

replace Mr. Silva with Ms. Pfeiffer and on April 7, 2006, SPS informed the DHS of the personnel change per the Contract. *Id.* at Ex. A *citing* Studley Depo. Exs. 18 & 21.

7. On April 5, 2006, Mr. Silva sent Mr. Studley another email that confirmed another discussion Mr. Silva and Mr. Studley had regarding transitioning Ms. Pfeiffer into Mr. Silva's work role at DHS and Mr. Studley's representation that Mr. Silva would work as SPS's president upon Mr. Silva's return. (Jarrard Decl. at Ex. A *citing* Studley Depo. Ex. 20) Mr. Studley did not object, orally or in writing, to Mr. Silva's April 5, 2006, email or the contents thereof. (Silva Decl. at ¶7)

D. Mr. Silva twice informs SPS of his rights under USERRA, requests re-employment upon his honorable discharge from military service, but is denied re-employment.

8. Mr. Silva entered into military duty on May 13, 2006 and deployed to Iraq on August 14, 2006. (Silva Decl. at Ex. A)

9. On or about July 7, 2007, shortly before departing Iraq, Mr. Silva sent SPS a letter that, *inter alia*, informed SPS of Mr. Silva's re-employment rights under USERRA. (Jarrard Decl. at Ex. A *citing* Studley Depo. Ex. 24)

10. Mr. Silva departed Iraq on August 2, 2007, and, on August 13, 2007, August 23, 2007, and September 15, 2007, requested to meet with Mr. Studley in order to discuss Mr. Silva's re-employment. (Jarrard Decl. at Ex. A *citing* Studley Depo. Exs. 25, 26, & 27). Mr. Silva's military service lasted less than five years and Mr. Silva was honorably discharged from said military service. (Silva Decl. at Ex. A)

11. On September 19, 2007, Mr. Studley finally met Mr. Silva in person whereupon Mr. Silva requested re-employment. (Silva Decl. at 11; Jarrard Decl. at Ex. A *citing* Studley Depo. Ex. 29) During that meeting Mr. Studley refused to re-hire Mr. Silva. (Silva Decl. at ¶11)

Mr. Studley called Mr. Silva “stupid,” raised his voice at Mr. Silva, and told Mr. Silva that he was a dishonorable person for forcing SPS to take him back. (Silva Decl. at ¶11)

12. On September 21, 2007, Mr. Silva again gave SPS written notice of his intention to return to work. (Jarrard Decl. at Ex. A *citing* Studley Depo. Ex. 29) On September 27, 2007, SPS, through counsel, responded to Mr. Silva’s September 21, 2007, letter, and stated that it refused to re-employ Mr. Silva, and based its refusal on the inaccurate statements that “the government [was] not willing to take [Mr. Silva] back” and that re-employing Mr. Silva would be difficult for financial reasons. (Jarrard Decl. at Ex. A *citing* Studley Depo. Ex. 31)

13. SPS’s representation that the “government would not take Mr. Silva back” was based on a communication from Carol Payne in which Ms. Payne inaccurately represented that DHS would cancel the Contract should Mr. Silva replace Ms. Pfeiffer. (Jarrard Decl. at Ex. A *citing* Studley Depo. Ex. 33)

14. Ms. Payne’s representation was wrong. When Phillip Davis, Ms. Payne’s then-supervisor, was informed of Ms. Payne’s representation he stated, *inter alia*, “we can not [sic] direct our contractors when it comes to personnel”, that replacing Ms. Pfeiffer with Mr. Silva “was Toby’s call, not ours,” and “it is the contractors [sic] job to fill our positions with qualified personnel.” (Davis Decl. at Ex. A)

15. SPS’s representation that it was in financial peril was incorrect as well as Mr. Studley, as SPS’s sole officer, testified that he made \$225,000.00 per year in 2006, made \$240,000.00 per year in 2007, made \$297,951.00 per year in 2008, and that SPS spent \$16,010.42 on country club dues in 2007. (Jarrard Decl. at Ex A *citing* Studley Depo. at pgs. 198:17-20; 199:10-21; 210:10-15) At deposition Mr. Studley admitted that it was not impossible to re-employ Mr. Silva and that the real reason SPS terminated Mr. Silva’s

employment was because Mr. Silva's "job got filled by somebody else [Ms. Pfeiffer]." (Jarrard Decl. at Ex. A *citing* Studley Depo. at 222:19-21; 229:11-18) In fact, Mr. Studley admitted the same to the DOL when he stated that he did not hire Mr. Silva back because Mr. Studley "assumed that if the position was filled then [SPS] didn't have an obligation" to rehire. *Id.* at Ex. A *citing* Studley Depo. Ex. 37 SPS000595. Mr. Studley admits that SPS did not offer Mr. Silva any position in calendar year 2007. *Id.* Ex. A *citing* Studley Depo. at 215:9-11. Mr. Studley further admits that SPS made no efforts to retrain Mr. Silva in another position at SPS. *Id.* at 132:1-2.

E. Mr. Silva files a complaint with the U.S. Department of Labor but SPS still refuses to re-employ Mr. Silva.

16. Mr. Silva, having no other recourse, complained to the U.S. Department of Labor about SPS's failure to re-employ him. (Silva Decl. at ¶13)

17. On February 14, 2008, and months after Mr. Silva engaged the U.S. Department of Labor for assistance, SPS reversed its September 27, 2007, position and offered Mr. Silva a position commencing on March 3, 2008. (Jarrard Decl. at Ex. A *citing* Studley Depo. Exs. 43 & 44)

18. The position that SPS "offered", however, was not the Vice President for Finance and Development – the position that SPS employed Mr. Silva under. And, as admitted by Mr. Studley, the offer was not a position of employment at Mr. Silva's "full wage and salary" and the offer did not reimburse Mr. Silva for Mr. Silva's lost wages and benefits from September 2007 through February 2008. (Jarrard Decl. at Ex. A *citing* Studley Depo. at 194:3-9) In fact, SPS refused to reimburse Mr. Silva for his lost wages and benefits from September 2007 through February 2008 even though DHS offered to "pay up to 50% of the lost wages and benefits." (Jarrard Decl. at Ex. A *citing* Studley Depo. Exs. 38 & 50 and pgs 186, 187, 218, 219;

Silva Decl. at ¶15) In fact, it was SPS who rejected the proposal that would have made Mr. Silva whole. *Id.*

III. ARGUMENT

A. Summary Judgment Standard.

Summary judgment should be granted when "the pleadings . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Disputes regarding the facts that are outcome determinative preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

There are no triable issues of fact in dispute. SPS failed to properly re-employ Mr. Silva, discriminated against Mr. Silva in part because of his military service, and failed to afford Mr. Silva his rights under 38 U.S.C. §§ 4316 & 4318.

B. USERRA guaranteed Mr. Silva post military service re-employment and protected him from discrimination.

The USERRA contains varied provisions. *See* 38 U.S.C. § 4301 et. seq. At issue in this motion are USERRA's provisions relating to re-employment, 38 U.S.C. §§ 4312, 4313, 4316, & 4318, and USERRA's provisions relating to protection against discrimination. 38 U.S.C. § 4311. This brief first addresses USERRA's re-employment provisions under 38 U.S.C. §§ 4312 & 4313. The brief then analyzes USERRA's 38 U.S.C. § 4311 anti-discrimination provisions, and concludes with an evaluation of USERRA's tertiary re-employment provisions and liquidated damages provisions under 38 U.S.C. §§ 4316, 4318, and 4323.

C. SPS violated Mr. Silva's USERRA re-employment rights by failing to give him his pre-military service job back.

1. *Mr. Silva has standing to assert his re-employment rights under 38 U.S.C. §4312.*

In order to enjoy USERRA's re-employment protections, the plaintiff must: (a) be a member of the Armed Forces of the United States; (b) give notice to his employer of the plaintiff's military obligations; (c) receive an honorable discharge from military service; (d) give timely notification, to the employer, of plaintiff's intent to return to work; and, (e) serve less than five years with the military (absent varied exceptions). 38 U.S.C. § 4312(a).

Once (a) through (e) are met USERRA's re-employment protections apply. *Id.*

Mr. Silva has standing under USERRA. Mr. Silva provided SPS with notice of Mr. Silva's deployment to Iraq. (SOF¹ ¶5) Mr. Silva provided SPS notice of Mr. Silva's intent to be re-employed in July 2007, August 2007 and September 2007. (SOF ¶¶9-12) Mr. Silva's service was less than five years. (SOF ¶10) Mr. Silva received an honorable discharge following the completion of his military service. *Id.*

2. *SPS failed to re-employ Mr. Silva as required by USERRA.*

An employee, who is a member of the Armed Force and is deployed for greater than ninety days, must be re-employed by the employer either: (1) in the job the employee had before he or she deployed; or, (2) in a job of like seniority, status, and pay to that of the pre-deployment job following reasonable efforts by the employer to qualify the employee for that job. If options (1) and (2) above fail then the employer must re-employ the employee in "any other position" that nearly approximates the employee's pre-deployment job with full seniority. 38 U.S.C. §§ 4313(a)(2)(A)-(B) & (a)(4); 20 CFR § 1002.197. Put differently, the employer must re-employ the employee if the employee is qualified for that position or can be qualified with reasonable efforts and the re-employment must be prompt. *Id.*; 38 U.S.C. § 4313(a).

SPS failed to re-employ Mr. Silva in the Vice President Finance and Business Development position Mr. Silva occupied prior to his military service. (SOF ¶¶11-12) SPS then

¹ The acronym "SOF" refers to the Statement of Facts paragraph listed in the "Facts" paragraph of this brief.

failed to re-employ Mr. Silva in a position of like seniority, status, and pay - - - in fact, it did not consider Mr. Silva for an alternate positions nor accept Mr. Silva's offer to serve in a lower position. (SOF ¶¶11-14) SPS failed to make any efforts to train Mr. Silva for any position. (SOF ¶15)

Accordingly, Mr. Silva's re-employment rights under USERRA were violated.

3. *SPS failed to re-employ Mr. Silva in an escalator position.*

The escalator position is the job the employee would occupy with reasonable certainty upon return from the employee's military-related absence. 20 CFR § 1002.191; *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, 284-285 (1946) (a re-employed veteran "steps back on at the precise point he would have occupied had he kept his position continuously during the war.")² If an employee's re-employment position is occupied by another person the employer must place the employee into that position even if doing so would result in termination of the other person. 20 CFR § 1002.139(a). Indeed, "employees must tailor their work forces to accommodate returning veteran's statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for non-veteran employees, those hardships fall within the contemplation of the Act, which is to be construed liberally to benefit those 'who left private life to serve their country.'" *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 703-704 (8th Cir. 1983) (fact that no position was vacant in which to re-employ veteran is no defense); *Murphree v. Communication Technologies, Inc.*, 460 F.Supp.2d 702, 710 (E.D. La. 2006)("if mere replacement of the employee would exempt an employer from [USERRA] then the Act would

² As noted by the 4th Circuit Court of Appeals, "we can and should use relevant pre-USERRA case law as a guide toward understanding USERRA...[i]n enacting USERRA, Congress . . . emphasized that Federal laws protecting veterans' employment and reemployment rights for the past fifty years had been successful and that the large body of case law that had developed under those statutes remained in full force and effect, to the extent it is consistent with USERRA." 20 C.F.R. § 1002.2 (2006). *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 303 (4th Cir. 2006).

be meaningless"). In *Murphree*, the Court found that the reservist-employee's position still existed after an intra-company reorganization, that the position was held by a replacement, and that such facts did not constitute a defense for the employer under USERRA. *Id.* at 710-711.

Mr. Silva's actual "escalator position" was the President of SPS as Mr. Silva would have reasonably occupied that position but for his military deployment - - - after all, Mr. Studley promised Mr. Silva that job in February 2006 and April 2006. (SOF ¶¶5-7; Silva Decl. ¶5-¶7) SPS was required to give Mr. Silva the President position upon re-deployment but did not do so. Assuming, *arguendo*, that Mr. Studley had no intention of making Mr. Silva the president, SPS still had an obligation to return Mr. Silva to his Vice President for Finance and Business Development job. 20 CFR § 1002.191; *Fishgold*, 328 U.S. at 284-285. SPS failed to do that. (SOF ¶¶11-12). Assuming, *arguendo*, that Mr. Silva's pre-service position was solely limited to the "Accounting Policy Expert" position in the Contract, then SPS was required to replace Ms. Pfeiffer with Mr. Silva. *See supra*. SPS failed to do that as well.

4. *The SPS failed to re-employ Mr. Silva in a position of like seniority, status, and pay.*

An employer, in lieu of the escalator position described above, must re-employ an employee into a position of like seniority, status, and pay equivalent to the escalator position. 20 CFR § 1002.193(a); *Fryer v. A.S.A.P. Fire & Safety Corp. Inc.*, 680 F.Supp.2d 317, 322, 326 (D. Mass. 2010).

Defendants failed to place Mr. Silva in a job of like seniority, status, or pay as it is clear that SPS did not re-employ Mr. Silva at all. (SOF ¶¶11-12)

5. *SPS made no attempt to retrain Mr. Silva for any position.*

An employee's lack of qualifications, whether due to deficient skills or a service related disability, does not result in the employee not being entitled to that position: the employer must

make reasonable efforts to help the employee become qualified for that job. Reasonable qualification efforts include more than helping the employee regain pre-service skills. *See S. Rep. No. 103-158 at 54* (1993) available at 1993 WL 43256*54 ("at a minimum, the employer must provide refresher training, and any training that an employee would have received if he or she had remained continuously employed or to make other reasonable efforts to update the employee's skills."); 38 U.S.C. §§ 4313(a)(1)(B)-(2)(B) & (3)(A)-(4).

If reasonable efforts fail to qualify the employee for an escalator position then USERRA requires the employee to be re-employed in a second position where, again, the employer must make reasonable efforts; and, should those efforts be unsuccessful in qualifying the employee for the second position, then the employer must make such efforts to re-employ the employee in a third position. 38 U.S.C. § 4313(a)(1)(B); (2)(B); 38 U.S.C. § 4313(a)(4).

Defendants made no efforts whatsoever to qualify Mr. Silva for any other position within SPS. (SOF ¶15)

6. *SPS has no defense to Mr. Silva's USERRA re-employment claim.*

An employer has three affirmative defenses to a USERRA re-employment claim. 38 U.S.C. §4312(d)(1). Those affirmative defenses are: (1) the employer's circumstances changed making re-employment impossible or unreasonable; (2) re-employing a service member would impose "an undue hardship on the employer" due to a service connected disability; or, (3) the employee had no reasonable expectation of re-employment due to the seasonal or temporary nature of the job. 38 U.S.C. §4312(d)(1)(A)-(C).

(A) SPS has no changed circumstance defense under 38 U.S.C. §4312(d)(1)(A).

The fact that someone else was hired to fill the employee's job does not qualify as a "changed circumstance" sufficient to cut-off an employee's re-employment rights. 20 C.F.R.

§1002.139(a); *Nichols v. Dept. of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993) (returning veteran had to be restored to former position because former position still existed); *Koll v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992); *Goggin*, 72 F.2d at 704; *Fitz v. Board of Education of Port Huron Area Schools*, 662 F.Supp. 1011, 1013-1015 (E.D. Mich. 1985) (the fact that defendant employer had to lay off 75 tenured teachers and would violate collective bargaining agreement in reemploying reservist was no defense to service member's re-employment claim and finding plaintiff entitled to judgment as a matter of law on re-employment claim) *aff'd*, 802 F.2d 457 (6th Cir. 1986); *Davis v. Halifax County School Systems*, 508 F.Supp. 966, 968-969 (E.D. N.C. 1981) (granting summary judgment for plaintiff on re-employment claim).

SPS's professed reasons for refusing to re-employ Mr. Silva differ but none are defensible. Mr. Studley testified that he believed SPS did not have to re-employ Mr. Silva because Ms. Pfeiffer occupied the position. (SOF ¶15) That is not a defense. *See supra*. SPS also claimed that DHS did not want Mr. Silva back and threatened to terminate the Contract if Mr. Silva was re-employed. (SOF ¶¶12-14) Notwithstanding that refusing to re-employ someone because someone from another corporate entity does not agree to their re-employment is legally indefensible, SPS's rationale fails for two factual reasons. First, the Contract did not allow DHS to terminate the Contract as it threatened. (SOF ¶3) If SPS wanted to replace an employee all it had to do was give DHS notice. *Id.* While the contract allowed DHS to object to the personnel SPS placed in the Accounting Policy Expert job, such an objection was based on employee qualifications and there is no dispute that Mr. Silva was qualified to do the Accounting Policy Expert work because Mr. Silva did that work under the Contract for the year prior to his mobilization. (SOF ¶3) Second, Carol Payne's threat was not sanctioned by her supervisor, Phillip Davis. (SOF ¶14) Upon discovering Ms. Payne's unauthorized threat, Mr. Davis

admonished her and informed her that it was SPS's job to fill the Contract's positions. *Id.* Indeed, Mr. Studley admits that it was not impossible to re-employ Mr. Silva. (SOF ¶15) As such, SPS's financial hardship defense fails as Mr. Studley, as SPS's sole officer, testified that his work-related SPS income increased during the 2006 to 2008 timeframe. *Id.*

But SPS apparently did not read the contract nor pick up the phone and query Ms. Payne's supervisor about the threat. SPS took what it thought was the path of least resistance. And that path is indefensible under the law.

(B) SPS has no defense under 38 U.S.C. §4312(d)(1)(B)&(C).

Since Mr. Silva is not disabled there is no need to evaluate the "undue hardship" defense under the 38 U.S.C. §4313(a)(3) & (b)(2)(B) prongs of 38 U.S.C. §4312(d)(1)(B). Since Mr. Studley admitted that SPS took no steps to retrain Mr. Silva there is no need to evaluate the 38 U.S.C. §4313(a)(4) prong of 38 U.S.C. §4312(d)(1)(B).

As to the "brief, nonrecurrent employment" 38 U.S.C. §4312(d)(1)(C) defense, such a defense focuses on whether the employee had a pre-deployment expectation that his employment was of a brief duration. *See U.S. v. Nevada*, 817 F.Supp.2d 1230, 1245-1246 (D. Nev. 2011). There is no such evidence to support this defense and the October 2005 employment agreement that SPS and Mr. Silva entered into proves otherwise. (SOF ¶1)

7. *Mr. Silva's refusal to accept an inferior "job offer" is no defense.*

"[A] veteran or reservist does not waive his or her rights under [USERRA] by refusing an offer of re-employment which extends anything less than full statutory guarantees, including proper seniority, position, pay and lost wages and benefits." H.R. Rep. No. 103-65, pt. 1, at 39 (1993) *as reprinted in* 1994 U.S.C.C.A.N. 2449, 2472 (*citing Hanna v. American Motors Corp.*, 724 F.2d 1300, 1312-1313 (7th Cir. 1984); *Stevens v. Tennessee Valley Authority*, 699 F.2d 314,

316 (6th Cir. 1983)). Such pre-USERRA case law has been recognized as relevant by the Fourth Circuit. *See supra* pg. 10 n.2.

Any claim that Mr. Silva's refusal to take SPS's supposed February 2008 offer of re-employment constitutes a waiver of Mr. Silva's rights under USERRA fails. SPS refused to pay Mr. Silva back pay for SPS's failure to re-employ Mr. Silva from September 2007 through February 2008. (SOF ¶15) Furthermore, SPS's February 14, 2008 re-employment letter did not set out what Mr. Silva's salary or benefits would be. (SOF ¶18) Thus, Mr. Silva refusal to accept the inferior position is not a waiver of his USERRA rights, especially given SPS's rejection of DHS's offer to make Mr. Silva whole. *Id.*

D. SPS discriminated against Mr. Silva under 38 U.S.C. § 4311.

The USERRA provides, in part, that:

(a) A person who is a member of . . . a uniformed service shall not be denied . . . retention in employment, or 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.

(b) An employer may not discriminate in employment...or take any adverse action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter...or, (4) has exercised a right provided for in this chapter.

(c) An employer shall be considered to have engaged in actions prohibited --

(2) Under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter... or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in absence of such enforcement action....or exercise of a right. 38 U.S.C. § 4311(a) - (c) (emphasis added).

1. *Mr. Silva has standing under his 38 U.S.C. § 4311(c) claim.*

In order to demonstrate discrimination and violation of 38 U.S.C. § 4311(c), the plaintiff must show, by a preponderance of the evidence: (1) that the plaintiff was protected under § 4311 because of his membership in the uniformed services; (2) that the employer took an adverse action against the plaintiff; and, (3) the plaintiff's exercise of a right under USERRA or action to enforce a right under USERRA was a motivating factor for the employer's adverse action. 38 U.S.C. § 4311(c)(2). A 38 U.S.C. § 4311(c) claim is different, in the elements, defenses, and standing criteria, than the 38 U.S.C. §§ 4312, 4313 claims analyzed above.

Mr. Silva meets points (1) and (2) - he was in the military, exercised his re-employment rights under USERRA, and sought to have the DOL enforce those rights. (SOF ¶13)

2. *Mr. Silva's military service was a motivating factor in SPS's decision to not re-employ him.*

As to point (3), the USERRA does not define "motivating factor." Courts hold the term "means that if the employer was asked at the moment of the decision what its reasons were and if it gave a truthful response, one of those reasons would be the employee's military position or related obligations." *Robinson v. Morris Moore Chevrolet-Buick, Inc.*, 974 F.Supp. 571, 576 (E.D. Tex. 1997). *Robinson* also held that the employee's "military position and related obligations were a motivating factor in [the employer's] decision if it relied upon, took into account, considered, or conditioned its decision on [the employee's] military-related absence." *Id.* at 576. Other courts have adopted this definition. *See e.g., Petty v. Metropolitan Government of Nashville-Davidson County*, 538 F.3d 431, 446 (6th Cir. 2008); *Grosjean v. First Energy*, 481 F.Supp. 2d, 878, 883 (N.D. Ohio 2007) (plaintiff not required to show military service was sole factor); *Brandsasse v. City of Suffolk, Va.*, 72 F.Supp. 2d 608, 617 (E.D. Va. 1999). Discrimination under 38 U.S.C. § 4311(c) can be established through disparate treatment, an employer's hostile remarks to its employee about military service, an employer's failure to follow

its own policies, and by inconsistencies in the employer's proffered reason for its adverse actions. *Sheehan v. Dept. of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001)(noting that "[d]iscriminatory motivation under USERRA may be inferred from...disparate treatment of certain employees compared to other employees..."); *Hance v. Norfolk Southern Ry. Co.*, 571 F.3d 511, 518 (6th Cir. 2009).

SPS refused to re-employ Mr. Silva in September 2007 upon Mr. Silva's return from Iraq. (SOF ¶12) SPS's refusal came after Mr. Silva, on July 7, 2007, September 19, 2007, and September 21, 2007 (twice in writing, once in person) exercised his re-employment rights under USERRA by demanding his job back and continued when Mr. Silva complained to the DOL. (SOF ¶¶9, 11-13)

Mr. Silva's exercise of his USERRA rights and complaints to the DOL were a motivating factor in SPS's decision to not re-employ Mr. Silva because of Mr. Studley's hostile statements toward Mr. Silva. *Sheehan*, 240 F.3d at 1014 – 1015. On September 19, 2007, Mr. Silva met with Mr. Studley to request his job; in response Mr. Studley accused Mr. Silva of being dishonorable for wanting his job back i.e., for exercising his USERRA re-employment rights. (SOF ¶11)

Mr. Silva's exercise of his USERRA rights and complaints to the DOL were a motivating factor in SPS's decision not to re-employ Mr. Silva because of SPS's varied inconsistencies in explaining why SPS could not re-employ Mr. Silva in 2007. *Sheehan*, 240 F.3d at 1014 – 1015. SPS inaccurately claimed that DHS would not authorize the re-hiring of Mr. Silva when the Contract did not give the DHS the authority the DHS claimed it had and DHS's management did not sanction the threat made by Ms. Payne. (SOF ¶¶13-14) SPS's inconsistencies are further evidenced by its claim that it was undergoing financial hardship even though Mr. Studley, the

entity's sole officer and president, saw his salary increase from \$225,000.00 per year in 2006 to \$240,000.00 per year in 2007 to \$297,951.00 per year in 2008 and SPS paid over \$16,000.00 in 2007 for country club dues. (SOF ¶15)

Mr. Silva's exercise of his USERRA rights and complaints to the DOL were a motivating factor in SPS's decision not to re-employ Mr. Silva because of SPS's failure to follow the procedures set out in the Contract. *Sheehan*, 240 F.3d at 1014 – 1015. The Contract provided a mechanism, in ¶9.4, by which SPS could inform the DHS that it was replacing personnel. (SOF ¶3) SPS utilized ¶9.4 of the Contract in November 2005, when it informed Carol Payne that it had replaced an employee working on the Contract, and in April 2006 when it informed DHS that Ms. Pfeiffer was replacing Mr. Silva. (SOF ¶¶3, 6) But SPS never used ¶9.4 when Mr. Silva requested re-employment. As such, SPS failed to follow the procedures set out in the contract vis-à-vis Mr. Silva but did so in favor of others.

Mr. Silva sought information as to the circumstances surrounding the termination of other SPS employees in order to develop the "disparate treatment" evidence that can prove the "motivating factor" prong. *Sheehan*, 240 F.3d at 1014 – 1015. SPS has refused to answer that discovery request and Mr. Silva has now moved to compel a response. (ECF 21) The motion is set for hearing on May 15, 2012. (ECF 32)

Nonetheless, the burden now shifts to SPS to prove that it would have taken the same actions vis-à-vis denying Mr. Silva re-employment had Mr. Silva not sought to enforce his rights under USERRA or exercised his rights under USERRA. 38 U.S.C. § 4311(c)(2). Since SPS cannot meet this burden summary judgment adjudication of Mr. Silva's USERRA discrimination claim is proper.

E. SPS violated Mr. Silva's 38 U.S.C. § 4316 and 38 U.S.C. § 4318 rights.

An employee who is re-employed under USERRA obtains certain benefits. *See* 38 U.S.C. § 4316(a)-(c). One such benefit is that an employee who (like Mr. Silva) serves on military duty for more than 180 days "shall not be discharged from such employment except for cause - within one year after the date of such re-employment." 38 U.S.C. § 4316(c)(2). SPS's failure to properly re-employ Mr. Silva deprived Mr. Silva of that USERRA right.

An employee who is re-employed under USERRA is entitled to his or her employer's share of any employer-funded pension/retirement benefit. 38 U.S.C. § 4318(a)(2)(A)-(B) & (b). SPS's failure to re-employ Mr. Silva deprived Mr. Silva of that USERRA right.

F. SPS's violation of Mr. Silva's Rights under USERRA was willful.

Mr. Silva is entitled to an award of liquidated damages if SPS's failure to comply with USERRA was willful. 38 U.S.C. § 4323(d). A willful violation of USERRA occurs if the defendant knew of its obligations under USERRA but did not comply with the statute. *Serriccho v. Wachovia Secs., LLC*, 606 F.Supp.2d 256, 265-266 (D. Conn. 2009). A willful violation means that SPS either knew that its actions towards Mr. Silva violated the law, or acted in reckless disregard of the provisions of the law. 20 C.F.R. §1002.312(c).

Here, SPS knew that Mr. Silva was protected under USERRA as Mr. Silva informed SPS of his rights under the statute in February 2006, July 2007, and September 2007. (SOF ¶¶ 5, 9, 12) On September 27, 2007, SPS rejected Mr. Silva's re-employment request and cited 38 U.S.C § 4312's impossibility defense as justification. But SPS showed reckless disregard for Mr. Silva's USERRA rights - - - it knew that it could replace Ms. Pfeiffer with Mr. Silva (it presumably read the law and informed itself of 20 C.F.R. 1002.139(a)) but chose not to follow the law. Why? Because Carol Payne, a low level bureaucrat, issued an empty threat that was not supported by

the underlying Contract or DHS's management. (SOF ¶¶13-15) Had SPS read the Contract and called Mr. Davis so as to inform DHS of what the law required this lawsuit would have been avoided. Mr. Silva was left jobless and forced to initiate litigation in order to secure the protections he should have been given. Now Mr. Silva is entitled to a doubling of his damages as a result of SPS's willful violation of his reemployment rights.

IV. CONCLUSION

Mr. Silva's motion for summary judgment should be granted as to the issue of liability.

Respectfully submitted this 10th day of May, 2012.

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CERTIFICATE OF SERVICE

I certify that on May 10, 2012, I electronically filed the foregoing Brief in Support of Motion for Summary Judgment with the Clerk of Court using the CM/ECF system, and I will then have a copy of the filed document mailed first-class, postage pre-paid to the following:

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