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**IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA**

ANTHONY TOTARO,

Plaintiff,

v.

LAWRENCE LIVERMORE NATIONAL
SECURITY, LLC,

Defendant.

NO. C 11-5446 PJH

**PLAINTIFF'S MOTION TO AMEND
COMPLAINT, NOTICE OF HEARING
AND MEMORANDUM AND
AUTHORITIES**

DATE: January 23, 2013

TIME: 9:00 am

Without oral argument

I. NOTICE OF MOTION HEARING DATE AND TIME

PLEASE TAKE NOTICE that a hearing on Plaintiff's Motion to Amend the Complaint will take place at 9:00 am on January 2, 2013, or as the court directs. Plaintiff respectfully

1 requests that the Court decide Plaintiff's motion without oral argument.

2 **II. CONCISE STATEMENT OF RELIEF**

3 Plaintiff requests that the Court grant him leave to amend the complaint to include Nils
4 Carlson and Gabriel Odell as Defendants.

5 **III. POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION**

6 **A. STATEMENT OF THE ISSUES TO BE DECIDED.**

7 Whether grounds exist to allow Plaintiff to amend his Complaint to include Nils Carlson
8 and Gabriel Odell as Defendants.

9 **B. STATEMENT OF FACTS.**

10 Plaintiff alleges that Defendant Lawrence Livermore National Security ("LLNS" or the
11 "Lab"), violated his rights under the Uniformed Services Reemployment Rights Act
12 ("USERRA"), *inter alia*, by not properly re-employing him. (Dkt. 1, Complaint) LLNS denies
13 this and claims that Mr. Totaro was properly reemployed. (Dkt. 11, Answer)

14 Mr. Totaro alleges that returned from military service in early June 2010, requested
15 reemployment and was partly, but not properly, reemployed by the Lab. (Dkt. 1, ¶¶22-26) Mr.
16 Totaro alleges that, upon returning to work, he met with his supervisor, Nils Carlson. (Proposed
17 Amd. Compl. at ¶¶26, 28) Mr. Totaro asked that his reemployment rights under USERRA be
18 considered in determination of his position, status and pay. *See id.* Mr. Totaro alleges that was
19 not properly reemployed by the Lab in accordance with the requirements of USERRA even
20 after informing, *inter alia*, Nils Carlson of his USERRA rights. *See id* & Jarrard Decl. ¶¶3-7.

21 Mr. Totaro filed his complaint on October 31, 2011. (Dkt. 1) Mr. Totaro alleged that
22 Nils Carlson, and others, acted as the Lab's agents and may be named as Defendants "should
23 discovery reveal that their acts and omissions caused Mr. Totaro harm." (Dkt. 1 at ¶ 5).
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1 Discovery commenced which, in turn, revealed that Nils Carlson was directly involved
2 in the reemployment decisions that harmed Mr. Totaro. (Jarrard Decl. at ¶¶ 3-7 *citing*
3 LLNS002772 and LLNS001307) In addition, defendants' privilege log reveals extensive email
4 activity between Nils Carlson and Gabriel Odell regarding Mr. Totaro. (Jarrard Decl. at ¶ 7)
5 These records also show that "lab legal" [read: Gabriel Odell] was a significant participant in
6 the decisions. (Jarrard Decl. at ¶ 8 *citing* LLNS001160).

8 **C. ARGUMENT AND AUTHORITIES RE MOTION TO AMEND A COMPLAINT.**

9 "A party may amend its pleading only with the opposing party's written consent or the
10 Court's leave. The Court should freely give leave when justice so requires." Fed. Rule Civ. P.
11 15(a)(2). The requirement that leave be freely given is "[a] mandate . . . to be heeded." *Foman*
12 *v. Davis*, 371 U.S. 178, 182 (1962). As such, the Ninth Circuit Court of Appeals recognizes a
13 "strong public policy permitting [leave for] amendment [of complaints]." *Outdoor Systems, Inc.*
14 *v. City of Mesa*, 997 F.2d 604, 614 (9th Cir. 1993); *Scott v. Eversole Mortuary*, 522 F.2d 1110,
15 1116 (9th Cir. 1975). Leave to amend is normally granted unless prejudice is found. *Yellow*
16 *Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union*, 639, 883 F.2d 132, 145 (D.C.
17 Cir. 1989).

18 In this matter, the last day to amend pleadings is November 16, 2012. (Dkt. No. 31).
19 Discovery cut off is ninety days away, February 15, 2013, and trial is not until September 9,
20 2012. *Id.* There is no prejudice to any party by allowing the amendment of the complaint.

21 **D. PLAINTIFF'S MOTION TO AMEND SHOULD BE GRANTED TO INCLUDE NILS**
22 **CARLSON AND GABRIEL ODELL AS DEFENDANTS.**

23 Courts consistently hold that USERRA imposes joint and several liability upon
24 employers as both individuals and entities. *Novak v. Mackintosh*, 919 F. Supp. 870, 878
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1 (D.S.D. 1996). 38 U.S.C. § 4303(4)(A)(i) (2010). USERRA defines an "employer" broadly.

2 *Id.*

3 [T]he term "employer" means any person, institution, organization,
4 or other entity that pays salary or wages for work performed **or**
5 **that has control over employment opportunities**, including--
6 (i) a **person**, institution, organization, or other entity to whom the
employer has delegated the performance of employment-related
responsibilities; [...]

7 38 U.S.C. 4303(4)(A)(i)(2010)(emphasis added).

8 To that end, individual supervisors and other "persons" are properly named defendants
9 in USERRA actions. *Brandsasse v. City of Suffolk, Va.*, 72 F. Supp. 2d 608, 618 (E.D. Va.
10 1999)(personnel director proper defendant in USERRA suit for failure to promote plaintiff).
11 *Carter v. Siemens Bus. Servs., LLC*, 2010 U.S. Dist. LEXIS 92354 (N.D. Ill. Sept. 2,
12 2010)(human resources consultant who recommended employment related-decisions was a
13 proper defendant in USERRA suit); *Baldwin v. City of Greensboro*, 2010 U.S. Dist. LEXIS
14 82278 (M.D.N.C. Aug. 12, 2010)(denying motion to dismiss individual defendants who had
15 direct influence on employment-related decisions).
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18 In this case, LLNS employs Mr. Totaro. LLNS pays salaries or wages for work
19 performed and controls employment opportunities through its agents.¹ Defendants' discovery
20 disclosures reveal that at the time Mr. Totaro sought to enforce his USERRA reemployment
21 rights, Nils Carlson (Mr. Totaro's supervisor), and Gaby Odell (a human resources attorney)
22 were in direct communication and either refused to recognize those rights or incorrectly applied
23 them. Accordingly both the individual supervisor (Carlson), as well the human resources agent
24 (Odell) who made recommendations that denied Mr. Totaro proper reemployment under the
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28 ¹ LLNS admits in its Answer that Mr. Totaro is an employee, it is licensed to conduct business
within the State of California, and LLNS is a private employer operating within the State of
California. *Compare* Dkt. No 1. at ¶ 2-4 and Dkt. No. 11 at ¶ 2-4.

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2012, I caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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And I hereby certify that I have caused to be transmitted via email the document at the email address listed below to the following non-CM/ECF participant: none

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