IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-CV-01826-MEH

DEREK M. RICHTER,

Plaintiff,

v.

CITY OF COMMERCE CITY, COLORADO,
TROY SMITH, in his individual capacity,
DAVID CUBBAGE, in his individual capacity; and
KAREN STEVENS, in her individual capacity,

Defendants.

MOTION FOR DECLARATORY JUDGMENT AND PARTIAL SUMMARY JUDGMENT RE LIABILITY

I. INTRODUCTION & SUMMARY OF ARGUMENT

The Uniformed Services Employment and Re-employment Rights Act (USERRA) advances our Country's policy that a veteran returning to the work force should be treated as if he or she never left. To that end, USERRA's implementing regulations state that an employer should allow a returning veteran the opportunity to make up a missed promotional examination upon his or her return to the workplace.

In this case Mr. Richter, a Commerce City Patrol Officer, missed promotional examinations in 2012 and 2013 because he was on military orders when those promotional opportunities opened and the resulting examinations took place. Mr. Richter asked Defendant Commerce City to allow Mr. Richter the opportunity to compete for those missed promotional examinations. Commerce City refused. To that end, Mr. Richter seeks an order declaring that Commerce City's refusal to allow him the

opportunity to compete for the missed promotional examinations violates USERRA and an order requiring Commerce City give him the opportunity to make up the missed promotional examinations upon his return to work.

The USERRA also bars an employer from retaliating against an employee who exercises a USERRA right. One such USERRA right is the right for a service-member employee to give his or her employer simple notice of his or her continued military service obligation.

In this case Mr. Richter gave Commerce City written notice of his continued military service obligation. Commerce City retaliated against Mr. Richter by placing Mr. Richter on a "military hold" status - - - a status that Commerce City created *only* for Mr. Richter and a status that has the singular effect of denying Mr. Richter thousands of dollars' worth of state and city-conferred leave benefits. The City admits that the reason it placed Mr. Richter on "military hold" status was because Mr. Richter's notice of military service was not to its liking insofar as Mr. Richter did not provide copies of his military orders with that notification. Since that undisputed fact pattern constitutes protected activity (providing simple notice, *sans* orders, of a military absence as allowed under USERRA), an adverse employment action (loss of benefits due to placement on "military hold" status), and a causal connection (the City admitting it placed Richter on "military hold" status because Richter did not provide notice to the City's liking) summary judgment adjudication of this retaliation claim is appropriate.

Mr. Richter also seeks an order declaring that the City's "military hold" status violates USERRA as the "military hold" status does nothing to protect the employment

benefits of deployed military reservists and everything to deprive deployed reservists of their benefits.

II. UNDISPUTED FACTS

A. Facts relating to Mr. Richter's USERRA re-employment claim.

1. Commerce City employs Derek Richter as a Police Officer. (Richter Decl. ¶2)

2. Derek Richter is a member of the Colorado Army National Guard and is currently on active duty with the Colorado Army National Guard. (Richter Decl. ¶3)

3. The Colorado Army National Guard activated Mr. Richter for military duty during the May 28, 2012, to October 17, 2012, timeframe. (*Compare* Dkt. 1, ¶33 *with* Dkt. 22, ¶33)

4. Mr. Richter gave Commerce City advance notice of the above-referenced mobilization. (Richter Decl. ¶5)

5. On or about June 12, 2012, Commerce City posted a job opening for a "Commander" position, a position of higher rank and pay than Mr. Richter's Police Officer position. (Dkt. 22. ¶33) Individuals who wanted to apply for the Commander position had from June 12, 2012, to June 22, 2012, to submit an application. (Crotty Decl. Ex. F *citing* Richter Dep. 102:5-25; 103:1-25)

6. Mr. Richter did not apply for the Commander position during the June 12 – June 22, 2012 timeframe as Mr. Richter was on military leave and he believed that USERRA would allow him to be considered for the Commander position upon his return to work. *Id.*

7. On or about August 13, 2012, Mr. Richter (while still on military orders) informed Commerce City that he sought to be considered for the Commander position. (Richter Decl. ¶6)(Dkt. 22, ¶34; Crotty Decl. at Ex. G *citing* Saunier Dep. Ex. 84)

8. Mr. Richter served honorably during the above-referenced May 28, 2012 – October 17, 2012 timeframe. (Richter Decl. ¶7)

9. On or about September 28, 2012, Mr. Richter informed Commerce City of his intent to return to work. (Richter Decl. ¶8)

10. Mr. Richter returned to work on October 17, 2012. (Richter Decl. ¶9) Upon returning to work Mr. Richter asked Commerce City's Interim Police Chief, Charles Saunier, whether he could compete for the Commander position in order to be placed on the eligibility list. *Id.* at ¶9. The "eligibility list" is a list that the department maintains insofar as if a candidate passes a promotional examination but a position is not vacant then the candidate may remain on an eligibility list until an opening occurs. (Crotty Decl. at Ex. H *citing* 30(b)(6) Dep. 98:11-25: 99:1-5; 100:12-22)

11. Commerce City refused to allow Mr. Richter to compete for the Commander position for two reasons. First, Commerce City contends that Mr. Richter did not "timely" apply for that position. (Dkt. 22, ¶34) Second, Commerce City contends that allowing Mr. Richter to compete for the Commander position upon his return from military leave would have "delayed the whole process", "slowed up the department," and "set the precedent for future cases." (Crotty Decl. at Ex. G *citing* Saunier Dep. 163:2-8; 165:22-25; 166:1-22; 167:15-25; 168:1-6)

12. Commerce City refused to allow Mr. Richter to test for the Commander position even if doing so would place Mr. Richter on the above-referenced eligibility list. (Sauiner Dep. 163:9-21) Commerce City's stated reason for not allowing Mr. Richter to test for eligibility list purposes was that the testing is "very expensive and time-consuming." *Id.* When pressed, Commerce City conceded that the sole expense associated with the June 2012 Commander position test was a lunch the City purchased for the three outside evaluators who (voluntarily and without compensation) conducted the Commander interview. *Id.* 165:2-21.

13. The City also takes the position that Mr. Richter was not allowed to compete for the Commander because he did not apply for the positions by the date said positions closed. (Crotty Decl. at Ex. H *citing* 30(b)(6) Dep. 84:8-21; 88:20-25; 89:1-9)

14. The Colorado Army National Guard subsequently ordered Mr. Richter to military duty from January 2, 2013, through March 31, 2013. (Richter Decl. at Ex. B *citing* RICHTER 00019-20). Beginning April 1, 2013, the Colorado Army National Guard extended Mr. Richter's military commitment for a period of active duty "not to exceed 400 days." (Richter Decl. at Ex. B *citing* RICHTER 00021-22) On or about March 31, 2014, Mr. Richter received an additional set of military orders that extended his military obligation to March 31, 2017. *Id. citing* RICHTER 00024.

15. On October 15, 2013, Commerce City posted a Police Sergeant job announcement. (Richter Decl. at Ex. C *citing* RICHTER 00399-402) The job announcement stated that candidates interested in applying for the Sergeant position had to submit their application packet by November 5, 2013. *Id.* Mr. Richter was on

active military duty when he applied for the Sergeant promotional position and was not getting paid by the City during that timeframe. (Richter Decl. ¶12) Mr. Richter did not submit his application for the promotional position by November 5, 2013. (Richter Decl. ¶12) Mr. Richter did, however, instruct Eric Ewing, a fellow-CCPD officer and Police Union representative, to inform Commerce City of Mr. Richter's intent to apply for the Sergeant position. (Richter Decl. ¶12) Mr. Ewing informed Commerce City of Mr. Richter's desire to compete for Sergeant on November 7, 2013. (Richter Decl. at Ex. D *citing* RICHTER 410-411)

16. Commerce City will not allow Mr. Richter the opportunity to continue his application for the Sergeant position and participate in the Sergeant promotional process upon his return from military duty "[b]ecause he submitted his [application] material's past the closing date for the position." (Crotty Decl. at Ex. K. *citing* Smith Dep. 82:19-25; 83:1-5; 118:14-23)

B. Facts relating to Mr. Richter's retaliation claim.

17. Colorado law requires municipal employers (like Commerce City) to provide military-reserve employees (like Richter) 15 days' paid leave per year. C.R.S. § 28-3-601. (Crotty Decl. at Ex. H *citing* 30(b)(6) Dep. 33:16-22)

18. The City allows its employees to take General Leave, an annual leave "bank used for employees to be away from the workplace for a variety of reasons" including sickness and vacation. (Crotty Decl. at Ex. H *citing* 30(b)(6) Dep. 10:4-12; 11:22-25; 12:1-9) If an employee is unable to use their full amount of annual leave then

the City "will automatically cash out up to that amount of hours and pay the employee for it." (Crotty Decl. at Ex. H *citing* 30(b)(6) Dep. 19:8-12)

19. Commerce City, in an undertaking that it made with this Court, agrees that it has "provided employees on military leave their allotted yearly general leave and holiday time even when the employees [are] not actively working for the city and actually earning or entitled to that leave." (Crotty Decl. at Ex. H *citing* 30(b)(6) Dep. 61:13-22)(Dkt. 28, p. 12)

20. As it relates to deployed service-member employees who (like Richter) have military service dates change during their military service, Commerce City policy states:

> [I]f the dates of [the] required service change and [the employee] fail[s] to communicate such date change to the City and/or do not make appropriate changes to my employee benefits, [the employee] understand[s] that the City will continue [the employee's] benefits during [the employee's] absence at the same level and [the employee] may be required to reimburse the City for the applicable costs upon [the employee's] return from service. (Crotty Decl. at Ex. H *citing* 30(b)(6) Dep. 106:11-13; Crotty Decl. at Ex. I. *citing* 30(b)(6) Depo. Ex. 102)(emphasis added)

21. The Colorado Army National Guard subsequently ordered Mr. Richter to military duty from January 2, 2013, through March 31, 2013. (Richter Decl. at Ex. B *citing* RICHTER 00019-20). Beginning April 1, 2013, the Colorado Army National Guard extended Mr. Richter's military commitment for a period of active duty "not to exceed 400 days." (Richter Decl. at Ex B *citing* RICHTER 00021-22) On or about March 31, 2014, Mr. Richter received an additional set of military orders that extended his military obligation to March 31, 2017. *Id. citing* RICHTER 00024.

22. Mr. Richter provided Commerce City with copies of his military orders for the above-referenced January 2, 2013 to April 1, 2013 time frame. (Richter Decl. ¶11)

23. Commerce City paid Mr. Richter his general leave and 15 days' military leave pay for calendar years 2013 and 2014 even though Mr. Richter did not work for Commerce City a single day during 2013 and 2014. (Crotty Decl. at Ex. H *citing* 30(b)(6) Dep. 8:13-25; 9:1-4: & Ex. 96)(*See also* Dkt. 28, p. 12)

(The protected activity.)

24. On or about April 15, 2014, Mr. Richter informed Commerce City, in writing, that he had been mobilized for an additional term of military service. (Richter Decl. at Ex. E *citing* RICHTER 00459) Mr. Richter, as is his right under the USERRA (*see infra*) provided Commerce City written notice of his military obligation in lieu of providing Commerce City copies of his military orders. (Richter Decl. ¶13)

(The retaliation.)

25. Instead of continuing to pay Mr. Richter his 15 days leave and allowing Mr. Richter to cash out his general leave bank, Commerce City placed Mr. Richter on what it calls a "military hold" or "inactive" status "[a]s a result of Mr. Richter not supplying any new orders and communicating with the city about his expected return date." (Crotty Decl. at Ex. H *citing* 30(b)(6) Dep. 40: 17-25; 41:1-2)

26. An employee on "military hold" status is not allowed to cash out their general leave bank or receive 15 days' of state legislated military leave. (Crotty Decl. at Ex. H *citing* 30(b)(6) Dep. 26:13-25; 27:1-2; Crotty Decl. at Ex J. *citing* Stevens Dep. 114:2-8) As a result of being placed on "military hold" status Mr. Richter did not receive

his general leave cash out and 15 days' military leave pay for calendar year 2015. (Richter Decl. ¶14) Nor has Mr. Richter received the same benefits (general leave cash out and 15 days' military leave) for calendar year 2016 even though Mr. Richter has requested such payment. (Richter Decl. ¶14; Crotty Decl. at Ex. H *citing* 30(b)(6) Dep. 9:23-25; 10:1-3 *citing* Ex. 96)

27. The City could not identify the natural person who created the "military hold" status, could not identify the individual (or entity) who made the decision to use the "military hold" status, could not identify when the decision to implement the "military hold" status was made, could not point to any written City policy or contract where the words "military hold" are used, and could not identify any other organization who used a "military hold" status. (Crotty Decl. at Ex. H *citing* 30(b)(6) Dep. 14:6-16; 102:12-17; 101:18-22; 100:23-25; 101:7-10; 101:10-14) The City admits that "military hold" status was created "for Mr. Richter and the condition that he is in with respect to his employment." (Crotty Decl. at Ex. H *citing* 30(b)(6) Dep. 14:17-22). The City could identify no other employee other than Richter who has been subject to the "military hold" status. (Crotty Decl. at Ex. H *citing* 30(b)(6) Dep. 14:23-25; 15:1-3)

III. ARGUMENT

A. Motion for Summary Judgment and Declaratory Judgment Standard.

Summary judgment is appropriate "when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). "[T]he moving party bears the initial burden of presenting evidence to show the absence of a genuine issue of material fact," and "the burden of showing

beyond a reasonable doubt that it is entitled to summary judgment." *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 979 (10th Cir. 2002). When the moving party bears the burden of persuasion on a claim at trial it must support its motion with evidence entitling it to a directed verdict at trial. *Anderson v. Dep't of Health & Human Servs.*, 907 F.2d 936, 947 (10 Cir. 1990).

Additionally, "a party seeking to obtain a declaratory judgment may move for summary judgment in his favor upon all or any part of his claim." *United States v. Fisher-Otis Co.*, 496 F.2d 1146, 1151 (10th Cir. 1974).

For the reasons stated below, Mr. Richter is entitled to (a) a declaration that the City violated his USERRA re-employment rights by not allowing him to compete for Commander upon his return to work on October 2012 (b) a declaration that the "military hold" status violates USERRA, (c) an order that the City provide Mr. Richter his denied benefits – caused by his placement on "military hold" status - - and (d) an order mandating that Mr. Richter be given the opportunity to take make-up promotional examinations (for the Commander and Sergeant positions) upon his return to work.

B. USERRA Generally.

The USERRA and its predecessor statute have protected veteran employment since World War II. Following World War II, the U.S. Supreme Court, in *Fishgold v. Sullivan Dry Dock,* held:

> The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for

> his country an advantage which the law withheld from those who stayed behind.[1]

The USERRA is liberally construed to benefit those "who left private life to serve their country in its great hour of need."[2] The USERRA exists to:

> (1) […] encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;
> (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and
> (3) to prohibit discrimination against persons because of their service in the uniformed services.[3]

To that end, USERRA contains provisions that guarantee returning veterans prompt re-employment (38 U.S.C. §§ 4312-4313) and protection against retaliation (38 U.S.C. § 4311).

The USERRA contains two provisions granting this Court the power of equitable relief when, like here, a lawsuit is bought against a local-government employer. First, 38 U.S.C. § 4323(e)[4] allows the Court to use "its **full equity powers**, including temporary or permanent injunctions, temporary restraining orders, and contempt orders,

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[1] *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946).
[2] *Fishgold.*, 328 U.S., at 285.
[3] 38 U.S.C. § 4301(a).
[4] 38 U.S.C § 4323(e) states:

> The court shall use, in any case in which the court determines it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.

to fully vindicate the rights or benefits of persons under the [USERRA]." The USERRA further provides that a court "shall" invoke its equity powers "in any case in which the court determines it is appropriate." *Id.* Second, 38 U.S.C. § 4323(d)(1)(A) authorizes a court to "require the employer to comply with the provisions of [USERRA]."

To that end, the USERRA allows a court to use its equitable powers to reconstruct an employer's hiring process. *Grandberry v. Dep't of Homeland Sec.,* 406 F. App'x 472, 475 (Fed. Cir. 2010). In *Wriggelsworth v. Brumbaugh*, 129 F. Supp. 2d 1106, 1110 (W.D. Mich. 2001), the court, under similar circumstances as this case, employed its equitable powers under §4323(d) and (e). In that case the Court entered judgment in favor of the returning servicemember and ordered that the employer immediately reinstate the plaintiff "as a detective with all the employment rights." *Id.*

Mr. Richter moves for summary judgment as to USERRA's re-employment and retaliation provisions. Both claims are addressed in turn.

C. Commerce City's Failure to Allow Mr. Richter to Test of Commander Upon His Return to Work Violated USERRA.

In order to enjoy USERRA's re-employment protections, Mr. Richter 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) serve honorably during the military service period; (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.

Once the employee meets the above-referenced criteria the employer must re-employ the employee into the "escalator position", i.e. the position the employee occupied before his or her military service, the "alternate escalator" position or the

"nearest approximate" position. 38 U.S.C. § 4313(a)(2)(A)-(B)(hereinafter the "4313 order of priority"). Illustrated differently, USERRA § 4313 "provides that a person entitled to reemployment under Section 4312 of USERRA shall be reemployed in the position of employment in which such person would have been employed if the continuous employment of such person had not been interrupted by military service or a position of like seniority, status, and pay, the duties of which the person is qualified to perform." *Duarte v. Agilent Techs., Inc.,* 366 F. Supp. 2d 1039, 1045 (D. Colo. 2005). Proper reemployment includes the right bumping another employee from an existing position.[5]

Assessing an employee's position in the 4313 "order of priority" requires examining whether the employee would have had the opportunity to promote during his or her military absence and, if the answer is "yes", allowing that employee the opportunity to make up the missed promotional examination. 20 C.F.R. § 1002.193(b)("If an opportunity for promotion…that the employee missed during service is based on [an] examination, then the employer should give him or her a reasonable amount of time to adjust to the employment position and then give [the] examination.").

Here the City first violated USERRA by not allowing Mr. Richter the opportunity to take the missed June 2012 Commander promotional examination upon Mr. Richter's return to work in October 2012. 20 C.F.R. § 1002.193(b). The City continues to violate

[5] The USERRA escalator principle provides the returning serviceman with a proper position, even if it requires displacing ("bumping") the current job-holder from his/her position. An employer "may not refuse to reemploy a returning service member [because] someone else was hired to fill [his] position during his absence, even if … reemployment might require the termination of the replacement employee." 20 C.F.R. § 1002.139(a), and even if that result would be contrary to CBA terms. *Goggin v. St. Louis*, 702 F.2d 698, 702 n.5, 704 (8th Cir. 1983).

USERRA by stating that it will deny Mr. Richter the opportunity to take the missed 2013 Sergeant's examination.

The City's defenses to its actions fail as a matter of law. The City argues it has no obligation to allow Mr. Richter to take a make-up promotional examination upon his return to the workplace because (a) Mr. Richter did not apply for the Commander position in during the June 12 – 22, 2012 job opening window or the Sergeant position during the October 15, 2013 – November 5, 2013 window, (b) allowing Mr. Richter to make up a promotional examination would "delay[] the whole process", "slow[] up the department," and "set the precedent for future cases," and (c) the alleged expenses associated with setting up an additional promotional examination.

Point (a) fails as a matter of law because Mr. Richter was on military leave during the timeframe in which both promotional opportunities opened and closed. USERRA contains no requirement that an employee must inform his or her employer of his or her desire to be considered for promotion (or apply for that promotion) during a period of military leave. Indeed, 20 C.F.R. § 1002.193(b) contemplates the returning veteran being given the opportunity to make up the missed examination upon his return to the workplace.

Point (b) fails as a matter of law because "unlike in the usual Title VII context [an] employer must sometimes treat veterans differently from other employees in order to assure that they receive the same benefits as their co-workers. Thus, as in this case, where a neutral employment policy provides that a promotional exam shall only be administered on a particular date to all employees, it may constitute discrimination to

refuse to allow veterans away on leave on the date in question to take a make-up exam upon their return from service." *Fink v. City of New York*, 129 F. Supp. 2d 511, 519 (E.D.N.Y. 2001). Taken together, *Fink* and 20 C.F.R. § 1002.193(b), mandate that the City give returning veterans *the opportunity* to compete for missed promotional examinations regardless of whether doing so would "delay the process", "slow up the department" or "set precedent for future cases." Further, giving Mr. Richter *the opportunity* to test for Commander (or Sergeant) would not "delay" or "slow up" a promotional process as Mr. Richter does not ask (nor does the law require) that corporate promotional events be suspended while an employee is away serving in the military. The law does, however, require equal opportunity for deployed military reservists and Commerce City has failed to provide Mr. Richter such equal employment opportunities.

Regarding point (c), USERRA absolves an employer from having to comply with the statute's re-employment requirements if the employer (not the employee) proves that "changed circumstances" makes re-employment "impossible or un-reasonable." 38 U.S.C. § 4312(d)(1)(A). The "changed circumstances" defense s construed narrowly. *U.S. v. Nevada*, 2012 WL 1517296, at*4 (D. Nev. Apr. 30, 2012) ("As the very purpose of USERRA is to ensure reemployment to our military men and women returning from military service except in the most exceptional circumstances, the statute understandably makes the employer's desires irrelevant."); *Brown v. Prairie Farms Dairy, Inc*., 872 F. Supp. 2d 637, 647 (M.D. Tenn. 2012) (changed-circumstances defense "must be construed narrowly against an employer seeking to avoid USERRA

liability"); *Fink*, 129 F. Supp. 2d at 519 ("Thus, as in this case, where a neutral employment policy provides that a promotional exam shall only be administered on a particular date to all employees, it may constitute discrimination to refuse to allow veterans away on leave on the date in question to take a make-up exam upon their return from service."). Accordingly, that the City may have to purchase lunch (or incur other additional) expenses in order to conduct a make-up examination for a returning veteran fails as a matter of law. Further, the City does not have to give Mr. Richter the same examination in order to satisfy USERRA. *Dominguez v. Miami-Dade Cty.,* 669 F. Supp. 2d 1340, 1348-49 (S.D. Fla. 2009), *aff'd*, 416 F. App'x 884 (11th Cir. 2011)("[T]he 'benefit of employment' to which [plaintiff] was entitled was the opportunity to be tested within a reasonable time after his military service concluded. [Plaintiff] was not entitled to take a particular exam. He was only entitled to take an exam that qualified him for consideration as a Fire Lieutenant and permitted the accrual of any other corresponding benefits.").

Additionally, both points (b) and (c) - - the parade of horribles that would allegedly befall the City should Mr. Richter (or others) be given the opportunity to make up missed promotional examinations fail as a matter of law when analyzed with USERRA's mandates. To wit:

> Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for nonveteran 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. *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993)(citations omitted).

For "[c]ourts have repeatedly held that an employer may not deny a veteran his rightful position under the Act…on the basis that the employer would suffer some loss of efficiency or additional expense*..."* *Goggin,* 702 F.2d at 703-704. Indeed, a court analyzing under USERRA's predecessor statute's re-employment provision held that a professional baseball team had "the obligation to give the baseball player returning from service who desires it the training and practice which the position calls for." *Niemiec v. Seattle Rainier Baseball Club,* 67 F. Supp. 705, 708 (W.D. Wash. 1946). To that end, if a professional baseball team (in 1946) had to accommodate a returning veteran into its professional athletic workforce then a police department (in 2016) owes a similar obligation to allow a returning veteran the opportunity to take a make-up promotional examination.

Finally, with regard to Defendants' alleged undue hardship defense (Dkt. 22 at 23) 38 U.S.C. § 4312(d)(1)(B), that USERRA defense fails right out of the gate. First, the only affirmative defense to Mr. Richter's § 4312 reemployment claim are listed in § 4312(d).[6] Second, the undue hardship defense applies *only* in circumstances where a returning veteran is unqualified due to disability incurred in military service.[7] Defendants have never alleged that Mr. Richter ever suffered from a disability that disqualifies him from employment because Mr. Richter is not disabled.

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[6] *See* 38 U.S.C. § 4312(d)(listing the only affirmative defenses available under the Act to reemployment claims); *See also Petty v. Metro. Gov't of Nashville*, 687 F.3d 710, 720 (6th Cir. Tenn. 2012).

[7] The defense applies only in circumstances when the returning employee is unqualified due to disability. *See* 38 U.S.C. §4313(b)(2)(B) prong of 38 U.S.C. § 4312(d)(1)(B); *see also* 20 C.F.R. 1002.139(b).

Accordingly, Mr. Richter respectfully requests that the Court grant his motion for summary judgment, declare the City violated USERRA's re-employment provision, and order the City afford Mr. Richter the opportunity to take make-up promotional examinations upon his return to work.

D. Commerce City Violated USERRA by Retaliating Against Mr. Richter by Denying his General Leave and State Leave Benefits.

The USERRA states that an employer cannot retaliate against an employee who exercises "a *right* provided for" under USERRA. 38 U.S.C. 4311(b)&(c)(2)(D)(emphasis added). The only defense allowed for a USERRA retaliation claim is stated in § 4311(c)(2), which places the burden on the employer to prove that, "the action would have been taken in the absence of such person's … exercise of a right." Based on the incontrovertible facts in this case, this defense fails as a matter of law.

Contemplating the hardship that is placed on an employee who is called to military service, Congress provide those service-members, the *right* to give informal, even verbal, notice of an employee's military obligation. 20 C.F.R. § 1002.85(c) ("The employee's notice may be either verbal or written. The notice may be informal and does not need to follow any particular format.") Further, an employer cannot impose prerequisites (such as requiring the employee provide military orders) to the receipt of employment benefits (such as general leave and state mandated 15 days' paid leave) beyond those required under USERRA. 38 U.S.C. § 4302(b).

Here Mr. Richter provided Commerce City informal written notice of his continued military service commencing April 14, 2014. This constitutes *protected activity* via the exercise of a USERRA right. 38 U.S.C. § 4311(b). Mr. Richter did not provide

Commerce City with copies of his April 14, 2014 orders as 20 C.F.R. § 1002.85(c) imposes no such requirement - - - it imposes the requirement of simply notice that, for reasons set out below, was not to the City's liking.

The *retaliation* consists of the City admittedly placing Mr. Richter into the "military hold" status - - - a placement that occurred "[a]s a result of Mr. Richter not supplying any new orders and communicating with the city about his expected return date[8]." Again, the City cannot impose additional requirements - - such as the provision of military orders - - upon a service-member that are not in the Act. Further, placing Mr. Richter into "military hold" status has but one effect: Mr. Richter losing his general leave and 15 day military leave cash out for 2015 and 2016. Unquestionably, the loss of such benefits constitutes an *adverse employment action. Hillig v. Rumsfeld,* 381 F.3d 1028, 1033 (10th Cir. 2004).

Against this backdrop Commerce City bears the burden of proving that it would not have placed Mr. Richter into "military hold" status in the absence of Mr. Richter's "exercise of a [USERRA] right." In other words, the City must prove that it would have placed Mr. Richter in military hold status, denying him benefits, regardless of whether Mr. Richter gave written notice with a copy of his orders. Commerce City cannot meet this burden because it admits that it: (a) placed Mr. Richter on military hold "[a]s a result of Mr. Richter not supplying any new orders and communicating with the city about his expected return date" (Crotty Decl. at Ex. H *citing* 30(b)(6) Dep. 40: 17-25; 41:1-2); (b) created "military hold" status solely for Mr. Richter (*Id. citing* 30(b)(6) Dep. 14:17-22); (c)

[8] Additionally, USERRA does not require an employee to communicate with an employer regarding the employee's "expected return date." 20 C.F.R. § 1002.88.

cannot identify any other employee other than Richter who has been subject to the "military hold" status. (*Id. citing* 30(b)(6) Dep. 14:23-25; 15:1-3); and, (d) maintains a policy that allows deployed military service-member employees the right to receive their benefits even if the employee fails to tell the employer of his or her military service's end-date. (Crotty Decl. at Ex. I)

Since the City cannot meet its burden of proof as required in § 4311(c)(2) summary judgment should be granted on Mr. Richter's behalf as to the USERRA retaliation claim and the Court should declare that the City's "military hold" status violates USERRA, § 4302 as it improperly places a precondition (the provision of orders) on an employee's right to receive his or her benefits.

IV. CONCLUSION

Plaintiff's motion should be granted.

Respectfully submitted April 29, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2016, I have caused to be electronically filed the foregoing with the Clerk of Court using CM/ECF system which will send notification of such filing to the following e-mail addresses:

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