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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICHARD BAENEN,

Plaintiff,

v.

CITY OF BURBANK, and TRACY PANSINI, individually,

Defendants.

Case No. CV10-9290 PSG (MANx)

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Date: February 13, 2012
Time: 1:30
Ctrm: 880

I. INTRODUCTION & SUMMARY OF ARGUMENT

Plaintiff Richard Baenen served as the City of Burbank's Disaster Preparedness Coordinator from 1988 until July 2008. On October 1, 2006, Mr. Baenen, who was (and still is) also a member of the U.S. Coast Guard Reserve, was mobilized for military duty. The City of Burbank refused to re-employ Mr. Baenen upon the completion of his military duty as the City concluded that a "sworn fire captain" was better suited to serve as the City's Disaster Preparedness Coordinator.

As a matter of law, the Uniformed Services Employment and Re-employment Rights Act ("USERRA") bars the City from refusing to re-employ Mr. Baenen because of its belief that a "sworn fire captain" is better for the job. Assuming, but not conceding, that the City's rationale is legally defensible, the City still violates USERRA by failing to: (1) re-employ Mr. Baenen into position of like seniority, status, or pay; and, (2) take any steps to qualify Mr. Baenen for the low-paying, low-seniority, and low-status jobs it purportedly considered bumping Mr. Baenen into.

Indeed the City admits, in its Answer, that (1) its acts toward Mr. Baenen violated Mr. Baenen's rights under USERRA; and, (2) that its acts toward Mr.

Baenen were willful - - - a condition precedent to doubling Mr. Baenen's damages.

Mr. Baenen's Motion for Summary Judgment should be granted as there is no triable issue of fact that the City failed to re-employ Mr. Baenen following the completion of Mr. Baenen's military service.

II. UNDISPUTED FACTS

1. Defendants admit that the City of Burbank employed Mr. Baenen as the City's Disaster Preparedness Coordinator. *Compare* Complaint (ECF 1) at ¶ 6 *with* Answer (ECF 7) at ¶ 1.

2. Defendants admit that Mr. Baenen gave his supervisor notice that Mr. Baenen had been recalled to active duty with the U.S. Coast Guard. *Compare* Complaint (ECF 1) ¶ 10 *with* Answer (ECF 7) at ¶ 1.

3. Defendants admit that the City of Burbank informed Mr. Baenen that he was being "laid off" effective July 9, 2008. *Compare* Complaint (ECF 1) at ¶ 13 *with* Answer (ECF 7) at ¶ 1.

4. Mr. Baenen's military service lasted less than five years; Mr. Baenen was honorably discharged from the military; and, Mr. Baenen, through counsel, gave the City notice of his intention to return to work. (Plf.'s Uncontroverted Statement of Facts and Conclusions of Law ("SOF") at ¶¶ 27, 28, 29)

5. Defendants admit that it "failed to re-employ Mr. Baenen to the position of employment in which Mr. Baenen was actually employed on October 1, 2006 - - the date of commencement of active duty service in the United States Coast Guard." *Compare* Complaint (ECF 1) at ¶ 26 *with* Answer (ECF 7) at ¶ 1.

6. Defendants admit that the "facts alleged in paragraphs 1 through 26 [of Mr. Baenen's Complaint] constitute violations of the provisions of the USERRA, 38 U.S.C. § 4301 *et seq.* including, but not limited to, 38 U.S.C. §§ 4312, 4313, 4318 and 4323." *Compare* Complaint (ECF 1) at ¶ 27 *with* Answer (ECF 7) at ¶ 1.

7. Defendants admit that the "City of Burbank and Tracey Pansini's actions in this matter were, individually or collectively, a willful violation of USERRA such that liquidated damages are legally appropriate under 38 U.S.C. § 4323(d)(1)(C)." *Compare* Complaint (ECF 1) at ¶ 28 *with* Answer (ECF 7) at ¶ 1.

8. Defendants admit that the "City of Burbank and Tracey Pansini either knew or showed reckless disregard for the matter of whether its individual or collective conduct regarding the failure to re-employ Mr. Baenen in accordance with the federal statutory law was prohibited by 38 U.S.C. §§ 4312 and 4313." *Compare* Complaint (ECF 1) at ¶ 29 *with* Answer (ECF 7) at ¶ 1.

9. Defendants admit that "Mr. Baenen informed the City of Burbank and Tracey Pansini in 2008 that the Uniformed Services Employment and Re-Employment Rights Act governed his employment relationship with the City of Burbank - all to no avail." *Compare* Complaint (ECF 1) at ¶ 30 *with* Answer (ECF 7) at ¶ 1.

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 here. The City of Burbank admits that it failed to properly re-employ Mr. Baenen and that it discriminated against Mr. Baenen because of his military service.

B. Mr. Baenen Has Standing Under the Uniform Services Employment and Re-Employment Rights Act's ("USERRA") Re-employment Provisions – 38 U.S.C. §§ 4312, 4313.

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. (The standing requirements – and elements - of Mr. Baenen's discrimination claim – 38 U.S.C. § 4311(c) – are different. *See infra* at ¶ D.)

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

Mr. Baenen has standing under USERRA. Defendants admit that Mr. Baenen provided it with notice of Mr. Baenen's deployment. (SOF ¶ 4) Mr. Baenen, through counsel, provided the City notice of Mr. Baenen's intent to be re-employed. (SOF ¶ 27) Mr. Baenen's service was less than five years. (SOF ¶ 28) Mr. Baenen received an honorable discharge. (SOF ¶ 29)

C. The City Violated Mr. Baenen's Re-employment Rights Under USERRA by Failing to Re-Employ Him – 38 U.S.C. §§ 4312, 4313.

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: (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).

The City failed to re-employ Mr. Baenen to the Disaster Preparedness Coordinator position Mr. Baenen occupied prior to his military service. (SOF ¶¶ 15, 23) The City then failed to re-employ Mr. Baenen in a position of like seniority, status, and pay - - - it considered Mr. Baenen for four (4) alternate positions (intermediate clerk, senior clerk, fleet maintenance technician, and fire equipment mechanic) all of which paid less than the job Mr. Baenen had pre-deployment. (SOF ¶¶ 7, 8, 9) The City then failed to take any efforts to qualify Mr. Baenen for any of those positions. (SOF ¶ 12) Although required by City regulation, the City took no steps to assist Mr. Baenen in locating employment outside of the City. (SOF ¶ 13)

These facts are beyond dispute, constitute violations of Mr. Baenen's rights under USERRA and the City admits to the same. (SOF ¶¶ 30, 31)

1. The City failed to re-employ Mr. Baenen 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.")

If an employee's re-employment position (like the "Disaster Preparedness Coordinator Position") is occupied by another person (like a "sworn fire captain"), the employer must place the employee (Mr. Baenen) 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, 703-7044 (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 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. Baenen's "escalator position" was the Disaster Preparedness Coordinator job as Mr. Baenen would have reasonably occupied that position but for his military deployment - - - after all, Mr. Baenen had held that job for the previous 18 years. (SOF ¶ 1) Although the City determined that a "sworn fire captain" was more suited for the job, the City was still required to give Mr. Baenen his job back upon re-deployment. The City did not do so.

Instead the City (improperly for reasons set out below) determined that a "sworn fire captain" was better suited for the Disaster Preparedness Coordinator. (SOF ¶ 23) Assuming (but not conceding) that the City's rationale is legally defensible (it isn't), USERRA required the City to place Mr. Baenen in a different position of like seniority, status, and pay. The City didn't do so. (SOF ¶¶ 15, 31)

2. The City failed to re-employ Mr. Baenen 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. Baenen in a job of like seniority, status, or pay. Defendants considered Mr. Baenen for four other jobs: intermediate clerk, senior clerk, fleet maintenance technician, or fire equipment mechanic. (SOF ¶¶ 11) The aforementioned jobs paid less than the Disaster Preparedness Coordinator position Mr. Baenen occupied before his military deployment and therefore failed under USERRA. (SOF ¶ 9) And, notwithstanding the undisputed fact that the positions the Defendants considered for Mr. Baenen were improper under USERRA, the Defendants took no steps to qualify Mr. Baenen for those positions anyways.

3. The City made no attempt to retrain Mr. Baenen 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) and (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). An employer's re-training efforts are excused if it would cause an undue hardship to the employer. 38 U.S.C. § 4312(d)(1)(B).

Defendants made no efforts whatsoever to qualify Mr. Baenen for the intermediate clerk, senior clerk, fleet maintenance apprentice, or fire equipment mechanic positions or any other position. (SOF ¶¶ 7, 8, 9, 11, 12) Defendants made no efforts to qualify Mr. Baenen for the "new" Disaster Preparedness Coordinator position by attempting to qualify Mr. Baenen as a sworn fire captain. *Id.* And, for the reasons set out below, the Defendants have no hardship defense.

4. The City cannot show an undue hardship in retraining Mr. Baenen – it had a $730 million budget.

An employer is not required to re-employ an employee if efforts necessary to qualify the employee would impose an "undue hardship." 38 U.S.C. § 4312(d)(1)(B). Determining whether a undue hardship exits requires analyzing: (1) the nature and cost of the action; (2) the overall financial resources available to the employer; (3) the number of persons employed by the employer; (4) the effect qualifications would have on the expenses, resources or operations of the employer; (5) the overall financial resources of the employer; and, (6) the size of the employer's business. 38 U.S.C. § 4303(15)(a)-(d). The employer must establish its undue hardship defense by preponderance of the evidence. 38 U.S.C. § 4312(d)(2).

The City cannot show an undue hardship. During fiscal year 2008-2009, the year the decision to terminate Mr. Baenen's employment was made, the City had a budget over $700 million. (SOF ¶¶ 17, 18) The City hired an additional 18 personnel during fiscal year 2008-2009, including three firefighters, three police officers, and a senior tree trimmer. (SOF ¶ 19, 21) No City department reduced its budget for fiscal year 2008-2009. (SOF ¶ 20) Indeed, the City could identify no job other than Mr. Baenen's that was eliminated in fiscal year 2008 – 2009. (SOF ¶ 22)

Accordingly, the City had ample resources to re-train Mr. Baenen for another position but chose not to use any of them.

5. The fact that a sworn firefighter took over the Disaster Preparedness Coordinator Position is no defense.

The USERRA, and its predecessor statute, hold that 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. 38 U.S.C. §4313(a)(1)(B)-(4); *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).

The City's professed reason for eliminating Mr. Baenen's job was that it was better filled by a "sworn fire captain." (SOF ¶ 23) The City's argument that a

sworn firefighter was better suited for the disaster preparedness coordinator job fails. Allowing an employer to determine (during a service-member employee's military absence no less) that someone else is simply "better" or "more qualified" for the job would render USERRA toothless. The allowance of such a defense would put the burden on employees to hire counsel, experts, and expend tens of thousands of dollars to explain to a jury (with the attendant risks that go along with a jury trial) that they are more qualified for the job. Indeed, Mr. Baenen has found no case that supports the Defendants' actions.

Accordingly, the Court should disregard any argument by Defendants that "a sworn fire captain was better" as a matter of law.

D. The City Violated Mr. Baenen's Rights Under USERRA by Discriminating Against Him – 38 U.S.C. § 4311(c).

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

> (1) Under subsection (a), if the person's membership . . . service . . . or obligation for service in the uniformed services 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 membership. 38 U.S.C. § 4311(a) and (c) (emphasis added).

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

In order to demonstrate discrimination and violation of 38 U.S.C. § 4311(a), the employee must show, by a preponderance of the evidence: (1) that the employee was protected under § 4311(a) because of his membership in the uniformed services; (2) that the employer took an adverse action against the plaintiff by denying the plaintiff retention in employment; and, (3) the plaintiff's military status was a motivating factor for the employer's adverse action. 38 U.S.C. § 4311(c). Additionally, 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 in Paragraphs B & C above.

Mr. Baenen meets points (1) and (2) - - he was in the military and was laid off - - - loss of a job is undeniably an adverse action. (SOF ¶¶ 2, 15)

2. Mr. Baenen's military service was a motivating factor in the City's decision to terminate his employment.

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).

The City admits that one of the factors it took into consideration in deciding to eliminate Mr. Baenen's job was Mr. Baenen's U.S. Coast Guard related absence from the City. (SOF ¶¶ 24, 25, 26, 31, 32) Indeed, Mary Alvord testified to the City's "ongoing concerns" about Mr. Baenen's military-related absences and the "void" it left in the Disaster Preparedness Coordinator position. (SOF ¶¶ 25, 26)

Additionally, discrimination under 38 U.S.C. § 4311(c) can be established through disparate treatment. *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…")

The City admits that it allowed employees with "personality" or "nepotism" issues to transfer to vacant positions in other City departments but did not afford Mr. Baenen that opportunity. (SOF ¶ 14) Further, the only position that the City eliminated in fiscal year 2008 and 2009 was Mr. Baenen's job even though "disaster preparedness" was one of the City's top three priorities for that fiscal year. (SOF ¶¶ 16, 20, 22) Both facts are evidence of disparate treatment.

Discrimination under 38 U.S.C. § 4311(c) can be established by an employer not following its policies. *Fryer*, 680 F.Supp.2d at 327.

The City had a policy that required the City to assist laid off employees in finding work but took no steps to ensure that Mr. Baenen received the benefits of that policy. (SOF ¶ 13)

Discrimination under 38 U.S.C. § 4311(c) can be established by an employer's hostile remarks to its employee about the employee's military service. *Sheehan*, 240 F.3d at 1014; *Hance v. Norfolk Southern Ry. Co.*, 571 F.3d 511, 518 (6th Cir. 2009).

Mr. Pansini told Mr. Baenen that if Mr. Baenen went on his military orders that Mr. Baenen "might not be coming back" to the City. (SOF ¶ 4(a)) It is

undisputed that threatening one's job (and following through with it as the City undeniably did) constitutes discrimination under USERRA.

Discrimination under USERRA can be established by inconsistencies between the employer's proffered reason for termination and the employer's actions. *Sheehan*, 240 F.3d at 1014.

One of the City's reasons for terminating Mr. Baenen's employment in 2008 was that the City was in a "budget-cutting time." (SOF ¶ 24) There was no "budget-cutting time." The City's fiscal year 2008 – 2009 budget was $731 million; the City hired 18 new employees that fiscal year; and, no City department had reduced its budget that fiscal year. (SOF ¶¶ 17-21)

Summary judgment adjudication of Mr. Baenen's 38 U.S.C. §4311(c) claim is proper. The City Manager and City Fed. R. Civ. P. 30(b)(6) deponent testified that a factor the City considered in eliminating Mr. Baenen's job was his military caused absence. Mr. Baenen was treated different than other employees: employees with "personality" or "nepotism" issues had the opportunity to occupy vacant position in other City departments. Mr. Baenen wasn't. The City had a policy that mandated out-placement services to laid off workers but didn't give Mr. Baenen the benefits of that policy. The City claimed that the budget played a factor in Mr. Baenen's termination but that was not reality – there were no budget

cuts that year. Those reasons, taken together, are enough for Mr. Baenen to meet his burden under 38 U.S.C. § 4311(c), notwithstanding Mr. Pansini's threat to Mr. Baenen.

IV. CONCLUSION

Mr. Baenen's motion for summary judgment should be granted.

Dated this 8th day of December, 2011.

Respectfully Submitted,

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PROOF OF SERVICE

STATE OF LOUISIANA, PARISH OF ST. TAMMANY

I am over the age of 18 and not a party to the within action; I am employed by the Law Offices of George C. Aucoin in the Parish of St. Tammany at 547 Labarre St., Mandeville, LA 70448.

On December 8, 2011, I served the foregoing document(s) described as the Brief in Support of Motion for Summary Judgment

X (BY ELECTRONIC SERVICE) by causing the foregoing document electronically filed using the Court's Electronic Filing System which will send notice of the filed document(s) on the individual(s) listed on the attached service list.

X (Federal) I declare that I am employed in the office of a member of the Court at whose discretion the service was made. I declare under penalty of perjury that the above is true and correct.

Executed on December 8, 2011, at Mandeville, Louisiana.

/s/Leslie G. Hunt
Leslie G. Hunt

BAENEN v. CITY OF BURBANK, ET AL
Civil Action No.:2:10-cv-9290-PSG(MANx)
Assigned to Philip S. Gutierrez, U.S. District Judge
Margaret A. Nagle, U.S. Magistrate Judge

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