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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER JONES Plaintiff(s), vs. MARRIOTT HOTEL SERVICES, INC. Defendant(s).	Case Number: C 12-000587 WHA PLAINTIFF'S REPLY TO MARRIOTT HOTEL SERVICES, INC.'S OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Marriott does not dispute: (1) that Mr. Jones satisfies USERRA's reemployment

criteria;[1] (2) that it did not reemploy Mr. Jones at any of its 142 nationwide locations following Mr. Jones' late-2009 request to resume work in early-2010; and, (3) that Marriott made its decision to not reemploy Mr. Jones in 2010 based on the economic conditions a single property (the San Francisco Marriott Marquis - - - one of the company's 142 properties) faced in 2008, not the conditions that the entire company (or the single property Marquis) faced in 2010.

Instead Marriott argues that its alleged 2008 elimination of Mr. Jones' Banquet Chef position at the Marriott Marquis relieves it of the "heavy" burden it bears in proving that changed circumstances made reemploying Mr. Jones impossible or unreasonable in 2010. Marriott selectively cites inapplicable regulations for the proposition that the 142-facility corporation (with $11 billion in 2009 revenue) did not have to look beyond its elimination of the Banquet Chef "escalator position" that Mr. Jones occupied at the San Francisco facility in determining whether reemploying Mr. Jones was possible in 2010.

Summary judgment should be granted in Mr. Jones' favor because Marriott failed to prove that changed circumstances made it unreasonable or impossible to reemploy Mr. Jones as a Banquet Chef, or in a position like a Banquet Chef, in one of the company's 142 facilities.

II. ARGUMENT

A. Marriott Hotel Services, Inc. - - - Not Just the San Francisco Marriott Marquis - - - Employed Mr. Jones.

Marriott does not dispute that Marriott Hotel Services, Inc. - - - the corporate entity (not just the San Francisco Marriott Marquis) - - - employed Mr. Jones.[2] Nor does Marriott dispute

[1] Marriott did not dispute Mr. Jones' argument that Mr. Jones satisfied the USERRA reemployment criteria. Dkt. 43, at 12.

[2] Dkt. 22, at 2; Dkt. 43-2, at 2; Dkt. 43-3, at 33. 38 U.S.C. §4303(4)(broadly defining "employer").

that it maintains hundreds of properties and employs thousands of people nationwide.[3] Marriott does not dispute this even after Mr. Jones argued that Marriott could not limit USERRA's reemployment obligations to the San Francisco Marriott Marquis' walls.[4]

Although Marriott does not - - - and cannot - - - dispute the law's requirements, it implies that the Court should not look beyond the walls of its Marriott Marquis facility in determining whether changed circumstances made it impossible for Marriott (the 142 facility company) to reemploy Mr. Jones in 2010. The Court in *United States v. Nevada* rejected the State of Nevada's attempt to narrow the meaning of "employer" to a single administrative department by arguing that the administrative department, as opposed to the state, employed the employee.[5]

This Court should follow *Nevada* and look beyond Marriott's insinuation that USERRA's requirements start and stop at the boundaries of the Marriott Marquis.[6] Giving Marriott its way would allow McDonalds, Burger King, Walmart, or any of the other multi-chain corporate entities that dot our country's landscape (and employ many of our country's reservists) to dodge USERRA's affirmative defense burdens. As the *Nevada* court found, Congress defined "employer" broadly so as to prevent McDonalds (or Marriott) from denying reemployment at its store on Main Street when its store on First Street had openings.

B. Marriott Failed to Meet its Affirmative Defense Burden Nor Did It Treat Jones Like other Employees.

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[3] *Id. See* Dkt. 43, at 5, ¶1 which Marriott does not dispute in its response brief.
[4] Dkt. 43, at 18.
[5] *United States v. Nevada*, 817 F. Supp. 2d 1230, 1238 (D. Nev. 2011)
[6] Other courts are in accord. Marriott cites *Derepkowski v. Smith-Lee Co.,* 371 F. Supp. 1071 (E.D. Wis. 1974). Dkt. 48, at 13, n.12. *Derepkowski* involved a case where the employer (unlike Marriott) offered the service-member employee a job at a different company location. *Id.* at 1072. Marriott could have, but didn't, do that. *See also Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1990)("We see no reason to imply a restriction on the Act's coverage based on business size.").

1. Marriott did not carry its affirmative defense burden.

Once an employee meets USERRA's reemployment criteria the burden shifts to the employer to establish that (1) changed circumstances made (2) reemployment (i) unreasonable or (ii) impossible.[7]

Marriott argues that it did not have to prove that changed circumstances made it impossible to reemploy Mr. Jones,[8] in 2010, because its elimination of a Banquet Chef position, in 2008, placed Mr. Jones in the escalator position of "terminated employee."[9] Marriott stops at that point. Marriott did not examine whether it was impossible or unreasonable to reemploy Mr. Jones at all nor did Marriott, as required by 20 C.F.R. §1002.194, examine the conditions that existed at the Marriott Marquis (or the greater company) in 2010 when Mr. Jones sought reemployment.

Marriott did not attempt to meet the "heavy" burden of proving impossibility because it couldn't. Marriott reported revenue of $11 billion at the end of 2009, and hired, employed, and promoted Banquet Chefs in 2010.[10] Marriott produced no evidence, in response to Mr. Jones' motion, that it was incapable of reemploying Mr. Jones in some food service capacity in its 142 locations. Even the conditions at the Marriott Marquis did not make reemployment impossible. For example, Mr. Battung's declaration establishes that Mr. Battung started at a position lower than Mr. Jones when Mr. Jones departed on military leave but, in 2010, was promoted to a

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[7] 38 U.S.C. § 4312(d)(1).

[8] Dkt. 48, at 16.

[9] Marriott's characterization of Mr. Jones' position as "eliminated" is inappropriate. The Act deemed Mr. Jones an employee "on furlough or leave of absence" during his military absence. 38 U.S.C. § 4316(b)(1)(A). Further, an employer may not escape the Act's substantive requirements by classifying an employee as terminated. *See* 70 Fed. Reg. 75246, 75263 (Dec. 15, 2005) (declining to allow employer to classify employee as "terminated."). Dkt. 10, at ¶ 23.

[10] Dkt. 43-3, at 33; Dkt. 43-2, at ¶¶ 8, 11 and 12.

position above Mr. Jones.[11] Mr. Cousineau offered Mr. Jones two Sous Chef positions shortly before Mr. Jones departed for military duty in 2008.[12] Marriott even had the resources to remodel (at the time of Mr. Jones' request to return to work) its facility.[13] Summary judgment should be granted in favor of Mr. Jones because of Marriott's failure to meet its affirmative defense burden.[14]

2. Marriott treated Mr. Jones differently and violated USERRA by imposing prerequisites to Mr. Jones' reemployment.

Marriott argues that Mr. Jones was treated "just like everyone else". Mr. Jones wasn't treated "just like everyone else". He didn't get his Banquet Chef Job back in 2010 even though Marriott admits that it hired, promoted, and continued to employ Banquet Chefs in 2010.

Marriott states that USERRA is not a "veteran's preference" statute.[15] In support Marriott cites *Davis v. Halifax County,* 508 F. Supp. 966 (E.D.N.C. 1981).[16] *Davis* cites *Key v. General Cable Corp.,* 144 F.2d 653, 655-56 (3d Cir. 1944). *Key* states:

> Men and women returning from military service find themselves, in countless cases, in competition for jobs with persons who have been filling them in their absence. Handicapped, as they are bound to be by prolonged absence, such competition is not part of a fair and just system, and the intention was to eliminate it as far as reasonably possible. The Act intends that the employee should be restored to his position even though he has been temporarily replaced by a substitute who has been able, either by greater efficiency or a more acceptable personality, to make it desirable for the employer to make the change a permanent one.

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[11] Dkt. 48-5, ¶¶3, 6, 8.
[12] Dkt. 48-4, at ¶19.
[13] Dkt. 48-4, at ¶15.
[14] While Marriott submitted declarations from Marriott Marquis employees that downsizing occurred at the Marquis, courts of this circuit have held that an "employer's blanket assertion that it 'downsized significantly just to keep the doors open' was insufficient as a matter of law to satisfy the burden under §4312(d)." *Cooper v. Hungry Buzzard Recovery, LLC,* 2011 U.S. Dist. LEXIS 128256 (W.D. Wn. Nov. 4, 2011).
[15] Mr. Jones' moving brief does not contain the words "veteran" or "preference".
[16] Dkt. 48, at 16.

Key underlines the Act's requirements that once an employee gives notice of intent to return to work, the employer cannot place additional requirements - - - like requiring the employee to "go to the web" or "call the Whitehawk Group" - - - to become reemployment eligible.[17] The Act supersedes any "contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by [USERRA], including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit."[18] Forcing Mr. Jones to apply for other jobs does not satisfy the spirit of the "fair and just" mechanism announced in *Key*. One of the San Francisco Marriott Marquis' many HR employees could have picked up the phone to ask his counterpart at the Marriott across town whether work was available for Mr. Jones. In fact the "4313 order of priority" encourages such conduct.

C. Marriott Violated the 4313 Order of Priority.

Marriott states that its reemployment obligations turn on whether an employee was "qualified" for his pre-service job.[19] Marriott specifically states that "if – and only if—the employee is ***not qualified*** for the escalator position, the employee should be returned to a different pre-service position or equivalent."[20]

Marriott ignores half of the statute it quotes. The statute (38 U.S.C. §4313(a)(2)(A)) allows an employee to be reemployed in **either** an escalator position **or** "a position of like seniority, status and pay."[21] Courts have rejected similar attempts to have USERRA's

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[17] *Dunlap v. Grupo Antolin Ky., Inc.*, 181 L.R.R.M. 2831, 2007 U.S. Dist. LEXIS 19337 (W.D. Ky. Mar. 14, 2007)
[18] 38 U.S.C. § 4302(b).
[19] Dkt. 48, at 12.
[20] *Id.* (emphasis in original).
[21] 38 U.S.C. §4313(a)(2)(A); 20 C.F.R. §1002.197(a).

reemployment provisions turn on whether an employee was "qualified."[22] Indeed, Marriott cannot eliminate half of the 38 U.S.C. § 4313(a)(2)(A) reemployment statute given that the "very purpose of USERRA is to ensure reemployment to our military men and women returning from military service."[23]

Marriott violated Mr. Jones' USERRA rights by not following the 4313 order of priority.

D. Milhauser is Factually Distinguishable.

Marriott cites *Milhauser v. Minco Products* as its case in chief. *Milhauser* is factually distinguishable: it involved an employer laying off an employee in June 2009 after assessing the economic conditions the company faced in the spring of 2009.[24] *Milhauser* did not (as is the case here) involve a company making reemployment decisions in 2010 based on information from 2008.

E. Responses to Marriott's Other Contentions.

1. Plaintiff does not concede the Marquis' economic status justifies its decision.

Marriott states that Mr. Jones does not dispute that economic considerations necessitated the elimination of his position in 2010.[25] Mr. Jones disputed that contention on January 13, 2010, when he asked David Traina how the banquet kitchen could function without someone doing the Banquet Chef duties.[26] Marriott's evidence further calls Marriott's contention into question given that Jhurney Battung occupied a position below Mr. Jones in 2007 but was promoted to a position above Mr. Jones in 2010.[27] Lastly, Marriott admits that it hired,

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[22] *Fullerton v. South King Co. Srv. Ctr., Inc.* 1995 U.S. App. LEXIS 34763 (9th Cir. 1995).
[23] *U.S. v. Nevada*, 2012 U.S. Dist. Lexis 60486, 13-14 (D. Nev. April 30, 2012) (*citing Leib v. Georgia-Pacific Corp.*, 925 F.2d 240, 245 (8th Cir. 1991)).
[24] *Milhauser v. Minco Prod.*, 855 F.Supp.2d 885, 888 (D. Minn. 2012).
[25] Dkt. 48, at 2.
[26] Dkt. 43, at 9 ¶8.
[27] Dkt. 48-5, ¶¶3, 6, 8.

promoted, and retained Banquet Chefs in 2010.[28]

2. 20 C.F.R. §1002.42 is not an affirmative defense.

Marriott cites 20 C.F.R. §1002.42 for the proposition that it does not have to prove the USERRA affirmative defenses.[29] 20 C.F.R. §1002.42 appears in Subpart C of 20 C.F.R. §1002. Subpart C is titled "General Eligibility Requirements for Reemployment." To be eligible for reemployment under USERRA an employee must establish the requirements set out in 20 C.F.R. §1002.32(a)(i)-(iv). The §1002.32 provision further states that the general eligibility requirements are subject to "important qualifications and exceptions, which are described in detail" in 20 C.F.R. §§1002.73-1002.139. Since 20 C.F.R. §1002.42 does not fall inside the 20 C.F.R. §§1002.73-1002.139 range it is not an exception to reemployment eligibility nor is it an affirmative defense enumerated in 20 C.F.R. §1002.139.

3. Marriott had no choice but to grant Mr. Jones military leave.

Marriott subtly hints that it benevolently granted Mr. Jones the military leave he requested.[30] Marriott had no choice but to grant the leave.[31]

F. Marriott Willfully Violated Mr. Jones' USERRA Rights.

Marriott tacitly concedes that if Mr. Jones proves his USERRA claims then Mr. Jones is entitled to liquidated damages. This is because Marriott makes no argument against the evidence (e.g. Marriott's notice of plaintiff's USERRA and disregard of the same) that Mr. Jones submitted regarding his 38 U.S.C. §4323 claim.

G. Responses to Marriott's Evidentiary Objections.

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[28] Dkt. 43-2, ¶11.
[29] Dkt. 48, at 2, 16.
[30] Dkt. 48, at 12 n.5.
[31] 20 C.F.R. §1002.87.

Marriott makes blanket hearsay, authentication, and (non-specific) best evidence rule objections to certain parts of Mr. Jarrard's declaration.[32] Marriott's objections fail because the documents contained in Mr. Jarrard's declaration are what Marriott produced or authenticated in discovery. Courts consistently hold that "[d]ocuments produced in response to discovery requests are admissible on a motion for summary judgment since they are self-authenticating and constitute the admissions of a party opponent."[33] An opposing party may not subsequently challenge a submitting party's ability to authenticate documents that the opposing party gave the submitting party in discovery.[34] As to Marriott's objections to paragraphs 8, 11, 12, and 19 of Mr. Jarrard's declaration, the underlying discovery admissions speak for themselves.

Marriott also objects to the portions of Mr. Jones' declaration regarding his understanding of the USERRA brief he received upon leaving the military, use of computer screen shots regarding Mr. Battung, and alleges that Mr. Jones contradicts portions of his deposition.

As to Marriott's "contradicting deposition testimony" objection, no contradictions exist. At deposition Mr. Jones testified, over objection, that defense counsel's recap of plaintiff's conversation with David Traina was "fairly accurate" regarding a review of the Marquis' 2008 business conditions.[35] That is not inconsistent with Mr. Jones' declaration testimony that Mr. Traina told Mr. Jones that people were "redeployed" into Mr. Jones' old job.[36]

Marriott states that Mr. Jones cannot testify about Mr. Battung's job duties. But Mr. Jones can declare that he has knowledge of what his (Jones') duties as the Banquet Chef were

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[32] Dkt. 48, at 28.
[33] *Anand v. BP West Coast Prods. LLC*, 484 F. Supp. 2d 1086, 1092 n.11 (C.D. Cal. 2007).
[34] *Maljack Prods., Inc. v. Good Times Home Video Corp*., 81 F.3d 881, 889 n.12 (9th Cir. 1996).
[35] Dkt. 48, at 22.
[36] Mr. Traina stated the same (i.e. that people were "redeployed" into Mr. Jones' duties) in an email to Marriott management. Dkt. 43-3, at 2.

and can compare that knowledge with his observations of Mr. Battung performing those duties. Mr. Jones is also competent to testify about the internet screen shots he took of Mr. Battung and properly declared - - - much like one authenticates photos - - - that those screen shots were what they purport to be. Whether the shots establish that Mr. Battung was a Sous Chef in January 2010 goes to the weight of the evidence.

As to Marriott's objection regarding the USERRA briefing that Mr. Jones attended: Mr. Jones went to a briefing on USERRA, obtained an understanding of what the law required, and applied that to Marriott's actions in 2010. That's not hearsay.

III. CONCLUSION

Plaintiff's motion for summary judgment should be granted.

DATED: December 21, 2012.

By *s/ Thomas G. Jarrard*
Thomas G. Jarrard
Attorney for Plaintiff
CHRISTOPHER JONES

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2012, I caused to be electronically filed Plaintiff's REPLY RE PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE LIABILITY with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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