

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION**

ROBERT D. DELEE,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 3:12CV380
)	
CITY OF PLYMOUTH, INDIANA,)	
)	
Defendant.)	
_____)	

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (Agreement) is entered into by and between Robert D. DeLee (DeLee) and the City of Plymouth, Indiana (Plymouth) to resolve allegations that Plymouth violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). DeLee and Plymouth, desiring to settle this case without the burdens and risks of further litigation, agree to resolve this lawsuit by the execution of this Settlement Agreement.

Factual Background

DeLee is an employee of Plymouth and an officer in the United States Air Force Reserve (Reserve). Plymouth has a local ordinance that requires proration of an employee's annual longevity pay when that employee was on an extended leave of absence during the prior year. DeLee took leave from his employment between September 1, 2010 and May 11, 2011 (First Deployment) to serve in the Reserve. Following its ordinance, Plymouth prorated DeLee's longevity pay to reflect his extended leave. DeLee alleged that the proration was improper under USERRA, and filed suit against Plymouth seeking monetary and other relief in the United States District Court for the Northern District of Indiana (District Court).

While his lawsuit was pending, DeLee took an additional leave with the Reserve between August 1, 2012 and April 3, 2013 (Second Deployment). The District Court granted summary judgment in favor of Plymouth. DeLee appealed the adverse District Court decision to the United States Court of Appeals for the Seventh Circuit (Seventh Circuit), which reversed the district court ruling in DeLee's favor. *See Robert D. DeLee v. City of Plymouth, IN*, No. 14-1970 Dkt. No. 24 (7th Cir. Dec. 9, 2014). The Seventh Circuit noted that "[t]here is logic to the district court's reasoning," however, it concluded that "the original purpose of Plymouth's longevity pay for police was to reward them for lengthy service and that that purpose survived the subsequently-enacted proration ordinance." *Id.* at 11, 19. Because the Seventh Circuit found "no question that a full longevity payment would have accrued but for his leave of absence," it held that Plymouth was required to pay the full longevity pay amount to DeLee. *Id.* at 18. In

reversing and remanding the District Court's order, the Seventh Circuit awarded the costs of the appeal to Robert DeLee. *See Robert D. DeLee v. City of Plymouth*, IN, No. 14-1970, Dkt. No. 25 (7th Cir. Dec. 9, 2014). The parties recognize both Plymouth's right to petition the Supreme Court of the United States for review of the court of appeals' decision and DeLee's right to further pursue claims for his costs on appeal, damages, and other relief before the District Court. The settlement terms to which the parties have agreed below represent the desire of the parties to resolve all remaining disputes in this case.

Agreement

1. Plymouth shall pay DeLee a total amount of \$4,184.83 as follows:
 - a. Plymouth shall pay DeLee \$4,184.83 in longevity pay less the employee withholdings and contributions on the longevity pay required by law. Plymouth shall pay its portion of any Social Security tax separately and the employer's contribution shall not be deducted from the overall settlement amount.
 - b. Plymouth shall pay the required amount in the preceding subparagraph by direct deposit to DeLee's designated bank account, as his ordinary pay is deposited. Said payment shall be made at the time of DeLee's next regularly scheduled pay day, so long as the Agreement is fully executed at least three days before that pay day to allow adequate time for the funds to be transferred (for example, if the Agreement is fully executed on or before February 12, 2015, payment shall be made on the pay day on or about February 15, 2015, etc. . .).
 - c. Plymouth shall provide documentary evidence of having paid DeLee as required by subparagraphs a and b of this paragraph by e-mailing a copy of DeLee's Payroll Warrant to DeLee's attorney Wayne T. Ault at wayne.ault@usdoj.gov within ten days of payment to DeLee.
2. For, and in consideration of Plymouth's payment to DeLee as set forth in paragraph 1 above, and Plymouth's payment of appellate costs required pursuant to paragraph 3.b below, DeLee releases and discharges Plymouth from the claims identified in the Complaint in this case, *DeLee v. City of Plymouth*, in the United States District Court for the Northern District of Indiana, South Bend Division, Civil Action No. 3:12-CV-380, and from DeLee's claims against Plymouth for longevity pay related to his Second Deployment.
 - a. Within fourteen days of Mr. Ault's receipt of the documentary evidence of Plymouth's payment to DeLee as provided in paragraph 1.c above, and receipt of any payment of appellate costs from Plymouth required pursuant to paragraph 3.b below, Mr. Ault shall sign and file the Stipulation of Voluntary Dismissal attached to this Agreement as Exhibit 1, with the District Court.
 - b. In the event of a failure to make payments to DeLee and the United States Department of Justice as required in paragraph 1 above, DeLee shall maintain the

ability to actively litigate the remaining issues in this case plus any additional claims arising from the breach. Should DeLee actively litigate this matter in the event of a breach, Plymouth shall maintain all available defenses on the merits of any claims, however, Plymouth waives any objection to the District Court's exercise of supplemental jurisdiction under 28 U.S.C. § 1367, or other applicable law, to hear any new claims for damages or other relief DeLee may allege as a result of Plymouth's alleged breach of this Agreement, and Plymouth further waives any objection to DeLee's amendment of the pleadings to reflect such claims.

- c. DeLee asserts that he has consulted with, or waived consultation with, private counsel capable of representing him on this matter if Plymouth breaches this agreement.
3. For, and in consideration of DeLee's release of claims as set forth in paragraph 2 above, Plymouth:
- a. Waives its right to (1) petition the Supreme Court of the United States (Supreme Court) for review of the Seventh Circuit decision in *Robert D. DeLee v. City of Plymouth*, IN, No. 14-1970, Docket No. 24 (7th Cir. Dec. 9, 2014); (2) petition the Seventh Circuit for rehearing *en banc*; and (3) initiate or pursue any other motion, appeal, or proceeding before the Seventh Circuit or the Supreme Court.
 - b. If the Seventh Circuit upholds DeLee's Bill of Costs (Docket No. 26) despite Plymouth's Objection (Docket No. 27) and other subsequent filings, within 14 days of the Seventh Circuit Decision or Final Judgment regarding appellate costs, Plymouth shall pay to the United States Department of Justice the amount of \$223.50, plus any additional appellate costs incurred in responding to Plymouth's objection (DeLee shall submit a list of any additional costs directly to Plymouth's attorney Sean Surrisi at cityattorney@plymouthin.com, with the parties agreeing that in no event shall any such costs exceed \$50.00), by a check made out to the United States Department of Justice and mailed or delivered to:

Wayne T. Ault
Assistant United States Attorney
Northern District of Indiana
5400 Federal Plaza, Suite 1500
Hammond, Indiana 46320

The parties agree to abide by any Seventh Circuit Decision or Final Judgment regarding DeLee's Bill of Costs (Docket No. 26) to the extent that such Decision or Final Judgment addresses the issue of costs, and waive their rights to (1) petition the Supreme Court for review of that Seventh Circuit Decision or Final Judgment; (2) petition the Seventh Circuit for rehearing *en banc*; and (3) initiate or pursue any other objection, motion, appeal, or proceeding before the Seventh Circuit or the Supreme Court. If beyond determining the parties' liability


for appellate costs, the Seventh Circuit's Decision or Final Judgment regarding DeLee's Bill of Costs (Docket No. 26) grants any other relief or imposes any other obligations on either party, however, the parties maintain their respective rights to seek further review by the Seventh Circuit or the Supreme Court regarding those issues.

4. Miscellaneous.

- a. The undersigned representative of Plymouth certifies that he is fully authorized to enter into the terms and conditions of this Agreement and to execute and legally bind Plymouth.
- b. This Agreement may be signed in counterparts, and its validity shall not be challenged on that basis. All such counterparts, together, shall be deemed to be one document and a photocopy of this Agreement and any signature page thereto is as valid as the original.
- c. Plymouth and DeLee agree to bear their own costs, attorneys fees, and expenses except any appellate costs that Plymouth is required to pay pursuant to paragraph 3.b of this Agreement.
- d. This Agreement, including the attached Exhibit 1, constitutes the entire agreement and all commitments of the parties. Any modifications to this Agreement must be mutually agreed on and signed by Plymouth and DeLee.

SO AGREED:

DELEE


Robert D. DeLee
Date: 2-3-15

PLYMOUTH



By, Mark Senter, Its Mayor
Date: 2-2-15

EXHIBIT 1

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION**

ROBERT D. DELEE,)	
)	
Plaintiff,)	
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CITY OF PLYMOUTH, INDIANA,)	
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Defendant.)	
_____)	

STIPULATION OF VOLUNTARY DISMISSAL

Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), the Plaintiff, Robert D. DeLee (DeLee), and the Defendant, City of Plymouth, Indiana (Plymouth), each by their undersigned counsel, stipulate to the voluntary dismissal of this case, with prejudice, with the parties to bear their own costs, attorneys fees, and expenses except any appellate costs that Plymouth already paid to DeLee before the date that this Stipulation of Voluntary Dismissal was filed with the Court. The action is voluntarily dismissed based on a settlement agreement between Robert D. DeLee and the City of Plymouth, Indiana following a decision of the United States Court of Appeals for the Seventh Circuit, which reversed the district court’s ruling in this matter in DeLee’s favor. *See Robert D. Delee v. City of Plymouth, IN*, No. 14-1970 Dkt. No. 24 (7th Cir. Dec. 9, 2014). The Seventh Circuit noted that “[t]here is logic to the district court’s reasoning,” however, it concluded that “the original purpose of Plymouth’s longevity pay for police was to reward them

for lengthy service and that that purpose survived the subsequently-enacted proration ordinance.”

Id. at 11, 19. Consequently, “there is no question that a full longevity payment would have accrued but for his leave of absence.” *Id.* at 18. The action is so dismissed.

Respectfully submitted,

DAVID CAPP
UNITED STATES ATTORNEY

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Hammond, Indiana 46320
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Internet Address: wayne.ault@usdoj.gov

/s/ Sean Surrisi
Sean Surrisi
Plymouth City Attorney
124 N. Michigan St.
Plymouth, IN 46563
Telephone: (574) 936-2948
Fax: (574) 936-4371
E-mail: cityattorney@plymouthin.com

Counsel for Plaintiff Robert D. DeLee

Counsel for Defendant City of Plymouth, Indiana

CERTIFICATE OF SERVICE

I certify that on this ____ day of _____, 2015, I electronically filed the foregoing Stipulation of Voluntary Dismissal using the CM/ECF system which sent notification of such filing to Sean Surrisi, counsel for defendant.

/s/ Wayne T. Ault
Wayne T. Ault
Assistant United States Attorney