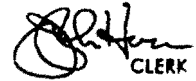


FILED

SEP 06 2016


CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

AMBER M. ISHMAEL, Plaintiff, v. BIOFUSION HEALTH PRODUCTS, INC., Defendant.	CIV. 16- <u>5079</u> COMPLAINT
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Plaintiff Amber M. Ishmael ("Ishmael"), by and through her undersigned attorneys, hereby states and alleges as follows:

JURISDICTION & VENUE

1. This civil action is brought under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301, *et seq.* ("USERRA").
2. This Court has jurisdiction over the subject matter of this civil action under 28 U.S.C. § 1331 and 38 U.S.C. § 4323(b).
3. Venue is proper in this judicial district under 38 U.S.C. § 4323(c)(2) because Defendant BioFusion Health Products, Inc. ("BioFusion") maintains a place of business in this judicial district and is considered a "private employer" as defined in 38 U.S.C. § 4323(i). Additionally, venue is proper under 28 U.S.C. § 1391(b) because the events or omissions giving rise to this action occurred in this judicial district.

PARTIES

4. At the time of the factual allegations discussed below, Plaintiff resided in Rapid City, South Dakota, which is located within Pennington County, South Dakota. Pennington County is within the jurisdiction of this Court.

5. Defendant is a business that specializes in nutritional supplementation. Defendant maintains a principal place of business at 1660 Deadwood Ave N., Rapid City, South Dakota, which is within the jurisdiction of this Court.

6. Defendant is an “employer” within the meaning of 38 U.S.C. § 4303(4)(A) and is subject to suit under USERRA under 38 U.S.C. § 4323(a).

FACTUAL ALLEGATIONS

7. Ishmael repeats the allegations set forth in paragraphs 1-6.

8. Ishmael has been a member of the armed services since January of 2010 and was a member of the South Dakota Air National Guard from February of 2014 until approximately April of 2016. At the time of the allegations discussed below Ishmael’s rank was Senior Airman, E-4, with the 114th Fighter Wing of the South Dakota Air National Guard, but she is currently a Staff Sergeant, E-5, with the 131st Bomb Wing of the Missouri Air National Guard.

9. BioFusion hired Ishmael on or about October 27, 2014, as a receptionist/secretary. She was a part-time employee and usually worked approximately three days per week for around eight hours per day.

10. BioFusion had few employees at the time period Ishmael was employed there. Other than Ishmael, the only employees were the CEO, Robert Crandall, and the bookkeeper, Tavi Price.

11. Ishmael had numerous duties in her position at BioFusion, but she mainly answered phones, talked to customers who walked into the store, made bank deposits, handled mail or advertising, and generally helped with the business however she was asked by Crandall or Price.

12. On or about December 22, 2014, Ishmael became aware that she may be able to attend a leadership training opportunity related to her military service called Airmen Leadership School. She provided verbal notice of this training, and her potential absence from work, to her supervisor, Crandall, on that date and again on January 5, 2015.

13. On January 7, 2015, Ishmael received official orders that she would attend active duty training for Professional Military Education in North Dakota for a period of 35 days beginning January 8, 2015, and continuing until February 13, 2015. Ishmael offered to give Crandall a copy of her written orders, but Crandall said that would not be necessary. Ishmael left for her training and had minimal contact with BioFusion employees while at her military service.

14. On February 7, 2015, Ishmael received a text message from BioFusion employee Price, asking when Ishmael planned to return to work. Ishmael responded that she would return to Rapid City on February 14, 2015, but was unable to return to work until February 23, 2015, because she was accompanying her husband to a surgery occurring out of state.

15. On February 10, 2015, Ishmael received a text message from Price stating "Amber, we expected you back around the 12th. We cannot hold your job any longer. Your services are no longer needed. Please drop off your key when you get back to Rapid. Good luck in your future!! Tavi & Rob."

16. Ishmael contacted Crandall on February 10, 2015, to attempt to discuss her termination, and Crandall stated something to the effect that he "could not handle the work flow

of the business while she was absent and that he needed to hire a new team member to replace her.”

17. While still at her military service, Ishmael contacted Employer Support of the Guard and Reserve (“ESGR”) on February 10, 2015, to report her termination. ESGR Ombudsman, Shannon Holstein, contacted Crandall sometime prior to February 25, 2015, regarding Ishmael’s termination and was informed that BioFusion was not going to hire Ishmael back and that her case would need to go to court to get resolved.

18. Ishmael returned from her military training on February 14, 2015; thus, she was on active duty for more than 30 days but less than 181 days.

19. On February 25, 2015, the United States Department of Labor, Veterans Employment and Training Service (“VETS”) opened a file based on Ishmael’s case in which Ishmael alleged that BioFusion had violated USERRA by terminating her employment on the basis of her military service. Ishmael also alleged facts to support a claim that BioFusion had failed to properly reemploy her following her military duty in violation of USERRA.

20. Within 14 days of Ishmael’s return from service, she let BioFusion know she was requesting reinstatement through her ESGR Ombudsman and the DOL/VETS process.

21. BioFusion has failed or refused to reemploy Ishmael as required by USERRA.

CLAIMS FOR RELIEF

22. Ishmael repeats the factual allegations set forth in paragraphs 7-21.

Claim 1: Termination in Violation of USERRA

23. Pursuant to 38 U.S.C. § 4311, USERRA prohibits discrimination in employment against an individual on the basis of his or her military service. Specifically, 38 U.S.C. § 4311 provides that “[a] person who is a member of . . . a uniformed service shall not be denied initial

employment, reemployment, retention in employment, 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.”

24. BioFusion violated Section 4311 of USERRA by terminating Ishmael on the basis of her membership in the South Dakota Air National Guard, her absence to perform military service, and/or her military service obligations.

25. BioFusion employee statements about Ishmael’s military service, her military status, and her related absence from work coupled with the timing of the termination during her military leave demonstrate that Ishmael’s termination was on the basis of Ishmael’s service in the South Dakota Air National Guard.

26. BioFusion’s violation of USERRA Section 4311 was willful under 38 U.S.C. § 4323(d)(1)(C) in that BioFusion showed reckless disregard for whether its conduct was prohibited by the provisions of USERRA.

27. Because of BioFusion’s actions in violation of USERRA, Ishmael has suffered a substantial loss of earnings and other benefits in an amount to be proven at trial.

Claim 2: Failure to Properly Reemploy in Violation of USERRA

28. Pursuant to 38 U.S.C. § 4312(a), USERRA provides that “any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter” if that person satisfies USERRA’s notice, service length, and reemployment request requirements. According to these requirements, the veteran must give advance written or verbal notice of her service to her employer, the length of the military absence from employment cannot exceed five years, and the veteran must request reemployment from her employer in

accordance with the statute. If the veteran's service was for more than 30 days but less than 181 days, she must submit an application for reemployment with the employer not later than 14 days after completion of the period of service. 38 U.S.C. § 4312(e)(1)(C).

29. Pursuant to 38 U.S.C. § 4313(a), USERRA provides that "upon completion of a period of service in the uniformed services, [the service member] shall be promptly reemployed in a position of employment . . . in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, the duties of which the person is qualified to perform."

30. BioFusion violated Sections 4312 and 4313 of USERRA by (1) failing to promptly reemploy Ishmael when she returned from her military service in February of 2015; and (2) by failing or refusing to properly reemploy Ishmael in an appropriate reemployment position, *e.g.*, the position in which she would have been employed if her continuous employment had not been interrupted by her military service.

31. Ishmael satisfied the notice, service length, and reemployment request requirements in USERRA Section 4312. She provided oral notice of her military orders to her supervisor on December 22, 2014, and January 5, 2015. When she received her written orders on January 7, 2015, she offered to provide those to her supervisor, who refused them as unnecessary. Ishmael was on military service for less than five years; specifically, more than 30 days but less than 181 days. Finally, she requested reemployment within 14 days of the completion of her military service through her local ESGR Ombudsman as well as through her VETS/Department of Labor complaint, which was submitted to BioFusion in writing on February 27, 2015.

32. BioFusion cannot establish an affirmative defense to this claim because it did not experience a change in circumstances that would have required the elimination of Ishmael's

receptionist position. BioFusion also cannot demonstrate an undue hardship that would have prevented it from reemploying Ishmael.

33. BioFusion's violations of USERRA Sections 4312 and 4313 were willful under 38 U.S.C. § 4323(d)(1)(C).

34. Ishmael has suffered a substantial loss of earnings and other benefits in an amount to be proven at trial as a result of BioFusion's violations of USERRA.

REQUEST FOR RELIEF

WHEREFORE, Ishmael respectfully requests that the Court enter judgment against BioFusion and, further, grant her the following relief:

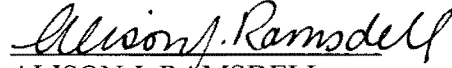
- A. Declare that BioFusion's termination of Ishmael's employment was unlawful and in violation of USERRA;
- B. Declare that BioFusion's failure or refusal to promptly reemploy Ishmael in an appropriate reemployment position was unlawful and in violation of USERRA;
- C. Order BioFusion to comply fully with the provisions of USERRA by reemploying Ishmael in an appropriate reemployment position;
- D. Order BioFusion to comply fully with the provisions of USERRA by paying Ishmael for her lost wages and other benefits suffered by reason of BioFusion's violations of USERRA;
- E. Declare that BioFusion's violations of USERRA were willful;
- F. Award Ishmael liquidated damages in an amount equal to the amount of her lost wages and other benefits suffered by reason of BioFusion's willful violations of USERRA, as authorized under 38 U.S.C. § 4323(d)(1)(C);
- G. Award prejudgment interest on the amount of lost wages and benefits due;
- H. Enjoin BioFusion from taking any action with respect to Ishmael that fails to comply with USERRA; and
- I. Grant such other and further relief as may be just and proper together with the costs and disbursements of this lawsuit.

JURY DEMAND

Ishmael hereby demands a jury trial under Federal Rule of Civil Procedure 38.

Dated this 6th day of September, 2016.

RANDOLPH J. SEILER
United States Attorney

A handwritten signature in cursive script, reading "Alison J. Ramsdell".

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