

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 16-10223
)	
CITY OF SOMERVILLE, MASSACHUSETTS)	
and COMMONWEALTH OF)	
MASSACHUSETTS, HUMAN RESOURCES)	
DIVISION,)	
)	
Defendants.)	

COMPLAINT

Plaintiff United States of America (“United States”), by and through its attorney, Carmen M. Ortiz, United States Attorney for the District of Massachusetts, alleges the following:

1. This civil action is brought pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4334 (“USERRA”).

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to 38 U.S.C. § 4323(b).

3. Venue is proper in this district under 38 U.S.C. § 4323(c) because both Defendants are located in, and do business within, this judicial district.

4. Venue is also proper under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to this lawsuit occurred in this judicial district.

PARTIES

5. Plaintiff is the United States of America.

6. Defendant City of Somerville (“City”) is a corporate governmental body and a political subdivision of the Commonwealth of Massachusetts, established pursuant to the laws of Massachusetts. The City is an employer within the meaning of 38 U.S.C. § 4303(4)(A).

7. Defendant Commonwealth of Massachusetts Human Resources Division (“Commonwealth”) is a necessary party pursuant to Fed. R. Civ. P. 19(a)(1)(A) in that, upon information and belief, the Court cannot provide complete relief in its absence as it administers promotional examinations for the City and establishes eligible lists upon which promotions are made.

FACTUAL ALLEGATIONS

8. Sean Keane (“Keane”) has been a member of the United States Marine Corps Reserve since 1989.

9. Keane began his employment with the City’s fire department as a firefighter in 1996 and currently holds the rank of Lieutenant.

10. Keane was called to active duty military service from April 2, 2004 to September 25, 2013.

11. The first 24 months of Keane’s deployment were made pursuant to U.S. Code, Title 10, Section(s) 12302 and/or 12301(d), while the later orders were made pursuant to U.S. Code, Title 10, Section 12301(d).

12. In total, Keane received seventeen (17) sets of orders, all of which stated that he had “been ordered to active duty ... in support of the national emergency declared under Presidential Proclamation 7463 of 14 September 2001 and as prescribed in Executive Order 13223. Under the provisions of Title 38, United States Code Section 4312(c)(4)(A) and (B) this period of active

duty is exempt from the five-year cumulative service limitation on reemployment rights under title 38, United States Code, Chapter 43.”

13. On or about March 11, 2002, then Secretary of the Navy, Gordon P. England issued a Memorandum stating that he had determined that “Navy and Marine Corps Reserve personnel voluntarily ordered to or retained on active duty (other than for training) in support of the national emergency declared under Presidential Proclamation 7463 of 14 September 2001, will have those periods of service exempted from the five-year limitation for reemployment rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. Chapter 43.”

14. In the March 11, 2002 memorandum, Secretary England further noted that “Orders for appropriate Reserve personnel will be annotated as follows: ‘You have been ordered to active duty from your residence in support of the national emergency declared under Presidential Proclamation 7363 of 14 September 2001. Under the provisions of Title 38, United States Code, Section 4312(c)(4)(A) and (B) this period of active duty is exempt from the five year cumulative service limitation on reemployment rights under Title 38, United States Code, Chapter 43.’”

15. On November 17, 2012, while Keane was on active duty, a promotional examination for the position of Lieutenant was administered by the City and Commonwealth to firefighters.

16. On May 30, 2013, while Keane was on active duty, the 2013 Fire Lieutenant Civil Service List (“2013 List”) was established by the Commonwealth for the City for purposes of selecting firefighters for promotion to Lieutenant.

17. On information and belief, the 2013 List was valid for 2 years and would have expired on or about May 30, 2015.

18. On September 25, 2013, Keane was Honorably Discharged from Active Duty.

19. On September 29, 2013, Keane returned to work as a firefighter for the City.

20. Following his return from active duty military service in September 2013, Keane contacted the City and Commonwealth and arranged to make-up the November 2012 Lieutenant's promotional exam that he missed while on active duty military service.

21. On or about May 16, 2014, Keane took the November 2012 makeup exam.

22. On June 16, 2014, Keane was notified he scored an 81 on the November 2012 makeup exam.

23. On June 17, 2014, the Commonwealth amended the 2013 List and placed Keane at the top of the list, above two firefighters who had already been promoted to Lieutenant on July 11, 2013.

24. On October 23, 2014, Keane was promoted by the City to Lieutenant.

25. Keane requested to be constructively promoted to Lieutenant as of July 11, 2013, the date he would have been promoted, based on his score and the June 17, 2014 Amended Fire Lieutenant Service List, had he not been away on military service.

26. The City rejected Keane's request to be constructively promoted as of July 11, 2013.

27. Had Keane been constructively promoted to Lieutenant as of July 11, 2013, he would have been eligible to take the Captain's promotional examination administered on November 15, 2014.

28. As a result of the City's refusal to constructively promote him as of July 11, 2013, Keane was deemed ineligible to take the 2014 Captain's promotional exam, or make-up exam.

29. The Collective Bargaining Agreement ("CBA") between the City and the Firefighters Association of Somerville, Local 76 Fire Suppression Unit provides for a \$500 perfect attendance award, paid quarterly, for employees who are present for the full calendar year.

30. Keane returned to work on September 29, 2013 and had perfect attendance for the 4th quarter of 2013.

31. Keane requested the City provide him with a prorated perfect attendance award for the 4th Quarter of 2013 in the amount of \$125.

32. The City denied Keane a prorated perfect attendance award for the 4th Quarter of 2013, asserting that an employee needs to be present for the full calendar year.

33. On information and belief, the City has provided a perfect attendance award for employees who take maternity leave or are required to serve jury duty, notwithstanding their absences.

34. On or about January 21, 2015, Keane filed a complaint with the Department of Labor (“DOL”) alleging that his rights under USERRA were violated.

35. DOL’s Veterans Employment and Training Service investigated the complaint, found that it had merit, and attempted to resolve the complaint informally.

36. On May 27, 2015, DOL referred Keane’s complaint to the Department of Justice (“DOJ”).

COUNT I

(violation of USERRA)

37. By its conduct, the City has violated 38 U.S.C. §§ 4312-13, among other ways, by:

a. failing to recognize and give full effect to Keane’s retroactive promotion date to Lieutenant - the date he would have been promoted to Lieutenant but for his military service – thereby denying Keane proper reemployment with the seniority, status, and benefits he would have enjoyed but for his military service;

b. denying Keane the opportunity to take the November 2014 Captain's make-up promotional exam, thereby continuing to deny Keane proper reemployment with the seniority, status, and benefits he would have enjoyed but for his military service;

c. denying Keane non-seniority based benefits as are generally provided to employees having similar seniority, status, and pay who are on a furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of his service or established while he performs such service.

38. All conditions precedent to the filing of this suit have been performed or have occurred.

39. Keane's military leave between 2004-2013 was not subject to the five-year limitation for reemployment rights under 38 U.S.C. § 4312(a)(2).

PRAYER FOR RELIEF

40. The United States prays that the Court enter judgment against the City and the Commonwealth and grant the following relief:

- a. declare that the City's failure to recognize and give full effect to Keane's constructive promotion to Lieutenant was in violation of USERRA;
- b. declare that the City's denial of Keane's request to take the November 2014 Captain's exam (or make up exam) was in violation of USERRA;
- c. order Defendants to comply with USERRA by:
 - (1) constructively promoting Keane to Lieutenant-1 as of July 11, 2013 and Lieutenant-2 as of July 11, 2014 and awarding all lost wages and benefits due as a result of the promotions;
 - (2) providing Keane with a makeup exam for the November 2014 Captain's promotional exam, including reasonable time to prepare for the exam;
 - (3) interfiling Keane's score on the makeup Captain's promotional exam on the eligibility list that resulted from the November 2014 Captain's promotional exam;

- (4) should his score merit it, assigning Keane a promotion date that corresponds to that of others who took the November 2014 Captain's exam and achieved the same score; and
 - (5) should his score merit it, constructively promoting Keane to Captain with all of the rights, benefits (including, but not limited to, backpay), and seniority that Keane would have enjoyed if he had been permitted to take the exam in November 2014 and had achieved the same score;
- d. award Keane prejudgment interest on the amount of lost wages and benefits found due; and
 - e. award such additional relief as justice may require, together with the costs and disbursements in this action.

Respectfully submitted,

PLAINTIFF
United States of America

By its attorneys:

CARMEN M. ORTIZ
United States Attorney
District of Massachusetts

VANITA GUPTA
Principal Deputy Assistant Attorney General
Civil Rights Division

/s/ Jessica P. Driscoll
JESSICA P. DRISCOLL, BBO No. 655394
Assistant United States Attorney
United States Attorney's Office
John Joseph Moakley U.S. Courthouse
One Courthouse Way, Suite 9200
Boston, MA 02210
Telephone: 617-748-3100
Facsimile: 617-748-3969
E-mail: Jessica.Driscoll@usdoj.gov

/s/ Jeremy P. Monteiro
DELORA KENNEBREW
Chief
Employment Litigation Section
ANDREW BRANIFF
Special Litigation Counsel
JEREMY P. MONTEIRO
Trial Attorney
U.S. Department of Justice
Civil Rights Division
Employment Litigation Section
601 D Street, N.W., Suite 4500
Washington, DC 20004
Telephone: 202-307-6230
Facsimile: 202-514-1005
E-mail: Jeremy.monteiro@usdoj.gov

Dated: February 10, 2016

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

UNITED STATES OF AMERICA

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Jessica P. Driscoll, Assistant United States Attorney United States Attorney's Office, John J. Moakley U.S. Courthouse 1 Courthouse Way, Suite 9200, Boston, MA 02210 / 617-748-3398

DEFENDANTS

CITY OF SOMERVILLE, MASSACHUSETTS, and COMMONWEALTH OF MASSACHUSETTS, HUMAN RESOURCES DIVISION

County of Residence of First Listed Defendant Middlesex (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 38 U.S.C. §§4301 et seq. Brief description of cause: Plaintiff alleges violations of USERRA.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 02/10/2016 SIGNATURE OF ATTORNEY OF RECORD /s/ Jessica P. Driscoll

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1. Title of case (name of first party on each side only) United States of America v. City of Somerville, Massachusetts and Commonwealth of Massachusetts, Human Resources Division

2. Category in which the case belongs based upon the numbered nature of suit code listed on the civil cover sheet. (See local rule 40.1(a)(1)).

I. 410, 441, 470, 535, 830*, 891, 893, 895, R.23, REGARDLESS OF NATURE OF SUIT.

II. 110, 130, 140, 160, 190, 196, 230, 240, 290,320,362, 370, 371, 380, 430, 440, 442, 443, 445, 446, 448, 710, 720, 740, 790, 820*, 840*, 850, 870, 871.

III. 120, 150, 151, 152, 153, 195, 210, 220, 245, 310, 315, 330, 340, 345, 350, 355, 360, 365, 367, 368, 375, 385, 400, 422, 423, 450, 460, 462, 463, 465, 480, 490, 510, 530, 540, 550, 555, 625, 690, 751, 791, 861-865, 890, 896, 899, 950.

*Also complete AO 120 or AO 121. for patent, trademark or copyright cases.

3. Title and number, if any, of related cases. (See local rule 40.1(g)). If more than one prior related case has been filed in this district please indicate the title and number of the first filed case in this court.

4. Has a prior action between the same parties and based on the same claim ever been filed in this court?

YES NO

5. Does the complaint in this case question the constitutionality of an act of congress affecting the public interest? (See 28 USC §2403)

YES NO

If so, is the U.S.A. or an officer, agent or employee of the U.S. a party?

YES NO

6. Is this case required to be heard and determined by a district court of three judges pursuant to title 28 USC §2284?

YES NO

7. Do all of the parties in this action, excluding governmental agencies of the United States and the Commonwealth of Massachusetts ("governmental agencies"), residing in Massachusetts reside in the same division? - (See Local Rule 40.1(d)).

YES NO

A. If yes, in which division do all of the non-governmental parties reside?

Eastern Division Central Division Western Division

B. If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?

Eastern Division Central Division Western Division

8. If filing a Notice of Removal - are there any motions pending in the state court requiring the attention of this Court? (If yes, submit a separate sheet identifying the motions)

YES NO

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME Jessica P. Driscoll, Assistant United States Attorney

ADDRESS United States Attorney's Office, John J. Moakley U.S. Courthouse, 1 Courthouse Way, Suite 9200, Boston, MA 02210

TELEPHONE NO. (617) 748-3398