

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN**

VINCENT HERZOG,

Plaintiff,

v.

THYSSENKRUPP WAUPACA, INC.

Defendant.

COMPLAINT

Plaintiff, Vincent Herzog (“Herzog”), by the undersigned attorneys, makes the following averments:

1. This civil action is brought pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301 - 4335 (“USERRA” or “Act”).

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)(1) and 28 U.S.C. § 1391(b)(2). Defendant ThyssenKrupp Waupaca, Inc. (“ThyssenKrupp”) is a private employer that maintains places of business in the district of this United States District Court, and a substantial part of the events giving rise to the claims in this action occurred in this district.

PARTIES

4. Herzog resides in Marinette, Wisconsin, which is within the jurisdiction of this Court.

5. ThyssenKrupp is a Wisconsin corporation that operates manufacturing plants in Marinette, Wisconsin and Waupaca, Wisconsin, and is an employer within the meaning of 38 U.S.C. § 4303(4)(A).

CLAIM FOR RELIEF

6. On or about January 16, 1996, Herzog was hired by ThyssenKrupp and began working in the Marinette, Wisconsin plant.

7. Beginning in approximately January 2007, Herzog joined the United States Army Reserve.

8. Herzog received orders indicating that his Army Reserve unit had been activated and that he would deploy for a tour of duty in the United States and Afghanistan starting March 16, 2008.

9. In advance of his tour of duty starting March 16, 2008, Herzog gave notice of his upcoming deployment to management at ThyssenKrupp.

10. In March 2008, prior to his deployment, Herzog worked at ThyssenKrupp as a Quality Assurance Technician on the banding line of the third shift.

11. During his tour and while on active military duty, Herzog suffered fainting spells.

12. The Army treated Herzog for this condition and diagnosed him with orthostatic hypotension.

13. After receiving medical treatment by the Army, Herzog served out the remainder of his military tour in a light duty position as a non-commissioned officer in charge of an ammunitions post.

14. Herzog's disability, which first manifested itself as fainting spells, was incurred during or was aggravated during his military deployment which started March 16, 2008.

15. Herzog contacted ThyssenKrupp in March 2009 in anticipation of his release from military service and return to work.

16. In March 2009, ThyssenKrupp informed Herzog that his position in the Quality Assurance Department had been eliminated and that his new position when he returned from military service would be in the Core Room.

17. Then, later in March 2009, ThyssenKrupp asked Herzog to cover a position on the banding line in the Quality Assurance Department on the second shift when he returned to work from military duty because a worker was taking leave.

18. Herzog was honorably discharged from his military tour on April 4, 2009.

19. Herzog reported for reemployment with ThyssenKrupp within 90 days after the completion of his military tour.

20. Herzog's cumulative length of absence from ThyssenKrupp for military service did not exceed five years.

21. Herzog returned to work at ThyssenKrupp on April 6, 2009 in the Quality Assurance Department on the second shift, as ThyssenKrupp had requested.

22. In or about early May 2009, Herzog gave ThyssenKrupp personnel military paperwork which disclosed his military medical information.

23. In or about May 2009 or early June 2009, Herzog passed out while working on the banding line in the Quality Assurance Department and he was taken to the emergency room at a local hospital.

24. In or about June 2009, while working on the banding line in the Quality Assurance Department, Herzog felt light-headed, and was treated with oxygen by ThyssenKrupp employees who serve as "first responders."

25. On or about June 10, 2009, ThyssenKrupp asked Herzog to obtain medical clearance from a doctor before returning to work and placed Herzog on medical leave.

26. In or about July 2009, Herzog provided ThyssenKrupp with a note from Dr. Mamoun Kloub, a neurologist, stating that he could return to work. ThyssenKrupp offered Herzog what it described as a temporary position in the back room of the Quality Assurance Department on the third shift.

27. From approximately July 2009 to October 2009, Herzog worked in the back room of the Quality Assurance Department on the third shift without experiencing any incidents requiring medical attention.

28. On or about October 15, 2009 Herzog gave Phillip Eatherton (“Eatherton”), Human Resources Director at ThyssenKrupp, a letter from Dr. Harold P. Crissinger regarding Herzog’s medical condition and work-related medical limitations and restrictions. On or about October 16, 2009, Herzog met with Eatherton, who informed Herzog that ThyssenKrupp would place Herzog in a position in the Core Room unless Herzog obtained new work-related medical limitations and restrictions.

29. During this meeting, Herzog informed Eatherton that he did not believe he could perform this position in the Core Room due to his medical condition.

30. On or about October 19, 2009, ThyssenKrupp placed Herzog on an involuntary unpaid medical leave.

31. On or about November 9, 2009, Eatherton sent Herzog a letter informing Herzog that ThyssenKrupp would place Herzog in a position in the Core Room unless, by November 20, 2009, Herzog obtained a medical evaluation from a specialist which identified his condition and what, if any, restrictions Herzog had that might need accommodation.

32. On or about November 20, 2009, Herzog signed a complaint he filed with the Department of Labor's Veterans' Employment and Training Service ("VETS"). VETS informed ThyssenKrupp about Herzog's complaint on or about December 2, 2009.

33. Herzog was examined by a neurologist at the Veteran's Affairs ("VA") Medical Center in approximately December 2009.

34. In or about January 2010, Herzog presented documents to ThyssenKrupp, including a letter from Dr. Debra J. Morley, a neurologist at the VA Medical Center, which described Herzog's disability as neurocardiogenic syncope and a possible component of postural hypotension, and described Herzog's work-related medical limitations and restrictions.

35. On or about February 17, 2010, Eatherton sent Herzog a letter stating that he had reviewed the medical restriction information Herzog provided, he had reviewed current job opening at ThyssenKrupp's Plant 4, and that ThyssenKrupp did not have a position to offer Herzog at that time.

36. Between February and August 2010, Herzog repeatedly contacted personnel at ThyssenKrupp to inquire about reemployment in a position he could have performed in light of his work-related medical limitations and restrictions.

37. Between October 2009 and the present, ThyssenKrupp management has not reemployed Herzog in any position.

38. Between October 2009 and the present, ThyssenKrupp management has not made any efforts to assist Herzog in qualifying for a position at the company.

39. The Department of Labor's Solicitor's Office concluded that the USERRA complaint Herzog filed against ThyssenKrupp had merit.

40. ThyssenKrupp violated USERRA, 38 U.S.C. §§ 4312 and 4313, by, among other ways, failing to properly reemploy Herzog upon his return from military service.

41. Because of ThyssenKrupp's actions in violation of 38 U.S.C. §§ 4312 and 4313, Herzog suffered a substantial loss of earnings and other benefits.

PRAYER FOR RELIEF

WHEREFORE, plaintiff Herzog prays that this Court grant the following relief:

- A. Declare that defendant ThyssenKrupp's failure or refusal to properly reemploy plaintiff Herzog was unlawful and in violation of USERRA;
- B. Order defendant ThyssenKrupp to comply fully with the provisions of USERRA by paying plaintiff Herzog for his loss of earnings and other benefits suffered by reason of ThyssenKrupp's failure and refusal to comply with the provisions of USERRA;
- C. Order defendant ThyssenKrupp to comply fully with the provisions of USERRA by offering to reemploy plaintiff Herzog in an appropriate position pursuant to 38 U.S.C. §§ 4312 and 4313;
- D. Award plaintiff Herzog prejudgment interest on the amount of lost earnings and other benefits found due;
- E. Enjoin defendant ThyssenKrupp from taking any action in violation of USERRA;
and
- F. Grant plaintiff Herzog such additional relief as may be just and proper, together with its costs and disbursements in this action.

Date: December 17, 2010

Respectfully submitted,

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December 15, 2010

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