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UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CURTIS KIRK,

Plaintiff

v.

ALL BATTERY SALES AND SERVICE,

Defendant.

Civil Action No. 13-cv-1927

COMPLAINT

Plaintiff, Curtis Kirk (“Mr. Kirk”), by and through his undersigned attorneys, brings this Complaint against All Battery Sales and Service (collectively, “ABS”), and alleges as follows:

I. NATURE OF THIS ACTION

1. This is a civil action brought pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301 - 4335 (“USERRA”). ABS violated Mr. Kirk’s USERRA rights by (a) failing to reemploy Mr. Kirk in an appropriate position following his return from active service and (b) subsequently demoting him and ultimately terminating his employment without proper cause. Mr. Kirk seeks his lost and/or reduced wages and benefits for these violations of USERRA.

1 **II. JURISDICTION AND VENUE**

2 2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331
3 and 38 U.S.C. § 4323(b).

4 3. The United States District Court for the Western District of Washington is a
5 proper venue for this action under 38 U.S.C. § 4323(c)(2) because ABS is a company that
6 maintains a place of business in Everett, WA, which is within this judicial district.
7 Additionally, venue is proper under 28 U.S.C. § 1391(b) because all or a substantial part
8 of the events giving rise to this action occurred in this district.

9 4. All statutory conditions precedent to the initiation of this lawsuit have been
10 fulfilled.

11 **III. PARTIES**

12 5. Mr. Kirk maintains a residence in Snohomish County, Washington.

13 6. ABS is a Washington State Corporation in good standing, incorporated
14 in 1979. ABS is a wholesaler distributor and retailer of Interstate Battery products, parts
15 and services. ABS employed Mr. Kirk during all relevant time periods of this Complaint.

16 **IV. FACTS**

17 **A. Following his Honorable Discharge from Active Duty, ABS Failed to**
18 **Properly Reemploy Mr. Kirk.**

19 7. Mr. Kirk joined the Army National Guard in 2003 as a combat engineer.
20 Prior to his employment with ABS, Mr. Kirk was called to active duty and deployed first
21 to Afghanistan in support of Operation Enduring Freedom and later to Iraq. He separated
22 from active duty on March 30, 2007, but remained a member of the Army National
23 Guard, ultimately with the 91st Training Brigade based at Joint Base Lewis McCord, and
24 operating out of training facilities in Snohomish, Washington, near Everett.

25 8. Mr. Kirk was hired by ABS on or about April 8, 2008 as a Front Counter
26 representative. The Front Counter position at that time was primarily a customer services
27 retail sales position. Front Counter representatives always worked 40 or more hours per
28 week, 9 a.m. to 5 p.m., Monday through Friday. They were paid hourly, with a 1-5%

1 commission on sales, as well as bonus and promotional potential. Mr. Kirk received
2 overtime pay, commissions and bonuses during his time at the Front Counter.

3 9. After providing ABS proper notice, Mr. Kirk was ordered to active duty in
4 support of Operation Iraqi Freedom on or about July 15, 2008.

5 10. Mr. Kirk entered active duty on August 18 and arrived in the theatre of war
6 in October, 2008. Mr. Kirk would arrive in Iraq in November 2008, where he would see
7 combat and remain until August 1, 2009. The end of his active duty in support of
8 Operation Iraqi Freedom was on August 16, 2009. During his time in Iraq, Mr. Kirk was
9 injured. Upon his return to the United States, he was held on medical retention from
10 August 17, 2009 to September 10, 2010.

11 11. On or about September 17, 2010, Mr. Kirk reported to ABS. An ABS
12 employee informed Mr. Kirk that his former position "was given away" to another
13 employee and that, rather than return to his former position at the Front Counter, he was
14 assigned to be a delivery driver.

15 12. Mr. Kirk advised the ABS employee that he believed the reassignment was
16 inconsistent with USERRA, but nonetheless Mr. Kirk, needing the work, accepted the
17 driver position.

18 13. Although delivery drivers are paid the same hourly rate as employees who
19 work at the Front Counter, drivers worked different and inconsistent hours. Deliveries
20 were uncertain and sometimes insufficient to fill 40 hours of work in a given week.
21 Furthermore, the commission structure for delivery drivers was less lucrative than for
22 Front Counter and there were no senior delivery driver positions, or other obvious
23 promotional opportunities, or regular bonuses. Mr. Kirk received no commissions or
24 bonuses during his time as a driver.

25 **B. ABS Demoted and Later Terminated Mr. Kirk Without Proper Cause.**

26 14. Mr. Kirk remained a delivery driver for approximately four weeks, until
27 approximately October 25, 2010.
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1 15. Mr. Kirk received little to no training when he became a driver, a position
2 for which he had no previous training or knowledge. He did not receive training in, *e.g.*,
3 route building, prioritization, relevant customer service, or even information regarding
4 the areas into which he was delivering. He was simply provided his products and
5 instructed to deliver them.

6 16. On or about October 25, 2010, Mr. Kirk was reassigned to a “Rotating
7 Bench” position, despite not having received any written warnings or oral/informal
8 counseling regarding his performance as a driver. The reassignment to the Rotating
9 Bench was a demotion and it was not reasonable or proper.

10 17. The Rotating Bench position involved cleaning scratches, dents or improper
11 labels on batteries, recharging them, and sending them to the secondary market. While
12 Rotating Bench employees were paid at the same hourly rate as other employees, they
13 worked only as long as it took to complete the stock of batteries on hand at a given time.
14 The total number of hours per week varied between 20 and 40 hours per week, with
15 virtually no overtime. There was no opportunity for commissions, promotions or regular
16 bonuses on the Rotating Bench. Mr. Kirk received no commissions during his time at the
17 Rotating Bench, and worked significantly fewer hours per week than he would have at
18 the Front Counter.

19 18. Mr. Kirk stayed in the Rotating Bench position from approximately
20 October 25, 2010 until his termination on January 20, 2012.

21 19. Mr. Kirk’s termination was without reasonable cause and without notice
22 that the conduct ABS claimed warranted termination would constitute cause for
23 discharge.

24 20. Mr. Kirk filed a complaint with the United States Department of Labor
25 (“DOL”), alleging that ABS had violated his rights under USERRA. The DOL’s
26 Veterans Employment and Training Service (“VETS”) conducted an investigation into
27 Mr. Kirk’s claim and determined that the claim had merit. In accordance with 38 U.S.C.
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1 § 4323(a)(1), DOL referred Mr. Kirk's complaint to the Attorney General of the United
2 States.

3 **V. USERRA CLAIMS**

4 21. Paragraphs 1 through 20 are realleged and incorporated by reference.

5 22. Mr. Kirk was entitled to proper reemployment under the protections of
6 Section 4312(a)(1)-(2) & 4312 (e)(1)(D) of USERRA. Mr. Kirk provided ABS with
7 advance notice of his call up, the cumulative length of his military service did not exceed
8 five years, and he timely reported to work with ABS after he was released from medical
9 retention.

10 23. ABS violated 38 U.S.C. §§ 4312 and 4313 of USERRA, among other ways,
11 by failing or refusing to reemploy Mr. Kirk in the position in which he would have been
12 employed had his employment not been interrupted by military service, or a position of
13 like seniority, status and pay, the duties of which Mr. Kirk was qualified to perform.

14 24. ABS violated 38 U.S.C. § 4316 of USERRA, among other ways, by
15 demoting and then discharging Mr. Kirk from his employment with ABS without cause
16 within the protected period.

17 25. As a result of ABS's unlawful conduct in violation of USERRA, Mr. Kirk
18 has suffered a loss of or reduced earnings and other benefits of employment in an amount
19 to be proven at trial.

20 **VI. PRAYER FOR RELIEF**

21 26. WHEREFORE, Mr. Kirk prays that the Court enter judgment against ABS,
22 as follows:

23 a. Declare that the reemployment, demotion and termination of Mr. Kirk's
24 employment by ABS was unlawful and in violation of USERRA;

25 b. Enjoin ABS from taking any action against Mr. Kirk that fails to comply
26 with the provisions of USERRA;

1 c. Order that ABS fully comply with the provisions of USERRA by paying
2 Mr. Kirk for his lost or reduced wages and other benefits suffered by reason of their
3 failure or refusal to comply with the provisions of this law;

4 d. Award Mr. Kirk prejudgment interest on the amount of lost wages found
5 due; and

6 e. Grant such other and further relief as may be just and proper together with
7 the costs and disbursements of this lawsuit.

8 Dated this 28th day of October, 2013.

9
10 Respectfully submitted,

11 JENNY A. DURKAN
12 United States Attorney

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