

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

WESLEY A. MCCULLOUGH,

Plaintiff,

v.

CITY OF INDEPENDENCE, MISSOURI,

Defendant.

Civil No. 05-0946-CV-W-FJG

JURY DEMAND

COMPLAINT

Plaintiff, Wesley A. McCullough, by his undersigned attorneys, makes the following averments:

1. This is a civil action brought pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301 - 4333 (“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)(2) and 28 U.S.C. § 1391(b) because Defendant City of Independence, Missouri (“City”) is located within this judicial district.

PARTIES

4. Plaintiff Wesley A. McCullough (“McCullough”) resides in Independence, Missouri, within the jurisdiction of this Court.

5. Independence, Missouri is within the jurisdiction of this Court.

CLAIM FOR RELIEF

6. On or about January 29, 2000, Plaintiff McCullough began employment with the City as a firefighter in its Fire Department.

7. McCullough enlisted in the United States Army Reserve (“USAR”) in July 2002, and was assigned to the 325th Medical Corp Hospital Field on or about August 30, 2002.

8. McCullough received the Army Service Award for exemplary service in July 2003.

9. McCullough served in the USAR until he resigned his commission in or about August 2004.

10. In or about July 2003, and again in or about October 2003, McCullough provided his employer with a copy of his official annual military drill schedule, provided to him by the USAR, covering the period of October 2003 through September 2004. On or about October 29, 2003, McCullough provided oral notice of military leave to be taken November 1, 2003. On or about December 4, 2003, he provided oral notice for military leave to be taken December 7, 2003.

11. The actions described in paragraph 10, above, constituted proper advance notice under USERRA.

12. Because McCullough was required to attend military drills on November 1-2, 2003 and on December 6-7, 2003, he was unable to work assigned shifts at the Fire Department on November 1, 2003, and December 7, 2003.

13. After giving proper advance notice to his employer that he was required to attend military drills on November 1, 2003 and December, 7, 2003, McCullough reported for duty and fulfilled his military obligations.

14. Upon the request of the City, on February 1, 2004, McCullough provided an official letter from the USAR stating that he attended monthly military drills on November 1 and December 7, 2003 to

the City through its Fire Department.

15. On February 11, 2004, McCullough received a letter stating that he would be suspended without pay for two days and placed on a six month probationary period beginning February 23, 2004, for failing “to provide required documentation of military absences” and for failing to “follow the instruction of Chief Thompson as an order to provide that documentation.”

16. McCullough was suspended without pay on February 17, 2004, and on February 20, 2004, and was placed on probation for six months beginning on February 23, 2004, for failure to provide military orders or appropriate memorandum either before or following his absence for military duty.

17. The City has failed and refused to pay McCullough for the period he was suspended and to clear McCullough’s personnel file of any wrongdoing in this matter.

18. The actions described in paragraphs 15 – 17 constitute violations of USERRA.

19. Specifically, the City has violated Section 4311 of USERRA, among other ways, by:

(a) requiring McCullough to provide official military orders or an official memorandum or letter to indicate that he was absent for military purposes, suspending him from employment, and placing him on a six month probationary period;

(b) failing and refusing to take appropriate action to remedy the effects of the violations described above, including failing and refusing to pay McCullough for the period he was not allowed to work due to his suspension and to clear his personnel file of wrongdoing in this matter.

PRAYER FOR RELIEF

WHEREFORE, McCullough prays that the Court enter judgment against the City, its officers,

agents, employees, successors and all persons in active concert or participation with it, as follows:

20. Declare that the City's policy or practice requiring official military orders or an official memorandum or letter for leave taken to fulfill a military obligation is unlawful and in violation of USERRA;

21. Enjoin the City from maintaining a policy or practice requiring notice of military obligation or intention to perform military service that violates USERRA;

22. Declare that the City violated USERRA when it suspended McCullough from employment and placed him on six months probation.

23. Require that the City fully comply with the provisions of USERRA by paying McCullough for his loss of wages and other benefits suffered by reason of the City's failure or refusal to comply with the provisions of this law and by clearing McCullough's personnel file of any indication of wrongdoing in this matter;

24. Enjoin the City from taking any action against McCullough that fails to comply with the provisions of USERRA;

25. Award McCullough prejudgment interest on the amount of lost wages found due; and

26. Grant such other and further relief as may be just and proper.

Respectfully submitted,

BRADLEY J. SCHLOZMAN
Acting Assistant Attorney General
Civil Rights Division

BY:

/s/ David J. Palmer
DAVID J. PALMER (DC Bar No. 417834)
Chief

/s/ Karen D. Woodward

/s/ David P. Avila

KAREN D. WOODARD (Maryland Bar, No Number Issued)

Deputy Chief

DAVID P. AVILA (CA Bar No. 227913)

Trial Attorney

U.S. Department of Justice

Civil Rights Division

Employment Litigation Section

950 Pennsylvania Avenue, NW

Patrick Henry Building, Room 4030

Washington, DC 20530

Telephone: (202) 353-3638

Facsimile: (202) 514-1005

Attorneys for Plaintiff

Todd P. Graves

United States Attorney

BY: /s/ Charles M. Thomas

Charles M. Thomas, MO # 28522

Assistant United States Attorney

Charles Evans Whittaker Courthouse

400 East Ninth Street, Room 5510

Kansas City, Missouri 64106

Telephone: (816) 426-3130

Facsimile: (816) 426-3165