

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

JAMES O. ALSTON,

Plaintiff,

v.

HAWTHORNE PAINT CO., INC.,

Defendant.

DRAFT: ELS: 2008.10.21

Civil Action No. \_\_\_\_\_

JURY TRIAL DEMANDED

**COMPLAINT**

Plaintiff James Alston (“Alston”), by the 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) because defendant Hawthorne Paint Co., Inc., (“Hawthorne Paint”) maintains a place of business in this district. Additionally, venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to this action occurred in this district.

**PARTIES**

4. Alston resides in Patterson, New Jersey, which is within the jurisdiction of this Court.

5. Hawthorne Paint maintains a place of business at 66 Fifth Avenue, Hawthorne, New Jersey, 07056, which is within the jurisdiction of this Court.

**CLAIMS FOR RELIEF**

6. Alston was hired by Hawthorne Paint in 1979 as a shipper/receiver. In the mid-1980s, Alston was promoted to a supervisory position. For nearly thirty years, from 1979 until his discharge from employment in January 2007, Alston worked without incident or any disciplinary action.

7. Murray Greene (“Greene”) is the Owner and President of Hawthorne Paint.

8. Alston is a reservist in the Army National Guard, and has continuously been a reservist since 1979.

9. On June 2, 2004, Alston received orders from the Army to report to active duty to serve in Operation Iraqi Freedom. Pursuant to this order, Alston served on active duty from June 6, 2004 to June 30, 2006.

10. Alston provided Hawthorne with timely notice of his orders to report to active duty.

11. While Alston was on active duty, Hawthorne Paint employee Stephen King (“King”) assumed Alston’s duties at Hawthorne Paint.

12. Upon his discharge from active duty, Alston immediately contacted Greene to inform him that he was available to return to work at Hawthorne Paint. Alston also told Greene

that he would have medical appointments three to four days per week, from July 2006 through December 2006, relating to injuries that Alston suffered as the result of an improvised explosive device attack in Iraq. Greene told Alston that he should return to work when he was completed with his medical appointments. Alston agreed.

13. On January 8, 2007, Alston informed Greene that he had completed his medical appointments and was ready to return to work at Hawthorne Paint. Alston's first day of reemployment with Hawthorne Paint was on January 9, 2007.

14. On January 11, 2007, as Alston was making batches of paint with another employee in Hawthorne Paint's facility, Greene approached Alston and inexplicably began to yell at him about what he was doing. Immediately after this incident, Alston asked Greene whether he still had his job. Greene responded that Alston's job was "taken" and that things were "not the same" at Hawthorne Paint, or words to that effect.

15. On January 18, 2007, Greene claimed that a Hawthorne Paint employee had stolen thirty (30) gallons of paint. However, after conferring with another Hawthorne Paint employee, Alston was able to locate the paint and show Greene that Greene was mistaken.

16. On January 19, 2007, Greene accused Alston and King of stealing certain paint from Hawthorne Paint. Both Greene and King denied that they had stolen paint. Alston was immediately terminated by Greene for allegedly stealing paint. King, however, was not terminated or otherwise disciplined for the alleged theft.

17. Upon being terminated, Alston informed Greene that he would file a complaint with the government regarding the termination. Greene responded that he "did not care," that Greene owned Hawthorne Paint, and that the government could pay Alston's salary.

18. Hawthorne Paint's decision to terminate Alston was motivated by Alston's military service and was therefore in violation of USERRA, 38 U.S.C. § 4311(c)(1).

19. Hawthorne Paint terminated Alston within one year of the date of his reemployment without cause, in violation of USERRA, 38 U.S.C. § 4316(c)(1).

20. Alston has suffered a substantial loss of earnings and other benefits of employment as a result of Hawthorne Paint's violations of USERRA in an amount and of a nature to be proven at trial.

### **PRAYER FOR RELIEF**

WHEREFORE, Alston prays that the Court enter judgment against Hawthorne Paint, its officers, agents, employees, successors, and all persons in active concert or participation with it, as follows:

21. Declare that Hawthorne Paint's decision to terminate Alston was motivated by Alston's military service and was therefore in violation of USERRA, 38 U.S.C. § 4311;

22. Declare that Hawthorne Paint terminated Alston within one year of the date of his reemployment without cause, in violation of USERRA, 38 U.S.C. § 4316;

23. Require that Hawthorne Paint fully comply with the provisions of USERRA by paying Alston all amounts due to him for loss of wages and benefits caused by Hawthorne Paint's violations of USERRA;

24. Offer to reinstate Alston to his supervisory position upon his return from his current deployment;

25. Enjoin Hawthorne Paint from taking any action against Alston that fails to comply with the provisions of USERRA;

26. Award Alston prejudgment interest in the amount of lost wages and other benefits found due; and

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


**JURY DEMAND**


Alston hereby demands a trial by jury of all issues so triable pursuant to USERRA, 38 U.S.C. § 4323(d)(1)(c).

GRACE CHUNG BECKER  
Acting Assistant Attorney General  
Civil Rights Division

By:

  
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JS 44 (Rev. 12/07, NJ 5/08)

**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 THE REVERSE OF THE FORM.)

**I. (a) PLAINTIFFS**

James O. Alston

(b) County of Residence of First Listed Plaintiff Passaic

(c) Attorney's (Firm Name, Address, Telephone Number and Email Address)

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**DEFENDANTS**

Hawthorne Paint, Co., Inc.

County of Residence of First Listed Defendant Passaic

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

Attorneys (If Known)

Mark Garbar - Cohn Liffand Pearlman Hermann & Knopf LLP

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

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 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)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

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

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395f) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input checked="" type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	

**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
- 7 Appeal to District Judge from Magistrate Judgment

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing. (Do not cite jurisdictional statutes unless diversity).  
Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301 et. seq.

Brief description of cause:  
Unlawful termination

**VII. REQUESTED IN COMPLAINT:**

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

**VIII. RELATED CASE(S)**

(See instructions):

JUDGE \_\_\_\_\_

DOCKET NUMBER \_\_\_\_\_

Explanation:

DATE

01/12/2009

SIGNATURE OF ATTORNEY OF RECORD

