

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

THOMAS M. SHEA,

Plaintiff,

v.

IRON WORKERS DISTRICT COUNCIL
OF NEW ENGLAND PENSION FUND;
and TRUSTEES OF THE IRON WORKERS
DISTRICT COUNCIL OF NEW
ENGLAND PENSION FUND,

Defendants.

Civil Action No. _____

COMPLAINT

Plaintiff Thomas M. Shea (“Shea”), by and through his 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 *et seq.* (“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 all Defendants are located in, and have places of business within, this judicial district.

4. Venue also is 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 Thomas M. Shea, a citizen of the Commonwealth of Massachusetts.

6. Defendant Iron Workers District Council of New England Pension Fund (the "Pension Fund") is an employer within the meaning of USERRA, 38 U.S.C. § 4303(4)(a).

7. Defendant Trustees of the Iron Workers District Council of New England Pension Fund (the "Trustees") administers the Ironworkers District Council of New England Pension Plan as Amended and Restated on January 1, 2010 ("Pension Plan").

FACTUAL ALLEGATIONS

8. Shea has been an Iron Worker for 32 years. He also has been a dues paying rank-and-file member of the Union and a participant in the Pension Fund's Pension Plan since 1982.

9. Shea enlisted in the United States Navy Reserve in 1999 and is a Senior Chief Petty Officer. Most recently, Shea was deployed with the First Marine Expeditionary Forces in Helmand Province, Afghanistan. While deployed, Shea was the C7 Construction Chief managing the process that validated and approved military construction projects supporting combat operations throughout Helmand Province.

10. Since 2007, Shea has been called to active duty military service on several occasions. He was deployed overseas on or about June 1, 2007 to April 18, 2008; January 1, 2009 to January 6, 2010; April 1, 2010 to September 30, 2010; October 1, 2010 to September 2011; and January 20, 2012 to July 9, 2013. He reported back to work from his final leave on August 1, 2013. Shea also served on active duty for training

in the Navy Reserves for approximately 58 days between mid-April 2008 and late August 2008, and was on active duty orders to attend a construction inspector school from October 15, 2008 to December 17, 2008

The Pension Plan

11. The Pension Fund's Pension Plan is a defined benefit plan. Section 3.08 of the Pension Plan provides a monthly retirement benefit (a "Service Pension") for rank-and-file retirees who have accumulated 30 pension credits and also either reached a specified age or accumulated at least 15 of those credits as of December 21, 2006.

12. Pension credits are based on hours of work. One full pension credit, the maximum amount that may be accrued in a calendar year, requires 1200 hours of work, and it is possible to earn fractions of a full pension credit for lesser numbers of hours worked.

13. Due to the nature of the construction industry, construction workers work a variable number of hours year-to-year. Consequently, the Pension Plan allows members such as Shea to "bank" hours worked in excess of 1200 during a particular calendar year, and apply them to supplement another slower calendar year in which the member worked fewer than 1200 hours, in order to earn a full pension credit for that year.

14. Shea became a Union member in June 1982. Including and applying banked hours in accordance with the Pension Plan, by December 21, 2006, Shea had accrued at least 15 pension credits; thus, regardless of his age, Shea needed 30 pension credits to retire.

15. By 2011, over the course of 30 years of service to the Union, properly applying banked hours and crediting Shea with hours he would have accrued had he not

been deployed for military service during the 2007-2011 period, Shea had accumulated over 30 credits.

16. Immediately upon Shea's reemployment following his October 1, 2010 to September 2011 military service, Shea was entitled to receive pension credits to cover his periods of military service, which would have made him retirement eligible. Shea, however, was improperly disqualified from receiving his pension because the Pension Fund, as administered by the Trustees (collectively the "Defendants"), refused to credit Shea for his service.

17. Defendants based their refusal to credit Shea for his military service on Article IV, § 4.01(c)(4)(A) of the Pension Plan, which provides that servicemembers must meet the following 3 criteria for their military service time to count toward their pension: (a) return to covered employment within 90 days of military discharge; (b) work at least 300 hours for a covered employer in the 1-year period following discharge from the military; and (c) accrue 2.5 pension credits in the subsequent 5-year period following release from active duty.

18. Shea returned to work within 90 days from September 3, 2011 (when he was released from active duty military service). During his period of terminal leave (the time before release from active duty when the military allows servicemembers to use excess leave or administrative time), Shea worked on August 26, 2011, for John Harvey & Sons, Inc., a covered employer under the Pension Plan. Shea also reported to the satellite Local 7 Union hall in Worcester, Massachusetts on October 6, 13, 28, November 3, 14, 16, 17, 22, and 29, 2011, all within 90 days from his release from active duty, and signed the out-of-work list, indicating Shea was seeking and available for work.

19. Shea again worked for a covered employer, Shiloh Steel, on December 5, 6, and 7, 2011. He then received Orders for Involuntary Mobilization.

20. Shea was unlawfully denied pension credits for his period of military service because Article IV of the Pension Plan's requirements that Shea work an additional 300 hours in the year following his release from military service, and earn 2.5 additional pension credits within five years, places additional prerequisites upon servicemembers' right to pension credits in violation of USERRA.

The Annuity Plan

21. As a member of the Union, Shea is also a participant in the Iron Workers District Council of New England Amended and Restated Annuity Plan (the "Annuity Plan").

22. The Annuity Plan describes itself as a plan described in Section 404(c) of ERISA, and the purpose of the plan is to provide supplemental retirement, disability and death benefits for employees and their beneficiaries.

23. The Annuity Plan requires that the Trustees establish individual Employee Accounts to track each employee's interest in the fund.

24. The Annuity Plan defines contributions to the fund as including contributions owed for military service, and provides that contributions owed to the account of any employee for a period of military service shall come from the last employer for whom the individual worked before entering military service.

25. During Shea's Military leaves from 2007 through 2013, Shea's employee account in the Annuity Plan was not funded. Shea had averaged over 1700 hours of employment in the 12 months before his deployment in 2007, and per USERRA

regulations, his annuity account should have been funded during his military leaves between 2007 and 2013 based on those hours.

26. Shea's last employer prior to his leave in 2007 was Capco Steel, which has subsequently gone out of business.

27. Consistent with USERRA requirements, if the last employer that an employee works for prior to his military leave is no longer functional, the plan must nevertheless provide coverage to the employee. *See* 20 C.F.R. § 1002.266. Consequently, the Trustees are liable for funding Shea's Annuity Plan account for his post-2007 military leave.

28. On or about October 30, 2011, Shea filed a complaint with the Department of Labor ("DOL") alleging that his rights under USERRA were violated.

29. DOL's Veterans Employment and Training Service ("VETS") investigated the complaint, found that it had merit, and attempted to resolve the complaint informally.

30. After informal resolution failed, VETS referred Shea's complaint to DOL's Solicitor's Office, which concurred that Shea's Complaint had merit and referred the matter to the U.S. Department of Justice.

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

COUNT I

**Failing to Credit Shea for Pension Credits he Earned while on Active Duty
Military Service in Violation of 38 U.S.C. §§ 4302 and 4318**

32. Shea repeats the allegations contained in paragraphs 1 through 31.

33. Under USERRA, the Pension Fund, as administered by the Trustees, was required to treat Shea as not having incurred a break in service by reason of his military leave. Instead, as set forth in Paragraph 20 above, the Pension Plan effectively requires Union members such as Shea, who should be retirement eligible but for their military service, to work beyond the 30 years and 30 pension credits ordinarily required to retire with a Service Pension.

34. As applied to Shea, the Article IV, § 4.01(c)(4)(A) of the Pension Plan violates USERRA. The Pension Plan is requiring Shea to work an additional 300 hours for a covered employer and up to five more years beyond the 30 years ordinarily required for a Service Pension, in order to receive the pension credits that he would have accrued had he not been absent to perform active duty military service during the 2007-2011 time period.

35. By their conduct, including maintaining a Pension Plan that imposes requirements on servicemembers beyond those required or permitted by USERRA, Pension Fund, as administered by the Trustees s violated 38 U.S.C. §§ 4302 and 4318 of USERRA by (1) placing additional prerequisites on Shea's right to receive pension credits immediately upon reemployment; and (2) refusing to credit Shea with pension credits he accrued while on active duty military service since 2007.

COUNT II

Discriminating Against Shea Based on his Active Duty Military Service in Violation of 38 U.S.C. § 4311

36. Shea repeats the allegations contained in paragraphs 1 through 35.

37. As written, and as applied to Shea, Article IV of the Pension Plan discriminates against servicemembers based on their military service by imposing a heightened requirement on servicemembers in order to receive seniority-based benefits of employment, while imposing a lesser requirement on non-servicemembers.

38. By their conduct, including maintaining a Pension Plan that effectively imposes additional years of service on servicemembers in order to receive a Service Pension, Defendants violated 38 U.S.C. § 4311 of USERRA.

COUNT III

Failing to Fund Shea's Annuity Fund while he was on Active Duty Military Service in Violation of 38 U.S.C. § 4318

39. Shea repeats the allegations contained in paragraphs 1 through 38.

40. Under USERRA, Defendants were required to treat Shea as not having incurred a break in service by reason of his military leave. Instead, as set forth in Paragraphs 21-27 above, the Trustees did not fund Shea's Annuity Plan account as required by USERRA and the Annuity Plan.

41. By their conduct, the trustees have violated § 4318 of USERRA by failing to fund Shea's Annuity Plan account.

PRAYER FOR RELIEF

Shea prays that the Court enter judgment against the Pension Fund, and the Trustees and grant the following relief:

- a. declare that Article IV of the Pension Plan violates USERRA;

b. declare that Defendants' failure, as of no later than December 31, 2011, to credit Shea with the 100 hours of service time for each month he served in the uniformed services during 2007-2011, and to assign him the pension credits associated with such hours for all purposes of determining his eligibility for a Service Pension, violated USERRA;

c. order Defendants to comply with USERRA by immediately crediting Shea with the hours of service and associated pension credits he would have earned had he not been absent to perform uniformed service during the 2007-2013 period;

d. order Defendants to comply with USERRA by rescinding Article IV of the Pension Plan's unlawful prerequisites, including requiring servicemembers to work at least 300 hours for a covered employer in the 1-year period following discharge from the military and accrue 2.5 pension credits in the subsequent 5-year period following release from active duty, before crediting their military service and/or considering them retirement eligible.

e. order Defendants to comply with USERRA by immediately paying into Shea's Annuity Plan account the required annuity payments he would have received had he not incurred breaks in service between 2007-2013;

f. award Shea prejudgment interest on the amount of pension, annuity, and other benefits found due; and

g. award such additional relief as justice may require, together with the costs and disbursements in this action.

THOMAS M. SHEA, PLAINTIFF,

By his attorneys:

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