

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

_____)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil Action No. _____
)	
v.)	
)	
PENNSYLVANIA DEPARTMENT OF)	
CORRECTIONS)	
Defendant.)	
_____)	

COMPLAINT

Plaintiff, the United States of America, by the undersigned attorneys, alleges as follows:

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)(1).

3. Venue is proper in this judicial district under 38 U.S.C. § 4323(c)(1) and 28 U.S.C. § 1391(b). Defendant Pennsylvania Department of Corrections (“PDOC”) is an agency of the Commonwealth of Pennsylvania, which maintains a place of business in this judicial district, and a substantial part of the events giving rise to this action took place in this judicial district.

4. PDOC is an employer within the meaning of 38 U.S.C. § 4303(4)(A).

CLAIM FOR RELIEF

5. On February 26, 1996, David C. Fyock ("Fyock") began his employment with PDOC. He was promoted to his current position of Corrections Officer 1 in 1997.

6. Fyock served as a member of the United States Army Reserve from 1990 until he retired on February 1, 2011. During Fyock's military service, he achieved the rank of Master Sergeant and received numerous military awards including the Bronze Star Medal, the Army Commendation Medal, the Army Good Service Medal, and the National Defense Service Medal.

7. Fyock served on active military duty from March 9, 2007, until February 13, 2010, which included deployments in Afghanistan and Iraq.

8. Following that military service, Fyock returned to work at PDOC on February 14, 2010.

9. While Fyock was on active military duty, PDOC administered two promotional examinations for Corrections Officer 2: one in May 2007 and another in August 2009.

10. Fyock met all of PDOC's minimum qualifications to take the promotional examination for a Corrections Officer 2 position, and to be considered for promotion to that position, as of both May 2007 and August 2009.

11. On June 14, 2010, Fyock took a make-up promotional examination for the Corrections Officer 2 position. He received a score of 91 on the make-up examination.

12. PDOC's promotional selection process for the Corrections Officer 2 position, both in the May 2007 and August 2009 testing and promotion cycles, involved, *inter alia*, interviewing and selecting from among the three applicants who scored highest on the relevant examination and applied for the particular Corrections Officer 2 vacancy.

13. Upon information and belief, the 91 score that Fyock achieved on his make-up promotional examination for the Corrections Officer 2 position was higher than the score of any individuals promoted to any of the thirteen position vacancies filled in the May 2007 testing and promotional cycle for the Corrections Officer 2 position.

14. Had Fyock not been absent for military service, and instead taken the May 2007 Corrections Officer 2 promotional test, his achievement of a score of 91 would have resulted in his promotion to Corrections Officer in the 2007 testing and promotion cycle given PDOC's selection process and Fyock's background, work record, and qualifications.

15. PDOC did not permit Fyock to use the make-up examination that he took in June 2010 as a make-up examination for the May 2007 examination he missed due to his military deployment, and refused to immediately promote him to a Corrections Officer 2 position that he would have received in the May 2007 testing and promotional process had he not been deployed. Instead, PDOC placed Fyock on the promotional eligibility list generated as a result of the August 2009 examination and has required him to apply for subsequent vacancies for the Corrections Officer 2 position.

16. On August 18, 2010, Fyock filed a USERRA complaint against PDOC with the United States Department of Labor's Veterans' Employment and Training Service. The United States Department of Labor's Solicitor's Office concluded that Fyock's claim had merit and referred this matter to the United States Department of Justice.

17. PDOC violated USERRA, 38 U.S.C. §§ 4312 and 4313, by, among other ways, failing to properly reemploy Fyock in a Corrections Officer 2 position upon his return from military service and successful performance on a make-up examination for that position.

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

PRAYER FOR RELIEF

WHEREFORE, Fyock prays that this Court grant the following relief:

A. Declare that PDOC's refusal to properly reemploy Fyock as a Corrections Officer 2 was unlawful and in violation of USERRA;

B. Order PDOC to fully comply with the provisions of USERRA by granting Fyock a promotion to the Corrections Officer 2 position made retroactive to the date on which he would have been promoted but for his military service, and by compensating him for his loss of earnings and other benefits suffered by reason of PDOC's failure to comply with those provisions;

C. Award Fyock prejudgment interest on the amount of lost earnings and other benefits found due;

D. Enjoin PDOC's from taking any action in violation of USERRA; and

E. Grant Fyock such additional relief as may be just and proper, together with costs and disbursements in this action.

Date: October 27, 2011

Respectfully submitted,

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