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IN THE UNITED STATES DISTRICT COURT, DISTRICT OF UTAH
CENTRAL DIVISION

PAUL M. COSTELLO,

Plaintiff,

vs.

VETERAN'S TRADING COMPANY, LLC;

Defendant.

Case No. 2:15CV348CW

COMPLAINT
JURY TRIAL REQUESTED

Honorable Clark Waddoups

Captain Paul M. Costello, through the undersigned Assistant United States Attorney, complains against Defendant Veteran's Trading Company, LLC ("VTC") as follows:

1. This is a civil action involving the Uniformed Services Employment and Re-employment Rights Act of 1994 ("USERRA"), 38 U.S.C. §§ 4301 to 4333. USERRA was enacted to encourage noncareer service in the uniformed services by, among other things, minimizing or eliminating the disadvantages to civilian careers that can result from such service. USERRA specifically protects veterans and Reserve component members from employment discrimination and provides reemployment rights with a pre-service employer following qualifying military service.

2. This Court has jurisdiction under 38 U.S.C. § 4323(b)(1) and 28 U.S.C. § 1331.

3. Venue is proper in the District of Utah, Central Division because VTC has a place of business in Park City, Summit County, Utah. 38 U.S.C. § 4323(c)(2); 28 U.S.C. §§ 1391(b), 125(2).

FACTUAL BACKGROUND

4. Captain Costello is a disabled veteran from the United States Navy where he served as an F-18 fighter pilot. Since 1997, he has served as a United States Naval Reserve member.

5. VTC is classified by the Small Business Administration (“SBA”) as a Service Disabled Veteran Owned Small Business. VTC’s headquarters are in Park City, Utah with sales offices in Florida, Maryland, Texas, and California. John Pierce and Jack Climer founded VTC.

6. Captain Costello began working for VTC on or about April 2006 and was given a 5% interest in the company.

7. In April 2008, VTC gave Captain Costello a 7% interest in the company.

8. In December 2008, Captain Costello was promoted to Vice President for Government Affairs for VTC and was given a small salary in addition to the aforementioned ownership interest.

9. Founder Jack Climer, who also was a disabled veteran, was removed as President of VTC based on a criminal conviction. Climer’s removal as President jeopardized VTC’s favorable contracting status as a Service Disabled Veteran Owned Small Business from the SBA, which required VTC to have a veteran with a disability rating serving as its President and participating in the day-to-day operations of the firm.

10. Consequently, founder John Pierce and principal Steve Culligan offered Captain

Costello the job of President of VTC in January 2012.

11. As President, Captain Costello was given a larger salary, a 25% ownership interest, and a 9% interest in profit sharing.

12. John Pierce had a 45% ownership interest in VTC and a 61% profit sharing interest. Principals Jeffrey Brown and Steven Culligan had a 26% and a 4% ownership interest and a 6% and a 19% profit-sharing interest in VTC respectively.

13. As President, Captain Costello became subject to the “Amended and Restated Operating Agreement of Veterans Trading Company, LLC” (“Operating Agreement”).

14. Among other provisions, the Operating Agreement defines a “member” as “any Person which is a holder of record of one or more Shares.” The Operating Agreement also provides that “[a]ll Members shall be Directors” of VTC. The Operating Agreement expressly provides that members were to be treated as partners only for purposes of taxation.

15. The Operating Agreement further provides that a member may be expelled and may forfeit all his/her shares if, among other things, the member has “two or more unexcused consecutive absences from mandatory special or regular meetings of the members or Board of Directors, after receiving sufficient notice under Section 6.02 and 6.04.”

16. For “special meetings” section 6.02(g) authorizes 24-hours’ notice if given by telephone or in person, 48-hours’ notice if given by electronic means, and 5-days’ notice if sent by regular mail.

17. Section 6.04(d) requires “not less than 10 nor more than 60 days[’]” notice for “each meeting of Members.”

18. To maintain its SBA designation as a SDVOSB, Captain Costello assumed more of an active role in the day-to-day operations at VTC, which required him to participate in numerous conference calls and to attend many out-of-town meetings with suppliers and clients.

19. In August 2012, under the direction of John Pierce, Captain Costello convened a meeting of VTC company officers in Colorado Springs, Colorado to brief them on current and future military operations related to the North American Aerospace Defense Command.

20. On or about July 28, 2012, Captain Costello placed a call to John Pierce informing him that the Navy was calling Captain Costello to active duty.

21. Captain Costello began active military duty on October 12, 2012.

22. On May 7-8, 2013, under the direction of John Pierce, Captain Costello presided over a meeting of VTC members in Seattle, Washington. Captain Costello was able to attend and preside over this meeting while he was on approved personal leave from the military.

23. Despite being President of VTC, Captain Costello did not have sole decisionmaking authority to take the company in the direction he wanted. John Pierce, Steve Culligan, and Jeffrey Brown could control the contents of the documents that Captain Costello authored, the offers he could make or accept, the meetings that he could attend, and what he was authorized to represent to suppliers or clients. After meeting with suppliers or clients, Captain Costello would report back to Pierce, Culligan, Brown. In effect, Captain Costello worked for Pierce, Culligan, and Brown.

24. On or about May 15, 2013, Captain Costello was given notice via email at approximately 9:04 a.m. that a special meeting of VTC that would be held later that day. This

electronic notice failed to comply with the Operating Agreement's requirement of 48-hours' notice. Nevertheless, even had notice been adequate, Captain Costello was unable to attend the meeting because of his active military duties.

25. John Pierce and Steve Culligan set an investor meeting for June 18, 2013, which Captain Costello confirmed his attendance via email. Shortly after confirming his attendance at the June 18, 2013 meeting, Captain Costello received an email notifying him that the June 18, 2013 special meeting with a potential investor had been moved to June 19, 2013 to accommodate the investor's schedule.

26. Captain Costello informed Steve Culligan that military duties on June 19, 2013 would preclude Captain Costello from attending the meeting.

27. Steve Culligan responded to Captain Costello that the June 19, 2013 meeting could not be changed.

28. On June 13, 2013, six days before the rescheduled meeting, Captain Costello was no longer able to access his email on VTC's server.

29. On June 14, 2013, Captain Costello left a message for VTC's information technology contractor to fix the problem with Captain Costello's email access. The information technology contractor did not respond to Captain Costello.

30. On June 17, 2013, Captain Costello left a message for John Pierce to fix Captain Costello's denied access to VTC's email server. Pierce never responded.

31. On June 18, 2013, Captain Costello left a message for Steve Culligan asking him to fix Captain Costello's denied access to VTC's email server. Culligan never responded.

32. On June 19, 2013, Captain Costello was attending to his military duties and was unable to join the meeting.

33. After the meeting on June 19, 2013, VTC's legal counsel called Captain Costello and informed him that his employment with VTC had been terminated for missing two consecutive member meetings. VTC's legal counsel also informed Captain Costello that his shares in VTC had been forfeited. VTC's legal counsel never indicated that Captain Costello's employment had been terminated because of poor performance.

34. On June 20, 2013, Captain Costello received a letter dated June 19, 2013, in which VTC's counsel reiterated that Captain Costello's "employment relationship with VTC is hereby terminated" because he missed two consecutive meetings. VTC's letter also discussed ways to "smooth your transition as an employee from the Company" VTC's letter never said that Captain Costello's employment was terminated because of poor performance.

35. Captain Costello's active military status ended on or about September 5, 2013, and he re-applied for employment at VTC on or about September 24, 2013.

36. VTC denied Captain Costello's application for re-employment.

FIRST CAUSE OF ACTION
(Violation of 38 U.S.C. § 4311)

37. Captain Costello incorporates herein paragraphs 1-36.

38. Captain Costello was an employee of VTC.

39. Captain Costello rendered service in the uniformed services as an active-duty reservist from on or about October 12, 2012 to September 5, 2013.

40. On June 19, 2013, VTC denied Captain Costello retention in employment and all

the benefits thereof—including but not limited to his salary, benefits, and ownership and distribution shares in VTC—by terminating his employment. Captain Costello’s membership, performance of service, and obligation to serve in the uniformed services was a motivating factor in the decision to terminate his employment.

SECOND CAUSE OF ACTION
(Violation of 38 U.S.C. § 4312)

41. Captain Costello incorporates herein paragraphs 1-40.

42. On or about July 28, 2012, Captain Costello gave advance notice of his October 12, 2012 active-duty military status to VTC member John Pierce.

43. Captain Costello had been absent from VTC by reason of service in the uniform services for fewer than five years.

44. Captain Costello timely submitted an application for re-employment within 19 days of ending approximately 11 months of active-duty military service.

45. VTC denied Captain Costello’s request for re-employment.

PRAYER FOR RELIEF

WHEREFORE, Captain Costello requests that this Court grant the following relief:

- A. A declaration that VTC violated 38 U.S.C. § 4311 by terminating Captain Costello’s employment when his active-duty military service precluded him from attending two mandatory meetings;
- B. A declaration that VTC violated 38 U.S.C. § 4312 by refusing to re-hire Captain Costello upon his timely application to be re-hired after his active-duty military service had ended;
- C. A declaration that one or both of VTC’s above-referenced violations were “willful”;

- D. An order requiring that VTC pay Captain Costello as liquidated damages an amount equal to the amount of his loss of wages and other benefits suffered by reason of VTC's willful failure to comply with the provisions of Title 38 of the United States Code;
- E. An order that VTC return Captain Costello's ownership and distribution shares and pay to Captain Costello all amounts that were distributed to shareholders between June 19, 2013 and the date of judgment; or
- F. In the alternative, if return of Captain Costello's ownership and distribution shares is not possible, then an order requiring VTC to pay Captain Costello in liquidated damages the fair value of those shares as determined at trial;
- G. An award of prejudgment interest on the amount of lost wages and value of Captain Costello's shares in VTC found due;
- H. An order requiring VTC to compensate Captain Costello for attorney fees heretofore expended, expert witness fees, expenses for litigation in this action, and expenses for medical care and treatment of health problems, including emotional distress, which VTC caused Captain Costello to suffer; and
- I. Any other relief that this Court deems just and equitable.

DATED this 12th day of May 2015.

CARLIE CHRISTENSEN
United States Attorney

/s/ Jared C. Bennett
JARED C. BENNETT
Assistant United States Attorney