

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 2:14-cv-04036-NKL
)	
STATE OF MISSOURI,)	
MISSOURI NATIONAL GUARD, and)	
MAJOR GENERAL STEPHEN L. DANNER,)	
in his Official Capacity, as Adjutant General of)	
the State of Missouri National Guard,)	
)	
Defendants.)	

ORDER

This matter is before the Court for entry of judgment by consent of the parties to effectuate a compromise and settlement of all claims in this case.

Plaintiff, United States of America (“United States”), commenced this action in the United States District Court for the Western District of Missouri, alleging that defendants, the State of Missouri, the Missouri National Guard, and Major General Stephen L. Danner, in his Official Capacity, as Adjutant General of the State of Missouri National Guard (collectively “MNG” or “Defendants”), violated the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 et seq. (“USERRA”), by requiring certain MNG civilian employees (“dual technicians”) to separate from their civilian employment with MNG, rather than placing these dual technicians on a leave of absence while they served in the military on active duty. The United States alleged that as a result of this practice, MNG was not providing

these dual technicians with their statutory entitlement to fifteen days of paid military leave per year for each year of military service.

Defendants deny that they violated USERRA and maintain that the policy was implemented with a good faith belief that it complied with USERRA.

This Court previously found in its Order granting the United States partial summary judgment that MNG violated USERRA by requiring Kinata Holt (“Holt”), the dual technician who first filed a charge with the Department of Labor regarding MNG’s policy, to accept separation when she joined the Active Guard Reserve (“AGR”) Program. Pending before the Court are the United States’ claims that MNG violated the USERRA rights of other similarly-situated dual technicians through its application of this policy and that MNG discriminated against Holt and other similarly-situated dual technicians by treating them less favorably than other employees.

With regard to the remaining claims, the MNG maintains that it did not violate the USERRA rights of other similarly-situated dual technicians, because these technicians knowingly and lawfully waived the benefits at issue. The MNG also denies that it discriminated against Holt and other similarly-situated individuals in violation of USERRA.

As a result of settlement discussions, the United States and MNG (collectively, the “Parties”) agree that this action should be resolved by entry of this Settlement Agreement (“Agreement”). They each agree to the jurisdiction of this Court over the Parties and to the Court’s subject matter jurisdiction. Further, the Parties agree that venue is proper in this judicial district for purposes of entering this Agreement and agree that all conditions precedent to the institution of this action have been fulfilled. Subject to the Court’s approval of this Agreement, the Parties waive a hearing and findings of fact and conclusions of law on all issues, and further

agree to the entry of this Agreement as final and binding between themselves as to the violations alleged in the United States' Complaint filed in this case.

This Agreement, being entered with the consent of the Parties, shall in no way constitute an adjudication or finding on the merits of the case, nor be construed as an admission by MNG of a finding of any wrongdoing or violation of any applicable federal or state law or regulation.

As used in this Agreement, the term "date of entry of this Agreement" is defined as the date on which the Court grants final approval to and enters this Agreement as a final order of the Court.

It is therefore, ORDERED as follows:

A. FINDINGS OF THE COURT

Having examined the provisions of this Agreement, the Court finds the following:

- (a) The Court has jurisdiction over the subject matter of this action and the Parties to this action.
- (b) The terms and provisions of this Agreement are lawful, fair, reasonable and just. The rights of the Parties are adequately protected by this Agreement.
- (c) This Agreement conforms with the Federal Rules of Civil Procedure and USERRA, and is not in derogation of the rights and privileges of any person. The entry of the Agreement will further the objectives of USERRA and will be in the best interest of the Parties.

B. GENERAL INJUNCTIVE RELIEF

MNG, by and through its officials, agents, employees and all persons in active concert or participation with MNG in the performance of employment or personnel functions, are enjoined from:

- (a) subjecting any of its civilian employees to a policy or practice that discriminates on the basis of military service in violation of USERRA by requiring the employee to resign, terminate, or separate from civilian employment as a condition to entering into any form of military service, including military service in the AGR Program;
- (b) subjecting any civilian employee who serves in the AGR Program to a policy or practice that discriminates on the basis of military service in violation of USERRA by treating that employee differently than any other civilian employee serving in any other form of military service in terms of leave status while on military service;
- (c) subjecting any civilian employee who serves in the AGR Program to a policy or practice that discriminates on the basis of military service in violation of USERRA by treating that employee differently than any other civilian employee serving in any other form of military service in terms of any employment benefits protected by USERRA;
- (d) subjecting any of its civilian employees to a policy or practice that discriminates on the basis of military service by requiring the employee to waive any civilian employment rights as a condition to entering into any form of military service, including military service in the AGR Program;
- (e) engaging in any act or practice that has the purpose or effect of unlawfully discriminating against any employee or potential employee because of that individual's military service; and

- (f) retaliating against or adversely affecting the terms or conditions of employment of any person because that person has opposed policies or practices that allegedly violate any provision of USERRA; has engaged in any activity protected by USERRA; has filed a charge with the Department of Labor (“DOL”), any corresponding state agency; or because of that person’s participation in or cooperation with the initiation, investigation, litigation or administration of this case or this Agreement.

C. IMPLEMENTATION OF POLICIES AND PROCEDURES

1. Within sixty (60) calendar days from the date of entry of this Agreement, MNG shall review and amend its written policies and procedures that regulate the employment status of any employees who engage in military service, to ensure the following provisions are included therein:

- (a) rescinding the policy of requiring civilian employees to separate from civilian employment in order to participate in the AGR Program;
- (b) rescinding the policy of requiring civilian employees to waive any USERRA protected rights or benefits in order to participate in the AGR Program;
- (c) placing all civilian employees leaving for military service (in an AGR Program or other active duty military positions) on a leave of absence status of “Absent-US” while away performing military service, unless that employee waives that right pursuant to the waiver provision in USERRA, 38 U.S.C. § 4316(b)(2).

MNG shall present to the United States for its review a draft of the proposed new or revised policies to comply with the requirements of Paragraph C.1. at least thirty (30) calendar days prior to their initial anticipated adoption. In the event the United States proposes modifications to the

policies submitted by MNG, the United States agrees to advise of said modifications in writing within fifteen (15) calendar days of receiving said policies from MNG and allow a reasonable opportunity, but not less than fifteen (15) days, for MNG to incorporate said modifications and adopt the proposed new or revised policies.

2. Within sixty (60) calendar days from the date upon which MNG implements the written policies and procedures set forth in Paragraph C.1., above, MNG shall take the following steps:

- (a) MNG shall distribute copies of such policies and procedures to all of its employees applying to and/or entering the AGR Program and to any applicable supervisors and agents that administer the AGR Program and shall provide a copy to the United States. Electronic means of distribution of MNG's policies and procedures shall be a sufficient means of complying with this provision;
- (b) MNG shall publicize such policies and procedures by posting them on any internet or intranet website used for posting notices or policy changes for or concerning MNG; including the information on any new AGR job announcements; providing the information to employees entering the AGR Program at AGR new-hire orientation, and revising the checklist accordingly;
- (c) MNG shall ensure that each new employee or supervisor receives a copy of the written policies and procedures implemented pursuant to Paragraph C.1., above, at the time of the new employee's hire or at the time of the supervisor's election or appointment.

D. RECORD KEEPING AND REPORTING

1. MNG shall retain during the life of this Agreement all records necessary to document the implementation of this Agreement. MNG shall furnish all records and documents relevant to its compliance with the implementation of this Agreement to counsel for the United States within thirty (30) calendar days of any written request, or such greater time as provided by the United States, but not less than thirty (30) calendar days.

2. MNG shall retain during the life of this Agreement all records that come into its possession relating to complaints or charges of discrimination based on military service or any other alleged violation of USERRA that may be filed against MNG or any employee, agent or representative of MNG and pertaining to an employee or applicant for employment with MNG: (a) through any informal channels of complaint; (b) through MNG's internal grievance procedure or with the MNG Human Resource Officers; (c) with the DOL; or (d) through or with any other federal, state or local agency authorized to receive such complaints. The United States shall have the right to inspect and copy all documents related to such complaints or charges upon reasonable notice to MNG without further order of this Court, which reasonable notice shall not be less than thirty (30) calendar days. MNG may elect to produce the aforementioned documents by electronic means.

3. MNG shall provide written notice to counsel for the United States of any disciplinary or other adverse employment action proposed or taken against Holt during the life of this Agreement promptly after such action is proposed or taken. The United States shall have the right to inspect and copy all documents related to such action upon reasonable notice to MNG without further order of this Court.

E. SPECIFIC RELIEF

1. In settlement of the claim of the United States for relief on behalf of Holt, MNG agrees to the following and it is hereby ordered by the Court that within thirty (30) calendar days of the date of entry of this Agreement:

- (a) MNG shall retroactively change Holt's employment status while she was on military service in the AGR Program to "Absent-US" instead of "Separation-US." Holt will be entitled to all the rights and benefits as if she had originally been placed on "Absent-US" status at the time she entered the AGR Program; and
- (b) MNG shall immediately take the steps necessary to credit Holt with thirty (30) days of military leave, which represents the number of days of military leave Holt would have received if she were placed on Absent-US status from the time she entered the AGR Program to the time she resigned from the AGR Program. Holt may elect to have these thirty (30) days of military leave paid out to her.

2. In settlement of the claim of the United States for relief on behalf of those dual technicians that were similarly affected by MNG's policy related to dual technicians serving in the AGR Program, MNG agrees to the following and it is hereby ordered by the Court that within sixty (60) calendar days of the date of entry of this Agreement:

- (a) MNG shall place each dual technician (other than Holt) who entered into the AGR Program from July 2010 to the date MNG implements the change to its policy required in Paragraph C.1. above, on "Absent-US" status effective retroactively as of October 1, 2014. Each of these dual technicians will be entitled to all the rights and benefits as if they had originally been placed on "Absent-US" status as of October 1, 2014.

- (b) MNG shall immediately credit each of these dual technicians with fifteen (15) days military leave for the current 2014-15 budgetary year.
- (c) Every October 1st hereafter, each of these dual technicians shall be entitled to an additional fifteen (15) days of military leave for each year of service in the AGR Program for the entire period of time that they are entitled to benefits under USERRA as based on their original date of entry into the AGR Program.
- (d) To implement this provision, MNG will provide counsel for the United States within thirty (30) days with a complete list of all dual technicians affected by the prior policy who were not placed on “Absent-US” status while serving in the AGR Program. MNG will provide counsel for the United States with any documentation the United States requests to confirm that the list is complete. Any dual technician not included on the list who is later determined to have in fact been affected by MNG’s policy shall nevertheless be entitled to all the rights and benefits as if he had correctly been placed on “Absent-US” status on October 1, 2014.
- (e) Within thirty (30) days of the Parties agreeing upon the list above, MNG shall provide written notice to each of the dual technicians on the list that based on this Agreement, their status has been changed to “Absent-US” effective October 1, 2014; that they are entitled to the rights and benefits of that altered status as of that date; that they have been credited with fifteen (15) days of paid military leave for the 2014-2015 budgetary year; and that they will be credited with the fifteen (15) days of paid military leave for each future year they continue to serve in the

AGR Program for the period to which they are entitled to USERRA protections based on their original date of entry into the AGR Program.

F. DISPUTE RESOLUTION

The Parties shall attempt to resolve informally any dispute that may occur under this Agreement. The Parties shall engage in good faith efforts to resolve the issue before seeking action by the Court. If the Parties are unable to expeditiously resolve the issue, either Party may move the Court for resolution, provided that written notice is first provided to the other Party at least ten (10) calendar days in advance of taking such action.

G. JURISDICTION OF THE COURT

1. During the life of this Agreement, the Court shall retain jurisdiction over this Agreement for the purposes of enforcing its provisions, resolving any disputes that may arise between the parties under it and entering such orders as may be appropriate.

2. This Agreement shall terminate two (2) years from the date of its entry without further order of the Court.

H. COSTS

The parties shall bear their own costs in this action, including attorney's fees.

I. SCOPE OF THE AGREEMENT

1. This Agreement sets forth the entire agreement between the United States and MNG, and supersedes all other negotiations, representations or agreements, either written or oral, between the United States and MNG.

2. If any provision of this Agreement is found unlawful, only the specific provision in question shall be affected and the other provisions shall remain in full force and effect.

3. This Agreement is meant to be construed under USERRA. Future employment actions by the MNG consistent with USERRA shall not be a violation of this Agreement.

J. COMMUNICATIONS

The Parties agree that all requests from either Party to the other shall be made in writing. Moreover, all responses to written requests shall be made within fifteen (15) calendar days, or such greater time as provided by the requesting Party. Notice shall be sent to counsel of record in this case.

APPROVED and ORDERED this 12 day of March, 2015.

/s/ Nanette K. Laughrey
UNITED STATES DISTRICT JUDGE