AMERICAN ARBITRATION ASSOCIATION
Employment Arbitration Tribunal
Case No. 01-16-0004-3913

Gregory Clontz v. Northrop Grumman Corporation

PARTIAL FINAL AWARD OF ARBITRATOR[1]

This case is before the American Arbitration Association ("AAA") pursuant to a Demand for Arbitration filed on behalf of Claimant Gregory Clontz ("Claimant"), in accordance with the Employee Mediation and Arbitration Program (Corporate Procedure H103A) of Respondent Northrop Grumann Corporation ("Respondent") and an arbitration agreement between the parties dated November 12, 2003. I was appointed and took the Oath of Arbitrator on December 3, 2016. After a discovery period, on February 9-11 and 13, 2018 I conducted a hearing in Tampa, Florida, for the testimony of the parties' eleven witnesses and the receipt of voluminous documentary evidence.[2] Both parties have submitted post-hearing briefs and replies thereto.

Issue to Be Determined

Did Respondent violate the Uniformed Services Employment and Re-Employment Rights Act ("USERRA"), 38 U.S.C. Sec. 4311, by terminating Claimant's employment based on his military service?[3]

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[1] **Portions of this Partial Final Award may refer to material subject to protection under the parties' Confidentiality Order.**

[2] At the hearing, Claimant was represented by David Shlansky and Colin Hagan of the Shlansky Law Group, LLP; Respondent was represented by Mary Ruth Houston and Glennys Ortega Rubin of Shutts & Bowen LLP.

[3] In a motion *in limine* dated January 24, 2018, Claimant had sought to expand the scope of the one cause of action pled in the July 25, 2016 Complaint. On February 3, 2018, I ruled that the "attempted addition of purported claims under [38 U.S.C.] Sections 4312 and 4316 in a motion *in limine* was too late and not in compliance with the procedure for requesting to amend a pleading." Accordingly, the sole issue to be determined is whether the decision to terminate Claimant's employment as of February 1, 2016 violates Section 4311.

Factual Summary

Claimant, who was 47 years old at the time of the hearing, enlisted in the United States Air Force at age 18 and has held a top-secret security clearance since he was 19 years old. In the Air Force, he worked primarily in the security/intelligence field and eventually earned the rank of Major. In 2004, after leaving active duty and becoming an Individual Mobilization Augmentee in the Air Force Reserves, he went to work for Respondent.

During the relevant time period, he did business development work for the part of Respondent's Electronic Systems Sector known as Xetron, which develops software and hardware for the United States government. Xetron's headquarters are in Cincinnati, but Claimant worked out of Tampa, which was his preference. A co-worker named Sam Becker also did business development and worked from Colorado. Becker had no military connection.

Over the years, Claimant had various absences for military duty in accordance with Respondent's military leave policy. Some were for brief periods of time, while others were of longer duration – including one tour of ten months in Afghanistan in 2013. For the past several years, he coordinated the leaves with Lori Askew in the Human Resources Services Center. There was no evidence of either party having had a problem with any of those leaves prior to October 2015.

What was a problem, however, was an undeniable friction concerning Respondent's desire for Claimant to work at Xetron headquarters in Cincinnati rather than by himself in Tampa. Beginning in mid-2012, Claimant's boss had repeatedly told him he would have to spend at least 50% of his time in Cincinnati, but Claimant

commented on his 2012 evaluation that he would continue to work as he had in the past; in other words, he said he did not intend to comply with that instruction. At the end of 2014, the tension heightened when both Claimant and Sam Becker (who had no military attachment) were told they were expected to be full-time in Cincinnati as of January 1, 2016. And that was then exacerbated when Claimant and Becker were told in June 2015 that their start date in Cincinnati would be even sooner – August 3, 2015.

It was no secret that neither Claimant nor Becker was pleased. Becker made no attempt to comply and, after using some paid time-off, eventually left on September 11, 2015 for ICR, a small start-up company that had at least some operations that would be in competition with parts of Respondent's business. Claimant asked for a one-week postponement of the start date so that he could fulfill his annual two-week reserve duty, and then on August 10, 2015 began working during the week in Cincinnati (but turned down the relocation package and did not actually move there). He was actively trying to land some other position with Respondent in Tampa, and was also looking into possible military assignments; he was glad when, in mid-September, he received one from his home unit to stand in as head of the Human Intelligence Division at Hurlburt Field, to begin on October 7, 2015.

In late September 2015, five important Xetron employees followed Becker to ICR, and those departures seemed to put Xetron management into a tailspin – precipitating an investigation that led to actual or threatened litigation against ICR, which eventually resulted in a settlement agreement. According to Respondent, the investigation, led by Xetron Site Director Martin Simoni, revealed that Claimant had

"connections" to ICR because he knew something about the departures and may have himself considered going to ICR.[4]

The investigation about the ICR departures began during the first week in October 2015, just about when Claimant was beginning his military leave. Simoni, who had no training in conducting investigations, ordered searches of numerous company email accounts to see if certain names or words appeared, and pursued more surveillance and screening of the accounts deemed to be the most suspicious. Claimant's was one of those, and an "investigation" of him became what Simoni called a "by-product" of the initial investigation about ICR.

Without telling Claimant, Simoni obtained approval to have "rules" put on Claimant's company email account whereby Simoni could immediately see any activity. By means of a keylogger device, he also arranged for monitoring everything Claimant did on his company laptop.[5]

Although it took time to scrutinize all the emails (and Simoni had then finished reviewing only about 30-40%), on October 30, 2015 Simoni, one of his superiors (David Salisbury), and Xetron's Human Resources Manager agreed that Claimant should be terminated. Simoni testified that he nevertheless continued to review Claimant's past and current emails, and ultimately he drafted a termination letter and circulated it to the

[4] For example, Simoni testified that Claimant had "connections in [ICR]" because Claimant "knew that people had gone over to ICR" from Respondent. Simoni also cited the fact that, in the course of communicating about the death of a former co-worker, Claimant had volunteered to his former boss, Jack Wolford, the fact that five people had left at the end of September and that he "had a feeling the bleeding of talent [at Xetron] had just begun." Wolford admitted that he then tried to pry information out of Claimant regarding ICR (including whether Claimant was thinking about going there himself), but that Claimant did not respond and provided no such information.

[5] The keylogger and the 2015 Performance Review will not be the subject of extensive discussion. The evidence on those points was inconclusive, leaving much of it a mysterious puzzle that need not be solved in order to decide the issue at hand.

Human Resources Manager and to the three required people in his chain of command for their approval, which they gave.[6]

On February 1, 2016, Simoni called Claimant (still out on active duty military leave) and told him of the immediate dismissal and emailed him the termination letter setting forth the reasons.[7] The letter also included a reference to the availability of Respondent's Dispute Resolution Process.

Claimant was shocked by the tone of the letter and the substance (or lack thereof) of the accusations against him. No one had previously mentioned or asked him about any of them. The following day, he wrote to Ginger Wierzbanowski, who he thought had some managerial role over Xetron, asking for an opportunity to defend himself. Simoni told her not to respond, and she did not. Clamant chose not to participate in the corporate grievance process, and this arbitration ensued.

Legal Analysis

Claimant must first prove, by a preponderance of the evidence, that his military status or activity was a motivating factor in the decision to terminate his employment. Coffman v. Chugach Support Services, Inc., 411 F.3d 1231, 1238 (11th Cir. 2005). A "motivating factor" is one that Respondent relies upon, takes into account, or considers. Id. It need not be the sole reason for the termination, but must be "one of the factors that a truthful employer would list if asked for the reasons for its decision." Id. Circumstantial evidence may often create an inference of motivation, and that would include facts such as temporal proximity between the military activity and the adverse

[6] Respondent is not relying on an "advice of counsel" defense, but I note that in-house counsel was also involved in the termination decision and letter.

[7] There was never any rational explanation of why so much time elapsed between the October 30, 2015 consensus on termination and the act of dismissal.

employment action, as well as inconsistencies or "holes" in any non-discriminatory reasons proffered by the employer. Id.

If Claimant meets that standard, the burden shifts to Respondent to prove, by a preponderance of the evidence, that it would have made the same decision regardless of Claimant's military status; in other words, Respondent must establish that its stated non-discriminatory reasons for the termination were genuine and not pretextual. Velasquez-Garcia v. Horizon Lines of Puerto Rico, Inc., 473 F.3d 11, 17 (1st Cir. 2007). If those reasons are found to be false or otherwise not believable, an inference is permitted that military status was a motivating factor. Atteberry v. Avantair, Inc., 2009 WL 1615519, at *4 (M.D. Fla. 2009).

It is not necessary for Claimant to prove any anti-military animus *per se*, and the record here strongly suggests there was none. Many of Respondent's employees have military backgrounds or ties, and much of the company's business is related to the military. With regard to Claimant in particular, his service and connections with the military seemed to be regarded as an overall positive qualification, and Respondent had a history of accommodating his absences for reserve duty.

What must be assessed, however, are the reasons set forth in the February 1, 2016 termination letter to determine if they would in fact have legitimately caused Claimant's termination. As explained below, those reasons – and the so-called "investigation" supposedly leading to them – are, at best, questionable and, at worst, materially inaccurate and seriously flawed.

But first there is the question of whether Claimant met his initial burden of establishing, even with just circumstantial evidence, some connection between his

military service and the termination. I find that he did. It is undisputed that Simoni and the rest of the Xetron management team wanted Claimant to work full-time in Cincinnati (especially after the only other business development people left in September 2015), and that Claimant did not want to. And as of October 7, 2015, he stopped doing so . . . because he went out on a military leave of absence that was going to last until at least April 2016. In other words, his military service was part-and-parcel, and the equivalent, of a refusal to follow their instruction and be where they wanted him to be. Doubt as to his loyalty and willingness to fulfill his obligations to Xetron then turned into the "investigation" that soon produced a consensus by October 30, 2015 that Claimant should be fired. In addition to temporal proximity, there is thus a logical line of dots connecting military service to the adverse employment action.

Focus then shifts to the validity of what Respondent asserts are the legitimate non-discriminatory reasons for the termination, and an assessment of whether they would in fact have caused his dismissal regardless of his military service. Directing me to the February 1, 2016 letter as setting forth those reasons, Respondent must not only prove their validity and accuracy but must establish that "it would indeed have fired" Claimant for them. Anginoni v. Town of Billerica, 999 F. Supp.2d 318, 321 (D.Mass. 2014).

Respondent's first reason, relating to Claimant's September 29, 2015 email to Pete Folberth, a former employee of Respondent, is based on incomplete and inaccurate information. Claimant did have have a legitimate reason to tell Folberth that Respondent had not won a bid in which they were both involved. Respondent had used Folberth's name and credentials in its attempt to get the award and had him sign a commitment to Respondent to do work (either as an employee of Respondent or as a subcontractor) if the

bid were won.[8] Sam Dick, the proposal manager for Respondent, gave unrebutted testimony that Respondent does not regard plain "win/loss" information (as this was) as confidential or proprietary. Dick also gave a full and credible explanation of why and how Claimant had logically been involved with the proposal for Respondent and how the limited time frame for submitting the proposal required postponement of discussion of a work-share arrangement (between his sector and Simoni's) until they knew if they won the bid.

Simoni could have learned all that if he had communicated with Dick at any time in the months between seeing the email and the termination, but he instead waited until February 3, 2016 (after the dismissal) to talk to Dick.[9] The sole reason he gave for not talking to Dick before the termination was the fact that Dick was a "friend" of Claimant,[10] thereby implying that Dick might provide information in Claimant's favor (which Simoni apparently did not want to learn) or tip off Claimant about the investigation. Respondent's first reason for termination thus mischaracterizes and takes facts out of context, and ignores more reliable information that Simoni chose not to obtain.

The second reason is based on an August 7, 2015 email sent by Claimant to Sam Becker, who had already made it clear to everyone that he would not comply with the

[8] It is true that Folberth's son worked at ICR. But there was no evidence that Folberth leaked information to the son or even had any that he was likely to share to Respondent's detriment. Indeed, Respondent's intent, had it gotten the award, was to have Folberth be an active member of the team doing the work. Also, the fact that there was no non-disclosure agreement ("NDA") yet in place at the time of the proposal does not necessarily mean that Claimant was guilty of any wrongdoing in telling Folberth the bid had been lost. Dick's unrebutted testimony was that there are differences of opinion within Respondent as to exactly when an NDA becomes necessary.

[9] The reason for talking to Dick then was never logically explained.

[10] Dick did not deny a friendship with Claimant and was a thoroughly credible witness. No one pointed to – and it is difficult to imagine – how talking to Dick before the termination would have enabled Claimant to commit some new wrongdoing or otherwise compromise Respondent's legitimate interests. There may be certain situations where an investigation should be kept hidden from a suspect, but this was not shown to be one of them.

full-time in Cincinnati directive and would be leaving Xetron. Claimant had received an announcement of an August 13, 2015 meeting of the Tampa Chapter of an industry group, and testified that he passed it on to Becker - not to suggest that Becker attend that specific meeting, but merely to alert him to the existence of the group as a good source of future opportunities for small businesses such as ICR, where Claimant believed Becker was heading.

Claimant wrote: "You should register with AFCEA Tampa chapter as an ICR guy. Lots of SOCOM/CENTCOM type forums such as this for small business." Simoni interpreted that as a suggestion that Becker should go to that particular meeting on August 13, 2015 and identify himself as an ICR employee while he was actually still employed by Respondent. Claimant explained that was not what he was doing and agreed that such behavior would be unethical. Claimant's intent was for Becker to be aware that he should look into attending future Tampa functions once he was at ICR.

It is fair to say that the message may have lacked some clarity and precision, but there is enough ambiguity to have warranted obtaining and considering Claimant's explanation rather than jumping to the conclusion that Claimant had committed a terminable offense. The wording of the message could certainly be interpreted to say what Claimant testified was his intent.

The third reason is the accusation that Claimant misrepresented his active duty assignment that began in October 2015 as not "voluntary" in order to deceitfully receive differential pay from Respondent.[11] Simoni testified that he reached (and stood by) this conclusion because of emails Claimant had written in August - September 2015 in which

[11] The letter says that Claimant did so in an email dated September 24, 2015; the date was actually September 21, 2015.

he had been seeking out military opportunities. In doing so, however, Simoni ignored the facts that (1) the military assignment Claimant actually began in October 2015 was not one of those for which he had been "volunteering," and (2) Lori Askew, the person Respondent put in charge of implementing its military leave policy, had approved Claimant's leave as qualifying for differential pay.[12]

Simoni had never seen Respondent's military leave policy prior to the termination (in which he accused Claimant of violating the policy), and never contacted Askew to learn about it or to question her decision that Claimant qualified for differential pay. Tellingly, although Simoni supposedly believed for several months that Claimant was receiving money to which he was not entitled, he never did anything toward stopping or recouping those overpayments as they were being made (or at any other time).

The fourth reason, Claimant's removal of the ""rules" on his computer, is similarly uncompelling. There was nothing that prohibited Claimant from having his company laptop with him while on leave. No one told him that "rules" were going to be placed on it, and the October 9, 2015 test email from Nina Stasny (which tipped him off that something had been done) was a surprise and a mystery to him. When Claimant talked to Stasny to find out what was going on, she told him how he could remove the "rules" (as, she explained, anyone can do on his or her own email address), and he proceeded to do that. He knew that he had left an auto-response on his email directing business inquiries to Simoni, and no one had ever told him that was not sufficient.

Even after Simoni learned several weeks later that Claimant had removed the "rules," no one tried to communicate with Claimant about the supposed need for them so

[12] Askew reiterated and explained that approval at the hearing. Whether she was right or wrong is immaterial to the fact that she, not Simoni, was charged with responsibility for making the decision.

that Simoni could respond immediately to business messages – and no one ever tried to reinstall the "rules." That failure seriously undermines the claim that what Claimant did (according to instructions freely given by Stasny) "interfered with the Company's legitimate business interests." It may also be significant that a decision to terminate had been made (on October 30, 2015) before anyone at Xetron knew about removal of the "rules."

Even less persuasive is Respondent's final reason – that on November 29, 2015 Claimant deleted without reading a November 24, 2015 email sent from Paul Lucarelli (IT Department) to Claimant's company email address, referencing a need to update a software security system on Claimant's laptop. Once again, this accusation lacks context and a full understanding of what happened – all of which was already known by Simoni or could have been available to him if he had asked and given Claimant a chance to explain.

Indeed, the termination letter totally ignores the fact that, after an automatic out-of-office response had been sent from Claimant's company email address, Claimant followed up with Lucarelli from Claimant's personal email account, explaining that he could not return the laptop because he was out of the country and had no immediate access to the laptop that was at his home on Tampa. The evidence showed that Lucarelli forwarded these messages to Simoni or others involved in the "investigation," thus suggesting that this was organized as part of the "investigation" and was not just a plain IT update situation. Simoni's inconsistent testimony as to whether he knew Claimant had a company laptop while on leave also diminished his credibility - and added to a view of

Claimant as a victim of a witch-hunt rather than the subject of a careful, thorough and non-biased inquiry.

In short, Respondent's proferred reasons – as well as the overall "lack of trust" that they supposedly inspired – collapse like a proverbial house of cards and come far short of establishing that Claimant committed terminable offenses and would have been fired regardless of his military leave, which he was thought to be using as a means to avoid working in Cincinnati full-time.[13] Respondent's defense to the *prima facie* case thus fails, and Respondent is liable for violating 38 U.S.C. Sec. 4311.

The question then is what relief should be awarded. Subject to proof by Claimant, the statute allows for "compensation for lost wages or benefits suffered by reason of the employer's" violation. Serricchio v. Wachovia Sec., LLC, 606 F. Supp.2d 256, 258 (D. Conn. 2009), aff'd, 658 F.3d 169 (2d Cir. 2011). That amount may be reduced if the employer proves that the employee failed to mitigate his damages.

Here, the evidence on both sides was sketchy. Neither side presented pay stubs, W-2's, tax returns or any other documentation of amounts that Claimant actually earned with Respondent (or that could have been earned with Respondent if he had not been terminated). Nor was there any testimony about mitigation.[14]

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[13] Although Claimant was technically an at-will employee, testimony indicated that it was part of Respondent's "culture" that he would need to be given some reasonable justification for being terminated and Respondent would have to identify some serious transgression warranting its decision. That makes it even more startling that Claimant was given no opportunity to be heard before the draconian action was taken, especially where the nature of the accusations could so adversely affect his prospects for future work in security/intelligence either in the military or private industry.

[14] Claimant has presented with his post-hearing brief public data from the military showing what the compensation was for Claimant's pay grade in the relevant years, and asks that I take judicial notice of it. I understand Respondent's point that the request for judicial notice should technically have been made earlier (or the chart should have been introduced as an exhibit at the hearing), but see no real prejudice when it was known all along that the official data are a matter of public record.

What little there is to go on is that Claimant testified he had an annual salary of "about $145,000" in 2015 and had received an average annual increase of 2.25% each year with Respondent since 2004.[15] That means that, if he had not been terminated, his salary with Respondent was or would have been as follows: $145,000 in 2015, $148,265 in 2016, ($136,404 of which was lost after the February 1, 2016 termination), $151,601 in 2017 (all lost), and $155,012 in 2018 ($116,259 of which will have been lost through September 30, 2018). That represents a total of $404,264 in salary that was not earned with Respondent ($136,404 plus $151,601 plus $116,259) from February 1, 2016 through September 30, 2018.

From that, we need to deduct what Claimant earned in the military after the termination. Those amounts were $82,794 in the last eleven months of 2016, $92,218 in all of 2017, and $70,824 for the first nine months of 2018, for a total of $245,836. $404,264 minus $245,836 equals $158,428, which is the back pay owed for lost compensation.

Claimant also seeks recovery for an education credit of $30,600 for an online MBA program, and $34,989.60 as the value of paid time-off he would have had with Respondent. Those amounts will not be allowed inasmuch as there is insufficient evidence to support them. Claimant's testimony reflects only that he had thought about the possibility of getting an MBA, and there was no evidence as to what Respondent's (or the military's) paid time-off policies are. Even more lacking is any real evidence as to what Respondent's pension program was, who was eligible and under what conditions, or

[15] Respondent criticizes the vagueness and speculative nature of such evidence, but does nothing to refute it.

even whether the plan is still operative. Accordingly, Claimant has not proven entitlement to pension benefits or travel expenses, for which there was again no evidence.

The statute allows for recovery of liquidated damages (equal to the amount of the back pay) if the employer's violation of USERRA was "willful." Case law attempting to attach meaning to the term "willful" explains that the employer need not have intended to violate the statute; rather, the standard is more that of whether the employer showed "reckless disregard" of its statutory obligations in taking the adverse action.

Here, I find such "reckless disregard" in the bungled and one-sided "investigation," the overzealous rush to judgment against Claimant, and the unquestioning managerial decision-making and approval of the termination without knowledge of the correct and complete facts[16] – all set against the backdrop of, and interwoven with, the common knowledge that military leave was enabling Claimant to avoid fulfilling his obligation to be in Cincinnati full-time. Although the decision-makers knew that military service should not be the reason for termination (and denied that it was), they made no reasonable effort to assure that they were acting based on other legitimate reasons unrelated to Claimant's military service, Accordingly, this is an appropriate situation for an award of liquidated damages in the amount of $158,428.

Claimant should also be entitled to a year of front pay, which would be his differential from October 2018 through September 2019. As noted above, the annual differential in 2018 would be $155,012 minus $94,432 equals $60,580. In the absence of

[16] The testimony of David Salisbury, one of the managers who had to approve the termination, demonstrated the carelessness (and failure to pin down facts) that scarred the termination process. With seemingly no regard for whether he knew what he was talking about, he proclaimed that Claimant was a "traitor" because he had given substantive information to Folberth about a project that Respondent had secured and was actively working on. The facts are that Claimant told Folberth only that Respondent had not won a particular bid, in which Respondent had asked Folberth to be involved and for which Respondent had represented to the customer that it would have Folberth and his talents available to do the work, if the bid were won – which it was not.

any evidence as to what the military pay will be in 2019, I will use $60,580 as the total amount of front pay for the twelve-month period of October 2018 - September 2019.

The parties have agreed that the issues of attorneys' fees and litigation expenses (including the administrative fees of the AAA and the arbitrator's fees) would be deferred until after this liability determination, and no evidence or arguments have yet been presented on those issues. As a prevailing party, Claimant may pursue those claims and, unless otherwise agreed upon by counsel, should do so according to the following schedule: Claimant's application for fees and expenses will be due by September 14 and any opposition from Respondent will be due by September 28, 2018.

Award

For the reasons stated above, I hereby award as follows:

1. Respondent is liable for $158,428.00 in back pay compensation for violation of 38 U.S.C. Sec. 4311.

2. Respondent is liable for liquidated damages of $158,428.00 for willful violation of 38 U.S.C. Sec. 4311.

3. Respondent is liable for front pay compensation of $60,580.00 for violation of 38 U.S.C. Sec. 4311.

4. In accordance with Paragraphs 1-3 above, Respondent is therefore liable for a total of $377,436.00 for back and front pay and liquidated damages, and is ordered to pay that amount by no later than September 30, 2018.

5. The amount set forth in Paragraph 4 above will bear pre-judgment interest for the period of February 1, 2016 through September 30, 2019 at the statutory rate set by the

State of Florida. Respondent is ordered to pay that pre-judgment interest to Claimant by no later than September 30, 2018.

6. Except for Claimant's claims for litigation expenses and attorneys' fees (on which proof has been requested according to the schedule set forth above), this Partial Final Award is in full resolution of all claims submitted to this arbitration, and any claims not specifically mentioned above are hereby denied.[17]

7. This Partial Final Award shall remain in effect until such time as a Final Award is rendered.

DATED: August 27, 2018

/s/ Edith N. Dinneen
EDITH N. DINNEEN
Arbitrator

[17]Although they may not have been expressly mentioned herein, all other evidence and arguments made by the parties have been considered.