

1 MATTHEW Z. CROTTY
Crotty & Son Law Firm, PLLC
2 905 West Riverside, Suite 404
Spokane, WA 99201-0300
3 Telephone: 509.850.7011

4 THOMAS G. JARRARD
The Law Office of Thomas G. Jarrard, PLLC
5 1020 N. Washington
Spokane, WA 99201
6 Telephone: 425.239.7290

7 Attorneys for Plaintiff

8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE WESTERN DISTRICT OF WASHINGTON**

10 CALEB GUTTING,

11 Plaintiff,

12 v.

13 SEA CON, LLC,

14 Defendant.

NO. 20-cv-00381-RSL-TLF

FIRST AMENDED COMPLAINT FOR
VIOLATIONS OF USERRA, DEMAND
FOR DAMAGES, AND TRIAL BY JURY

**EXEMPT FROM FILING FEES
UNDER 38 U.S.C. § 4323(h)(1)**

15 **COMES NOW** Plaintiff, Caleb Gutting, through his attorneys, and alleges as follows:

16 **I. PARTIES AND JURISDICTION**

17 1.1 Plaintiff Caleb Gutting worked within the Western District of Washington at all
18 times pertinent hereto.

19 1.2 Defendant doing business as, SEA CON, LLC is registered to do business in the
20 State of Washington under UBI 601 999 210, EIN 91-2014742, and maintains a place of business
21 at 165 NE Juniper Street, Issaquah, Washington 98027-2518.

22 1.3 All acts complained of occurred in the Western District of Washington.

23 1.4 The Federal Court for the Western District of Washington has jurisdiction over
24 this matter under 38 U.S.C. § 4323(b)(1)-(3), 28 U.S.C. § 1331, and 28 U.S.C. §1367.

1 1.5 Venue is proper in the Federal Court for the Western District of Washington under
2 38 U.S.C. § 4323(c)(1)-(2) and the Defendant exercised authority in this judicial district. This
3 Court has personal and subject matter jurisdiction.

4 **II. FACTS**

5 2.1 Plaintiff incorporates the above paragraphs as set forth verbatim herein.

6 2.2 Defendant hired Mr. Gutting on or about October 1, 2015.

7 2.3 Defendant hired Mr. Gutting to work as a Construction Superintendent. At the
8 time of his hire SEA CON employed between 10-15 Construction Superintendents. Of those
9 Construction Superintendents, Mr. Gutting was the only one who served in the military reserves.

10 2.4 At all times relevant to this lawsuit Mr. Gutting served in the Washington Air
11 National Guard.

12 2.5 From the 2015 to the early-2017 timeframe Mr. Gutting initially worked for SEA
13 CON in the Spokane, Washington area. During that timeframe Mr. Gutting's military obligations
14 were generally one weekend per month plus two weeks each year (with additional domestic
15 operations occasionally supporting the FEMA Region 10 Homeland Response Force). And
16 during this timeframe Mr. Gutting's immediate supervisor Eric Reese supported Mr. Gutting's
17 military obligations. In fact, Mr. Gutting nominated SEA CON and Mr. Reese for an Employer
18 Support for Guard and Reserve (ESGR) award.

19 2.6 SEA CON transferred Mr. Gutting to the Seattle, Washington area in the Spring
20 of 2017.

21 2.7 Once in Seattle, Mr. Gutting began hearing negative comments regarding his
22 military service obligations. Those comments were made by, among others, Brian Yandell.

1 2.8 During the early 2017 timeframe, while discussing a pay increase, Mr. Yandell
2 said, to Mr. Gutting, “there is legally nothing we can do about your military service, but that
3 doesn’t mean there isn’t anything we can do.”

4 2.9 Mr. Yandell did not give Mr. Gutting the pay increase that Mr. Gutting requested.

5 2.10 In the late 2017 timeframe, Mr. Gutting learned of an upcoming Air National
6 Guard mobilization.

7 2.11 Mr. Gutting immediately informed Mr. Reese and Steven Caniglia (Mr. Yandell’s
8 replacement, VP of Operations) of the mobilization. Their reaction consisted of words to the
9 effect of, “ok we will adjust and plan accordingly.” At that meeting Mr. Caniglia said that upon
10 Mr. Gutting’s return he (Gutting) would likely be taking more of an office roll to further his
11 career.

12 2.12 The Air National Guard mobilized Mr. Gutting from June 24, 2018 through March
13 9, 2019. During this time Mr. Gutting served in Doha, Qatar.

14 2.13 Mr. Gutting honorably performed that service, timely notified SEA CON of his
15 intent to return to work, and returned to work.

16 2.14 Upon his return to work Steven Caniglia asked how long Mr. Gutting intended to
17 remain in the Washington Air National Guard, to which Mr. Gutting replied that he was unsure.

18 2.15 During Mr. Gutting’s employment with SEA CON the company provided its
19 employees with annual bonuses. Customarily, SEA CON paid those annual bonuses at the end
20 of the year. Indeed, Mr. Gutting received such a bonus approximately two months after his
21 October 2015 hire. SEA CON typically pays these bonuses in December, typically at or around
22 the same time as the company Christmas party. The bonuses are typically 5% of salary. However,
23 SEA CON did not give Mr. Gutting a bonus for 2018.

1 2.16 During Mr. Gutting's absence for deployment, January and March 2019,
2 Defendants hired two new Construction Superintendents.

3 2.17 Upon Mr. Gutting's return to work, SEA CON assigned him to manage a project
4 in Federal Way, Washington.

5 2.18 Knowing that the Federal Way project would ultimately end, Mr. Gutting asked
6 Kris Azizah about what project he would be working on next. Mr. Azizah told Mr. Gutting that
7 once the Federal Way project ended Mr. Gutting would go to work on the Poulsbo RV project.

8 2.19 During the late-2018-to-early-2019 timeframe SEA CON hired at least five other
9 workers who did the same or similar work as that of Mr. Gutting. One such hire was Mark
10 Vandenberg.

11 2.20 Upon information and belief, Mr. Vandenberg is not a member of the military
12 reserves.

13 2.21 Mr. Gutting's work on the Federal Way project ended on or about August 27,
14 2019.

15 2.22 On August 27, 2019, Mr. Azizah and Mr. Reese told Mr. Gutting that he was being
16 "laid off."

17 2.23 Although, Mr. Gutting had years more tenure than the superintendents that
18 Defendants hired while he was absent, those replacement superintendents continued in
19 employment after Mr. Gutting's employment was terminated.

20 2.24 Upon information and belief, Mr. Gutting was the only employee that SEA CON
21 laid off in 2019.

22 2.25 SEA CON made a profit in 2019.

23 2.26 SEA CON hired at least one other worker in 2018/2019 and paid that worker a
24 similar wage as to what SEA CON paid Mr. Gutting in 2019.

1 2.27 At all times relevant hereto, SEA CON maintained a posted notice where
2 employers customarily place notices for employees as required by 38 U.S.C. § 4334.

3 2.28 At all times relevant hereto, SEA CON maintained policies that prohibit unlawful
4 discrimination.

5 2.29 At all times relevant hereto, SEA CON had a duty to conduct itself in compliance
6 of the law, including the USERRA and ensure its agents followed the Act. The above actions by
7 SEA CON, and its agents breached those duties and are the proximate cause of Mr. Gutting's
8 damages.

9 2.30 On March 10, 2020, Mr. Gutting filed his complaint.

10 2.31 On April 6, 2020, Defendants agreed to waiver of service for the summons and
11 complaint.

12 2.32 On May 19, 2020, over nine months after Mr. Gutting's employment was
13 terminated, and over a month after being served with the complaint, Defendants' Project manager,
14 Mr. Azizeh signed a memorandum to Mr. Gutting's employment file.

15 2.33 Although the memo is purportedly retained in Mr. Gutting's employment file,
16 Defendants never provided a copy of it, or gave Mr. Gutting any notice that it was placed in his
17 file.

18 2.34 The memorandum complains that in the Summer of 2019, Mr. Gutting's project
19 construction site was messy, and that Mr. Gutting was laid off for lack of work.

20 2.35 Defendant's assertion that Gutting's position was eliminated for lack of work is
21 merely a pretext for discrimination and violation of his reemployment rights.

22 2.36 In fact, Defendants advertised an opening for Gutting's previous position shortly
23 after he was "laid off", yet never contacted Mr. Gutting.

1 2.37 Defendant's assertions regarding Gutting's job site cleanliness is merely a pretext
2 for discrimination and violation of his reemployment rights.

3 **III. CAUSES OF ACTION**

4 **CAUSE OF ACTION NO. 1 - VIOLATION OF 38 U.S.C. § 4311**

5 3.1 Defendant violated 38 U.S.C. § 4311 of USERRA, among other ways, by
6 discriminating against Mr. Gutting when Defendant denied him his bonus (for calendar year 2018)
7 and fired him (in 2019) partly because of his membership, service, or obligation to perform service
8 in the uniformed service.

9 3.2 Defendants alleged reasons for terminated Mr. Gutting's employment and denial
10 of benefits of employment are a pretext created to avoid the truth and legal liability.

11 3.3 Defendant's actions caused Mr. Gutting damages in an amount to be proven at
12 trial.

13 **CAUSE OF ACTION NO. 2 - VIOLATION OF 38 U.S.C. § 4316**

14 3.4 Defendant violated USERRA's benefit protections statute by denying Mr. Gutting
15 benefits of employment in 2018. Without limitation, Defendant violated § 4316 by failing to pay
16 Mr. Gutting the annual bonus as required by the law.

17 3.5 Defendant further violated USERRA, 38 U.S.C. § 4316(c)(1) by firing Mr. Gutting
18 within a year of his return from military duty.

19 3.6 Defendants alleged reasons for terminated Mr. Gutting's employment and denial
20 of benefits of employment are a pretext created to avoid the truth and legal liability.

21 3.7 Defendant's actions caused Mr. Gutting damages in an amount to be proven at
22 trial.

23

24

1 **CAUSE OF ACTION NO. 3 - VIOLATION OF THE WASHINGTON LAW AGAINST**
2 **DISCRIMINATION RCW §§ 49.60.030 & 180**

3 3.8 The Defendant violated the Washington Law Against Discrimination by denying
4 Mr. Gutting his annual bonus for 2018 and terminating his employment in 2019.

5 3.9 Defendant's actions caused Mr. Gutting damages in an amount to be proven at
6 trial.

7 **CAUSE OF ACTION NO. 4 – VIOLATION OF USERRA 38 U.S.C. § 4312.**

8 3.10 Defendants' actions violated 38 U.S.C. §§ 4312 and 4313 by, among other things,
9 failing to promptly reemploy Mr. Gutting either in the position of employment in which he would
10 have been employed if his continuous employment with Defendant had not been interrupted by
11 his military service, or a position of like seniority, status and pay, the duties of which Mr. Gutting
12 was qualified to perform.

13 3.11 Defendants alleged reasons for denying Mr. Gutting prompt, and proper
14 reemployment, status, pay and benefits of employment and continued employment are a pretext
15 created to avoid the truth and legal liability.

16 **CLAIM FOR LIQUIDATED DAMAGES**

17 3.12 The Defendant either knew or showed reckless disregard for whether its conduct
18 was prohibited under the provisions of USERRA, and its conduct was willful as defined by 38
19 U.S.C. § 4323(d), 20 C.F.R. § 1002.312(c), because Defendant knew or should have known that
20 its intended actions violated the law and the Defendant carried out said illegal conduct with
21 knowledge and responsibility.

22 3.13 To the extent that any contract, agreement, collective bargaining agreement, policy
23 or practice of the Defendant constitutes any limitation on Mr. Gutting's rights under USERRA, it
24 is illegal, null and void, inapplicable and of no force or effect pursuant to 38 U.S.C. § 4302.

1 **IV. PRAYER FOR RELIEF**

2 4.1 Plaintiff respectfully demands a jury trial as to his USERRA and his state law
3 claims and further to be awarded compensation for all injury and damage suffered. To wit:

4 a. both economic and non-economic damages in the amount to be proven at
5 trial including back pay, front pay, lost benefits of employment, negative tax
6 consequences of any award;

7 b. liquidated damages, exemplary damages, general damages and punitive
8 damages as provided by law; and,

9 c. reasonable attorney and expert fees, and costs, pursuant to 38 U.S.C. § 4323
10 and as otherwise provided by law.

11 4.2 Under USERRA, a court may order equitable remedies, including reinstatement
12 and recoupment of any loss of wages or benefits. 38 U.S.C. § 4323(d)(1) (A, B).

13 4.3 USERRA also empowers a court to use “its full equity powers, including
14 temporary or permanent injunctions, temporary restraining orders, and contempt orders, to
15 vindicate fully the rights or benefits” of the service member. *Id.* § 4323(e). A court may award
16 the prevailing party reasonable attorneys’ fees, expert witness fees, and other litigation expenses.
17 *Id.* § 4323(h)(2).

18 4.4 Based on the violations discussed previously, Plaintiff asks the Court for the
19 following:

20 a. Declare that Defendant's failure to pay the 2018 bonus and the 2019
21 employment termination was unlawful and violated USERRA, 38 U.S.C. §§
22 4311(a) & 4316;

23 b. Declare that Defendant’s violations of USERRA were willful pursuant to,
24 38 U.S.C. § 4323(d)(1)(C);

- 1 c. Award plaintiff general damages.
- 2 d. Order such other relief as may be just and proper.

3 DATED this July 17, 2020.

4 /s Thomas G. Jarrard
5 THOMAS G. JARRARD
6 The Law Office of Thomas G. Jarrard, PLLC
7 1020 N. Washington
8 Spokane, WA 99201
9 425-239-7290

10 /s Matthew Crotty
11 MATTHEW Z. CROTTY
12 Crotty & Son Law Firm, PLLC
13 905 West Riverside, Suite 404
14 Spokane, WA 99201
15 Telephone: 509.850.7011

CERTIFICATE OF SERVICE

I certify that on July 17, 2020, I caused the forgoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the all counsel of record.

I certify that I have caused to be transmitted via U.S. Mail or email the document to the following non-CM/ECF participant/s: None

/s Thomas G. Jarrard
THOMAS G. JARRARD
The Law Office of Thomas G. Jarrard, PLLC
1020 N. Washington
Spokane, WA 99201
Telephone: (425) 239-7290
tjarrard@att.net