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

11 BRETT GAILEY,

12 Plaintiff,

13 v.

14 THE CITY OF EVERETT,

15 Defendant.

Case No. 19-cv- 859

PLAINTIFF’S COMPLAINT FOR  
VIOLATIONS OF THE UNIFORMED  
SERVICES EMPLOYMENT AND  
REEMPLOYMENT RIGHTS ACT,  
DEMAND FOR DAMAGES, AND JURY  
TRIAL

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

17 **I. INTRODUCTION**

18 1. This civil action is brought pursuant to the Uniformed Services Employment and  
19 Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301 - 4335 (“USERRA”) and is exempt from  
20 filing fees under 38 U.S.C. § 4323(h)(1).

21 2. Plaintiff, Brett Gailey, by the undersigned attorneys, avers as stated herein.  
22

23 **II. PARTIES**

1           3.       Mr. Gailey was at all times pertinent to this lawsuit a resident of the State of  
2 Washington, an employee of the City of Everett Police Department (“EPD”), and a member of  
3 the Army National Guard or Army Reserves.

4           4.       Defendant, City of Everett, is an employer as defined by 38 U.S.C. § 4323(i).

### 5                               **III.     JURISDICTION AND VENUE**

6           5.       The Federal Court for the Western District of Washington at Seattle has personal  
7 jurisdiction over the parties and subject matter jurisdiction for the claims in this complaint  
8 pursuant to 38 U.S.C. § 4323(b)(3), 28 U.S.C. § 1331, and 28 U.S.C. § 1367(a) as it relates to Mr.  
9 Gailey’s claim for violation of the Washington Law Against Discrimination (“WLAD”).

10          6.       Venue is proper in the Federal Court for the Western District of Washington at  
11 Seattle under 38 U.S.C. § 4323(c) and 28 U.S.C. § 1391(b) because the acts and omissions in this  
12 complaint occurred in this District.

### 13                               **IV.     FACTS**

14          7.       Mr. Gailey applied for work as a patrol officer with the EPD in early 2004. As  
15 part of the application process Mr. Gailey disclosed he was a member of the Idaho Army National  
16 Guard. Knowledgeable of Mr. Gailey’s Army National Guard status the EPD’s then-Chief, Jim  
17 Scharf, asked Mr. Gailey (during a February 2004 interview) whether Mr. Gailey was going to  
18 get deployed. At that time Mr. Gailey was in a non-deployable unit which, in turn, led Mr. Gailey  
19 to state he was not in a deployable unit.

20          8.       Immediately after this interview the EPD offered Mr. Gailey a police officer  
21 position to start on or about April 4, 2004.

1           9.       Towards the end of February 2004, the Idaho Army National Guard involuntarily  
2 transferred Mr. Gailey to a deployable unit and involuntarily ordered him to active duty starting  
3 April 4, 2004. These orders included a tour in Iraq.

4           10.      Mr. Gailey immediately informed Chief Scharf of the deployment and asked that  
5 EPD keep his (Gailey's) position open until he returned from Iraq. Chief Scharf said "no."

6           11.      Knowing the EPD's refusal to keep his position open violated federal law, Mr.  
7 Gailey contacted the Employer Support for Guard and Reserves (ESGR) who, in turn, ultimately  
8 convinced the EPD to keep Mr. Gailey's position open until his return from Iraq.

9           12.      Mr. Gailey returned from Iraq in November 2005. Upon returning, Mr. Gailey  
10 immediately contacted EPD Lieutenant Steve Uram and told Mr. Uram he was ready to come to  
11 work as soon as possible. Mr. Uram told Mr. Gailey he needed to take a second background  
12 investigation, psychological evaluation and polygraph before he could start. These are steps that  
13 Mr. Gailey had already completed prior to his initial hiring.

14           13.      Nonetheless, Mr. Gailey re-took the polygraph (and other) examinations. Mr.  
15 Gailey noted the questions asked in the second (2005) polygraph examination were the same as  
16 the ones he took a year earlier (2004) except for an additional question which asked: "In February  
17 2004, did you know you were going to be deployed while interviewing with Chief Scharf?"

18           14.      Mr. Gailey answered "no" to that question. Mr. Gailey passed the polygraph.

19           15.      Having passed (a second time) the tests he previously passed, Mr. Gailey reported  
20 to work at the EPD on January 6, 2006.

21           16.      Mr. Gailey received his first paycheck shortly thereafter. Upon receiving his first  
22 paycheck he learned the EDP listed his hire date as January 6, 2006, as opposed to April 4, 2004  
23 an error that could result in Mr. Gailey not receiving certain longevity and retirement pay.

1           17.     Mr. Gailey tried to get the EPD to change the hire date, but EPD refused. On or  
2 about mid-February Mr. Gailey contacted the ESGR who, in turn, convinced the EPD to change  
3 Mr. Gailey's hire date to April 4, 2004. The EPD corrected Mr. Gailey's hire date on or about  
4 the end of April 2006.

5           18.     On or about March 1, 2007 Mr. Gailey walked past Lieutenant Theodore Olafson's  
6 office. At this time, Lieutenant Olafson was Mr. Gailey's Patrol Lieutenant. Mr. Olafson called  
7 Mr. Gailey into his office. He began small talk with Mr. Gailey and asked Mr. Gailey how long  
8 he had been with the department. Mr. Gailey told him he had been with the department since  
9 April 2004 but did not actually start on the street until January 2006 because of his deployment.

10           19.     Mr. Olafson then said, "Oh yeah, you're that guy." Mr. Gailey asked Mr. Olafson  
11 what he meant by that to which Mr. Olafson replied, "you're the guy we should not have hired."  
12 Mr. Gailey asked Mr. Olafson to elaborate to which Mr. Olafson said words to the effect "the  
13 department shouldn't have held your position since you were not actually hired." Mr. Gailey told  
14 Mr. Olafson he was hired, and federal law required the department hold his position while  
15 deployed. Mr. Gailey then asked whether he (Gailey) was doing a good job to which Mr. Olafson  
16 said, "you're doing very well but you should not have been hired because you're one of those  
17 guys always looking for an angle." Mr. Olafson defined "angle" as someone who was "selfish."  
18 Mr. Gailey thought Mr. Olafson's comment was misinformed given that Mr. Gailey had just  
19 returned from an 18-month combat deployment.

20           20.     On or about July 1, 2007, Sergeant Mike Jesmer (Mr. Gailey's Patrol Sergeant)  
21 pulled Mr. Gailey aside and told Mr. Gailey he (Jesmer) had a conversation with Sergeant Gary  
22 Woodburn in which Mr. Jesmer told Mr. Woodburn that Mr. Gailey was a good officer and  
23 investigator. Mr. Woodburn told Mr. Jesmer that Mr. Gailey was a "trouble maker" because he  
24

1 fought for his job when he deployed. Sergeant Jesmer ended the conversation by telling Mr.  
2 Gailey to “be careful” because people, in the department, had formed opinions of Mr. Gailey  
3 because of his military service and deployment.

4 21. As of the date of this complaint Mr. Olafson remains employed with EPD, has  
5 influence over EPD’s hiring and promotional decisions, and, upon information and belief, played  
6 a part in deciding not to promote Mr. Gailey as further described below.

7 22. The Army National Guard deployed Mr. Gailey to Iraq from May 2010 to  
8 December 2011.

9 23. Mr. Gailey returned to work in early 2012.

10 24. In the March 2013 timeframe Sergeant Karen White became Mr. Gailey’s  
11 supervisor. Mr. Gailey and Ms. White enjoyed a good working relationship, but that relationship  
12 began to change as manpower issues increased in the department.

13 25. During the 2013 timeframe Mr. Gailey was a member of Region One SWAT.  
14 Region One SWAT is a combined EPD and Snohomish County Sheriff’s Office (SCSO) team.  
15 During this time Mr. Gailey had recently transferred to a new assignment in an Army unit located  
16 in Japan. Mr. Gailey’s military commitment to that unit required he complete 36 days of training,  
17 in Japan, during a fiscal year.

18 26. The relationship with Sergeant White began to sour once Mr. Gailey began to  
19 participate in those military duties. Ms. White often confronted Mr. Gailey with being away too  
20 much. And in response to Ms. White’s frustration, Mr. Gailey opposed Ms. White’s negative  
21 attitude to his military service by explaining military leave was a legislated benefit and federally  
22 protected. These conversations occurred in the Fall of 2014.

1           27.     Sergeant White then began to excessively scrutinize Mr. Gailey's patrol work. Mr.  
2 Gailey's yearly evaluation ending in April 2015 contained a complete blindsiding critique far  
3 beyond the normal criticisms found in a patrol evaluation. As part of a corrective action based  
4 upon this April 2015 evaluation EPD told Mr. Gailey he could no longer apply for additional  
5 training, specifically SWAT training, nor serve in an Acting Sergeant capacity.

6           28.     However, from November 30, 2015 through December 1, 2015, Sergeant White  
7 disregarded those duty restrictions and her April 2015 critique of Mr. Gailey's performance by  
8 allowing Mr. Gailey to serve as Acting Sergeant during that timeframe. Shortly thereafter,  
9 Lieutenant Robert Goetz downgraded Mr. Gailey from Acting Sergeant, not based on account of  
10 performance by Mr. Gailey while he served as Acting Sergeant, rather because of Sergeant  
11 White's prior (April 2015) critique of his performance.

12           29.     In 2015 Mr. Gailey spoke with Sergeant James Collier, the EPOA President.  
13 During that conversation Mr. Collier told Mr. Gailey of a discussion with Ms. White in which she  
14 complained about Mr. Gailey's use of military leave, vacation leave and absences due to SWAT  
15 training. He also said he was aware of Ms. White complaining to Sergeant Phil Erickson about  
16 the same issues, specifically Ms. White complaining to Mr. Erickson about Mr. Gailey's military  
17 leave to Japan and that it upset her that Mr. Gailey was allowed time off while in Japan to enjoy  
18 the culture and people of Japan.

19           30.     In May 2016 Mr. Gailey participated in the Sergeant's examination process. The  
20 process included a written examination of laws, policy, and procedure along with an oral board  
21 with Sergeants and Lieutenants and a working assessment center.

22           31.     At the completion of the examination process Mr. Gailey was ranked number two  
23 (2) out of nine (9) for the 2016-2018 Sergeants' list.

1           32.     However, Chief Dan Templeman choose to promote Timothy McAllister to  
2 Sergeant even though Mr. McAllister was ranked number 9 out of 9 on the 2016-2018 Sergeant's  
3 list.

4           33.     On or about July 11, 2016, Sergeant White stopped serving as Mr. Gailey's  
5 supervisor and Sergeant Timothy Morgan took over as Mr. Gailey's supervisor.

6           34.     From August 11, 2016 to September 1, 2016, Mr. Gailey took military leave. On  
7 or about September 2, 2016 Mr. Gailey returned to work. Shortly thereafter Mr. Gailey was called  
8 into Lieutenant Bruce Bosman's office. Lieutenant Bosman, the SWAT Commander, handed  
9 Mr. Gailey a memorandum which said due to the excessive amount of SWAT training days  
10 missed, Mr. Gailey was being removed from the sniper team and placed on the entry team. The  
11 memorandum listed five and a half missed days since April 2016. The vast majority of those  
12 "absences" were either previously approved by Lieutenant Bosman or occurred due to Mr.  
13 Gailey's military obligations.

14           35.     Mr. Gailey opposed Mr. Bosman's decision. When Mr. Gailey expressed concern  
15 that one and half days was with leadership permission, one day was for union representation, one  
16 day was for earned leave with his children and two days was for federally protected military leave,  
17 the EPD leadership changed its story. The EPD's new story was the reason for Mr. Gailey's  
18 move was because EPD needed his leadership on the entry team - - a reason that was not expressed  
19 in the memorandum.

20           36.     With the promotion of Officer Christopher Bennett to Sergeant on October 2, 2016  
21 Mr. Gailey was now ranked #1 on the Sergeant's list.

22           37.     On or about October 27, 2016, Mr. Gailey along with Master Police Officer Greg  
23 Sutherland responded to a call regarding harassing peddlers. Mr. Gailey responded to that call  
24

1 and ultimately arrested two individuals for Soliciting without a Peddler's License. Mr. Gailey's  
2 actions were approved by three supervisors MPO Sutherland, Sergeant Bryan Brockman and  
3 MPO Chris Olson on that day. A few weeks after this arrest Mr. Gailey was notified by Lieutenant  
4 Goetz and Sergeant Morgan, that he (Gailey) was going to receive a written coaching and  
5 counseling for this arrest. The three supervisors who approved Mr. Gailey's arrest of the peddlers  
6 at the time were not disciplined or admonished. In fact, Mr. Sutherland was promoted to Sergeant  
7 and Mr. Olsen was subsequently promoted to Detective.

8 38. When Lieutenant Goetz gave Mr. Gailey the coaching and counseling Mr. Goetz  
9 stated it was generated "from high up the chain of command." EPD's stated reason for the  
10 counseling was that Mr. Gailey was outside of policy and procedure with the arrest as this crime  
11 did not occur in his presence in accordance with the RCW 10.31.100 Misdemeanor Presence Rule.  
12 Although Mr. Gailey did not agree with the counseling, he accepted the coaching and counseling  
13 silently because he was now first on the Sergeant's list and did not wish to be seen negatively.

14 39. On or about January 22, 2017, the EPD passed Mr. Gailey over for promotion and  
15 instead promoted Robert Edmonds to Sergeant even though Mr. Gailey ranked higher than Mr.  
16 Edmonds on the promotion list. Chief Templeman told Mr. Gailey that because of his (Gailey's)  
17 previous evaluation and coaching he was going to promote the number three person on the list  
18 instead of Mr. Gailey. Until this instance Chief Templeman never promoted anyone but the  
19 number one candidate on the sergeant's list.

20 40. After passing Mr. Gailey over for the Sergeant openings the EPD amplified its  
21 discriminatory and retaliatory conduct towards Mr. Gailey. On February 22, 2017, Mr. Gailey  
22 received his 2016 performance review which listed nine instances of alleged poor performance.  
23 Yet, none of the instances occurred during the time in which Mr. Morgan was Mr. Gailey's  
24



1 supervisor --- the previous eight months. One report was from the supervisor time of Ms. White  
2 and the rest are during the supervisory time of Mr. Sutherland. During the timeframe germane to  
3 the February 22, 2017, evaluation Mr. Gailey wrote in excess of 100 reports, but the evaluation  
4 cited only nine of those reports (one including a traffic stop) as deficient. Mr. Gailey shared the  
5 evaluation with MPO Greg Sutherland and Sergeant James Collier who agreed the evaluation was  
6 “petty.” For example, the newly implemented reporting platform (New World) upon which  
7 reports are written, repeatedly gave other EPD officers significant difficulty, but EPD did not take  
8 that into account in issuing Mr. Gailey his performance evaluation.

9 41. Underscoring the pretextual nature of the performance evaluation is that it  
10 contained a critique of his leadership capabilities (Improvement Needed) yet, in the same breath,  
11 noted that “Officer Gailey is not currently assigned to a leadership position”. Indeed, a heavily  
12 redacted email (dated March 24, 2017, GAILEY0002) obtained from the U.S. Department of  
13 Labor/VETS (more on that below) reveals at least one person expressed concern over Mr. Gailey  
14 being rated for “leadership” as doing so would result in EPD holding Mr. Gailey to a higher  
15 standard than his co-equals. Another heavily redacted email (dated March 28, 2017,  
16 GAILEY0044) reveals the EPD wanted the PIP to “make sense to an un-involved reader.”

17 42. After receiving the 2016 Performance Review, Mr. Gailey sought to write a  
18 rebuttal prior to accepting it. Mr. Gailey told Sergeant Morgan he wished to submit a rebuttal but  
19 was told, by Sergeant Morgan, he had to sign and accept the evaluation prior to leaving for  
20 military duty. Out of fear of continued management pressure Mr. Gailey signed the evaluation  
21 before making a complete rebuttal.

22 43. Mr. Gailey took military leave from February 25, 2017 to March 18, 2017.  
23  
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1           44.     On March 30, 2017, Lieutenant Goetz, Sergeant Morgan, and Lieutenant Olafson  
2 (who was replacing Lieutenant Goetz) summoned Mr. Gailey to an “impromptu meeting.” This  
3 meeting was run by Lieutenant Goetz with the purpose of issuing Mr. Gailey a Performance  
4 Improvement Plan (PIP).

5           45.     Unquestionably, the PIP was (like the 2016 Performance Review) a pretext  
6 designed to cover up EPD’s discriminatory and retaliatory denial of Mr. Gailey’s promotion to  
7 Sergeant. Indeed, after receiving the PIP, Mr. Gailey met with Mr. Olafson and asked Mr. Olafson  
8 if he would (as Mr. Gailey’s new lieutenant) critically review Mr. Gailey’s past two evaluations  
9 with the purpose of helping Mr. Gailey improve his performance. Lieutenant Olafson agreed to  
10 do so; however, as of the date of this lawsuit Mr. Olafson has not done so even though Mr. Gailey  
11 (on May 16, 2017) asked Mr. Olafson if he had reviewed the evaluations. The import of this is  
12 clear: had EPD truly cared about “improving” Mr. Gailey’s performance it logically follows that  
13 his supervisor (Olafson) would work with Mr. Gailey in doing so.

14           46.     The pretextual nature of the PIP did not end there, for the PIP said Mr. Gailey was  
15 to be observed by Sergeant Morgan. Sergeant Morgan then gave Mr. Gailey reading assignments  
16 that had nothing to do with Mr. Gailey’s alleged performance defects. When pressed on this  
17 inconsistency Sergeant Morgan said he felt uncomfortable talking with Mr. Gailey because he  
18 feared that Mr. Gailey would sue the EPD.

19           47.     On June 17, 2017, Mr. Olafson and Mr. Goetz issued Mr. Gailey a Documented  
20 Coaching and Counseling (DC&C) for a vehicle pursuit incident that occurred on February 20,  
21 2017. This involved an incident in which a vehicle left the scene of a hit and run accident. The  
22 June 17, 2017, interview violated section 31.0 page 343-344 of the Everett Police Department  
23 Procedure Manual.

1 48. Mr. Gailey's PIP "final review" was to take place on May 30, 2017, however that  
2 final review did not occur until July 5, 2017. Between May 30, 2017 and July 5, 2017, Mr. Gailey  
3 asked Sergeant Morgan and Lieutenant Olafson for a final review but none of those individuals  
4 meaningfully responded to Mr. Gailey's requests.

5 49. On June 21, 2017, Mr. Gailey was again passed over for promotion. Officer  
6 Stephen Ross was promoted instead.

7 50. Deputy Chief St. Clair told Mr. Gailey he was passed over for promotion because  
8 of his 2015 and 2016 performance reviews and being on a PIP.

9 51. On July 5, 2017, EPD removed Mr. Gailey from the PIP.

10 52. During Mr. Gailey's near fifteen years at the EPD he applied for several positions.  
11 Although more than qualified for these positions he was not appointed to any of the following:

- 12 • Criminal Intelligence Unit 2006- not chosen although Mr. Gailey's  
13 military background is in intelligence.
- 14 • Criminal Intelligence Unit 2013- Passed over for junior officer.
- 15 • Person's Crimes Unit- passed over for junior officer.
- 16 • Sex Crimes Unit 2015- passed over even though three of the four board  
17 members later told Mr. Gailey they were surprised he did not get the  
18 position because they said he came out on top.
- 19 • Sex Crimes Unit 2016- passed over for junior officer.  
20 School Resource Officer- Applied three different times in years 2012,  
21 2014, and 2015- passed over for junior officers.

22 53. Often, after returning from military leave, Mr. Gailey's time away has been the  
23 center of jokes by supervisors. Sergeants Kevin Fairchild and Margie Anders (Retired) often  
24 characterized Mr. Gailey's time back as "floating work days" meaning Mr. Gailey is only there  
for a few days of work. This joking attitude has spread to fellow officers as they see it as  
acceptable by supervisors.

54. To the extent EPD takes the position that Mr. Gailey's "performance" was the  
reason for his non-selection to the above-referenced positions that explanation is a mere cover up

1 of discrimination and retaliation as Mr. Templeman, the person who made the decisions not to  
2 promote Mr. Gailey, has allowed others (non-military reserve or national guard) under his  
3 command to remain employed and promoted even though they have done far worse, during the  
4 exact same timeframe.

5 55. For example, it is common knowledge Captain David Fudge had a stalking  
6 domestic relationship with a female detective within the department. Further, on or about July 3,  
7 2017, Captain Fudge was involved in a traffic accident with his department issued take home car.  
8 This occurred while Captain Fudge was making a traffic stop outside the city of Everett which he  
9 did not call out on. Despite the seriousness of these incidents, Captain Fudge, who has no military  
10 obligations, was not held accountable although these matters are widely known and talked about  
11 within the Officer ranks.

12 56. Upon information and belief, Lieutenant Robert Goetz was the recipient of a  
13 temporary protection order in 2016. This order was initiated by a civilian female member of the  
14 department whom he had been dating. The order stated he could not have contact with her, and  
15 he could not be in possession of firearms. While this order was in effect, Lieutenant Goetz, who  
16 has no military obligations, continued in his patrol lieutenant position although it required him to  
17 carry a firearm.

18 57. On November 10, 2017, Mr. Gailey attended the EPOA Retirement Dinner.  
19 During that dinner EPD's second in command, Deputy Chief Mark St. Clair, who has no military  
20 obligations, handed out edible underwear and sex toys to female officers as part of a prize game.  
21 Mr. Templeman was present for the dinner, witnessed Mr. St. Clair's actions, and did nothing to  
22 stop it. There were several female civilians, mostly Officer's wives, present who were highly  
23 offended by this behavior.

1           58.     Upon information and belief, Mr. Templeman did not discipline Mr. St. Clair for  
2 his conduct at the dinner.

3           59.     On November 13, 2017, Mr. Morgan in briefing attended by Mr. Gailey, MPO  
4 Sutherland, and Officer Keith Christensen, described attending a hearing with DSHS reference  
5 his child. Mr. Morgan bragged he attended in his police uniform and laughed how it obviously  
6 intimidated the DSHS representative. Mr. Morgan said the representative was obviously  
7 intimidated while Mr. Morgan asked him questions about his child's case. Mr. Morgan, who has  
8 no military obligations, was on his own time at the time of this hearing. Upon information and  
9 belief, Mr. Morgan did not receive discipline or counseling for this conduct.

10          60.     On or about September 23, 2013, the EPD placed Sergeant Morgan on a  
11 performance improvement plan regarding, among other things, incomplete reports/investigations  
12 and lack of communication with chain of command yet the EPD promoted Morgan to Sergeant  
13 on January 8, 2016.

14          61.     On or about September 12, 2013, the EPD issued Greg Sutherland a Letter of  
15 Reprimand for violating multiple department policies yet the EPD promoted Sutherland to  
16 Sergeant on June 25, 2018.

17          62.     Upon information and belief Mr. Gailey is the only EPD employee who has  
18 complained to the ESGR about EPD violating USERRA.

19          63.     On or about October 19, 2017, Mr. Gailey filed a USERRA complaint with the  
20 DOL/VETS in which he alleged that EPD's passing him over for Sergeant violated USERRA.

21          64.     Thereafter the DOL/VETS informed EPD of Mr. Gailey's claim.

22          65.     EPD disputed Mr. Gailey's claim.

1           66.     On or about November 22, 2017, the DOL/VETs determined the EPD violated Mr.  
2 Gailey's USERRA rights by passing him over for promotion in January and April 2017 and based  
3 its decision on Mr. Templeman's deviation from his prior practice of promoting the next highest  
4 person on the promotion list when it came to promoting Mr. Gailey.

5           67.     Not liking the DOL/VETs determination that EPD violated USERRA, the EPD,  
6 on December 12, 2017, at 10:03 AM and through its yet-to-be-identified agent, informed the  
7 DOL/VETS that "other military reserve employees have not had performance issues," that Mr.  
8 Gailey has performance issues, and that the DOL should infer from that line of reasoning that the  
9 EPD did not discriminate.

10          68.     The EPD's December 12, 2017, 10:03 AM email to the DOL was, at a minimum,  
11 misleading because none of the individuals EPD promoted over Mr. Gailey were "other military  
12 reserve employees" as none of them were (a) actively serving members of the military reserves  
13 and (b) none of them had accused EPD of violating federal law.

14          69.     On December 12, 2017 at 1:38 PM the EPD sent another email to the DOL in  
15 which EPD represented that it had "hired 20 veterans or active duty personnel."

16          70.     Upon information and belief, *none* of those above-referenced 20 individuals had  
17 ongoing military reserve obligations but instead had either (a) fulfilled their military service  
18 obligation or (b) were in the process of leaving active duty but would have no military reserve  
19 obligation (i.e. an obligation that required the person to leave the EPD to serve in the military)  
20 once they left active duty and began work at the EPD.

21          71.     On or about December 19, 2017, the DOL again determined the EPD's failure to  
22 promote Mr. Gailey to Sergeant in January 2017 violated USERRA.

1           72.     On January 31, 2018, an unknown person contacted the DOL/VETS and provided  
2 written document that an April 8, 2016, critique of Mr. Gailey’s performance “may shed some  
3 light on how Brett is being treated differently due to his military service; and this is just not a  
4 performance issue as the City is trying to portray it.”

5           73.     On or about March 8, 2018, the DOL/VETS again sustained Mr. Gailey’s  
6 USERRA complaint.

7           74.     On April 22, 2018, Mr. Morgan called Mr. Gailey into his office with Sergeant  
8 Fairchild present. During this meeting, Mr. Morgan confronted Mr. Gailey regarding an arrest he  
9 had made in February 2018. During this arrest Mr. Gailey found an illegal knife on the suspect  
10 and charged him accordingly. Mr. Morgan advised Mr. Gailey during this meeting he had  
11 measured the knife and found it under the 3-inch requirement necessary for charging. The  
12 meeting ended. Mr. Gailey re-measured the knife and reconfirmed that the knife was over three  
13 inches.

14           75.     Additionally, at this April 22, 2018 meeting Mr. Morgan spoke with Mr. Gailey  
15 reference a lost Adult Protective Services (APS) complaint. This discussion ultimately ended  
16 with Mr. Gailey receiving (on May 18, 2018) a DC&C for failure to investigate an Adult  
17 Protective Services Complaint. This DC&C was issued in violation to Mr. Gailey’s right to  
18 privacy (Mr. Morgan illegally searched Mr. Gailey’s personal bag) as well Mr. Morgan did not  
19 afford Mr. Gailey his right to have a union representative present during this counseling session.  
20 This incident occurred shortly before Mr. Templeman promoted four Officers to Sergeant.  
21 Clearly, EPD wanted to “paper the file” shortly before Mr. Gailey was eligible for another  
22 promotion.

23           76.     On June 5, 2018, EPD promoted Craig Davis to Sergeant.  
24

1 77. On June 18, 2018 EPD promoted Jeff Pountain to Sergeant.

2 78. The EPD passed Mr. Gailey over for promotion to Sergeant even though he ranked  
3 first on the Sergeant's list and ranked ahead of Messrs. Davis and Pountain.

4 79. Upon information and belief Mr. Gailey is the only EPD employee who has  
5 complained to the DOL/VETS about EPD violating USERRA.

6 80. On November 22, 2018, EPD allowed Mr. Gailey to serve as acting sergeant and  
7 has since served as acting sergeant several times since coming under the supervision of Sergeant  
8 Davis.

9 81. Upon information and belief, the EPD is a party to contracts with the State of  
10 Washington which prohibits the EPD from discrimination against veterans and military service  
11 members and further evidence of its knowing and reckless disregard for the protections afforded  
12 a service member.

13 82. Upon information and belief, the EPD is a party to contracts with the United States  
14 which prohibit the EPD from discrimination against veterans and military service members and  
15 further evidence of its knowing and reckless disregard for the protections afforded a service  
16 member under USERRA.

17 83. At all times relevant hereto, the EPD had a duty to conduct itself in compliance  
18 with the law, including USERRA and ensure its managers and agents followed the Act.

19 84. The above-referenced actions by the EPD and its agents breached those duties.

20 85. The EPD's actions are the direct and proximate cause of Mr. Gailey's damages.

21 86. To the extent that EPD alleges application of any agreement that constitutes any  
22 limitation on Plaintiff's rights under USERRA, it is illegal, null and void, inapplicable and of no  
23 force or effect pursuant to 38 U.S.C. § 4302.



1 87. Upon information and belief, EPD maintained workplace posters that set out  
2 employer responsibilities under USERRA as required by 38 U.S.C. § 4334.

3 **V. CLAIMS FOR RELIEF**

4 **(COUNTS 1 & 2 – VIOLATION OF THE WASHINGTON LAW AGAINST**  
5 **DISCRIMINATION & RETALIATION (WLAD))**

6 88. Plaintiff incorporates the above allegations as if set forth herein.

7 89. The WLAD bars an employer from discriminating against an employee based  
8 upon that employee's military or veteran status. The WLAD also bars an employer from  
9 retaliating against an employee who opposes illegal workplace discrimination or who exercises  
10 his rights under the law.

11 90. Defendant refused to promote Mr. Gailey, imposed discipline, denied benefits of  
12 employment and placed Mr. Gailey on performance improvement plan on account of his military  
13 service obligations and/or on account of Mr. Gailey's numerous attempts to oppose EPD's  
14 discriminatory treatment of him on account of his military service and/or on account of his having  
15 opposed EPD's violations of federal law.

16 91. Defendant's conduct caused Mr. Gailey damages in an amount to be proven at  
17 trial.

18 **(COUNT 3 – DISCRIMINATION IN VIOLATION OF 38 U.S.C. §4311(a))**

19 92. Plaintiff incorporates the above allegations as if set forth herein.

20 93. Under 38 U.S.C. § 4311(a) an employee's military obligation cannot serve as a  
21 motivating factor for an employer's decision that is adverse to that employee.

22 94. EPD refused to promote Mr. Gailey in 2017 and 2018 on account of his obligation  
23 to serve in the military.

1           95.     EPD refused to allow Mr. Gailey to serve in additional duty positions on account  
2 of his obligation to serve in the military.

3           96.     EPD demoted/removed Mr. Gailey from his SWAT assignment on account of his  
4 obligation to serve in the military.

5           97.     EPD's stated reasons for not promoting Mr. Gailey, demoting Mr. Gailey, and  
6 disciplining Mr. Gailey are pretextual reasons designed to cover up the fact that EPD did not like  
7 the fact that Mr. Gailey's reserve duty conflicted with his EPD duties.

8           98.     EPD's acts and omissions have caused Mr. Gailey damages in an amount that will  
9 be proven at trial.

10                   **(COUNT 4 – RETALIATION IN VIOLATION OF 38 U.S.C. §4311(b))**

11           99.     Plaintiff incorporates the above allegations as if set forth herein.

12           100.    Under 38 U.S.C. § 4311(b) an employee's exercise of a USERRA right, such as  
13 the right to take military leave and/or right to contact the ESGR/DOL to enforce USERRA rights,  
14 cannot serve as a motivating factor for an employer's decision that is adverse to that employee.

15           101.    Mr. Gailey exercised his right to enforce his USERRA rights beginning in 2004  
16 and, most recently, ending with his DOL/VETs complaint.

17           102.    Defendant unlawfully retaliated against Mr. Gailey for exercising his USERRA  
18 rights by refusing to promote him, demoting him, and disciplining him as stated above.

19           103.    Defendant's conduct caused Mr. Gailey damages in an amount to be proven at  
20 trial.

21                   **(COUNT 5 – VIOLATION OF 38 U.S.C. § 4323(d)(1)(C))**

22           104.    Mr. Gailey is entitled to liquidated damages because of Defendant's knowing  
23 failure to comply with USERRA as it knew, or had reason to know, that Mr. Gailey's military  
24

1 service and/or protected activity could not serve as a factor in denying him the above-referenced  
2 benefits of employment.

3 105. Defendant's conduct as described above was willful within the meaning of 38  
4 U.S.C. § 4323(d)(1)(C).

5 106. To the extent that Defendant alleges that the application of any state law, local  
6 law, ordinance, contract, agreement, policy, plan or practice constitutes any limitation on Mr.  
7 Gailey's rights under USERRA, it is illegal, inapplicable, null, void and has no force or effect  
8 pursuant to 38 U.S.C. § 4302.

9 **VI. PRAYER FOR RELIEF**

10 Mr. Gailey respectfully demands:

- 11 1. A jury trial;
- 12 2. Both economic and non-economic damages in the amount to be proven at trial  
13 including back pay, front pay, prejudgment interest, lost benefits of employment, negative tax  
14 consequences of any award;
- 15 3. Liquidated damages;
- 16 4. Retroactive promotion to sergeant pursuant to 38 U.S.C. § 4323(e).
- 17 5. Reasonable attorney and expert fees, and costs, pursuant to 38 U.S.C. § 4323 and  
18 as otherwise provided by law; and,
- 19 6. All other relief that is just and equitable

20 DATED June 4, 2019.

21 CROTTY & SON LAW FIRM, PLLC

22 */s Matthew Z. Crotty*

23 MATTHEW Z. CROTTY, WSBA 39284

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