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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

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11  
12 PHILBERT SMITH

13 Plaintiff,

14 vs.

15 ACME CORPORATION, and Does 1  
16 through 10, inclusive

17 Defendants

Case No:

**COMPLAINT FOR  
DISCRIMINATION UNDER 38  
U.S.C. §4301, ET SEQ.;  
DISCRIMINATION UNDER  
CALIFORNIA MILITARY AND  
VETERANS CODE §394;  
TORTIOUS DISCHARGE IN  
VIOLATION OF PUBLIC  
POLICY; DECLARATORY  
RELIEF; PUNITIVE DAMAGES**

**DEMAND FOR JURY TRIAL**

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22 **JURISDICTION, VENUE AND THE PARTIES**

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25 1. Count I of this complaint arises under the Uniformed Services  
26 Employment and Reemployment Rights Act (“USERRA”), 38 U.S.C. §§4301-  
27 4333. The jurisdiction of this court is founded on federal question jurisdiction, 28  
28 U.S.C. §1331, as conferred by 38 U.S.C. §4323(b)(3). Jurisdiction as to the

1 remaining Counts is conferred by 28 U.S.C. §1367(a). Venue is proper because the  
2 defendant former employer maintains a place of business in this district, as  
3 provided in 38 U.S.C §4323(c)(2).

4 2. Defendants Doe 1 through Doe 10, inclusive, are sued herein under  
5 fictitious names. Their true names and capacities are unknown to plaintiff. When  
6 their true names and capacities are ascertained, plaintiff will amend this complaint  
7 by inserting their true names and capacities herein. Plaintiff is informed and  
8 believes and thereon alleges that each of the fictitiously named defendants is  
9 responsible in some manner for the occurrences herein alleged, and that plaintiff's  
10 damages as herein alleged were proximately caused by those defendants. Each  
11 reference in this complaint to "defendant," "defendants," or a specifically named  
12 defendant refers also to all defendants sued under fictitious names.

13 3. Plaintiff Philbert Smith, at all pertinent times alleged herein, was a citizen  
14 and resident of Los Angeles, California.

15 4. Plaintiff is informed and believes, and alleges on the basis of that  
16 information and belief, that defendant ACME Corporation (hereinafter "ACME")  
17 is a corporation that maintains a place of business in Los Angeles, California.

18 5. Plaintiff further alleges that the work duties he performed under the  
19 employment contract that gave rise to the allegations set forth herein were  
20 substantially performed in Los Angeles, California.

21 6. Plaintiff is informed and believes and thereon alleges that at all times  
22 herein mentioned defendants, and each of them, were the agents, servants and  
23 employees each of the other, acting within the course and scope of said agency and  
24 employment.

25 7. During the course of his employment with defendants, plaintiff performed  
26 each and every condition and covenant required on his part to be performed  
27 pursuant to said employment agreement and in particular was continuously  
28 employed by defendant from on or about May 30, 2001, to on or about June 20,

1 2002.

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3 **GENERAL FACTUAL ALLEGATIONS**  
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5 8. Plaintiff Philbert Smith hereby alleges as follows:

6 9. At all times relevant herein, plaintiff was a helicopter pilot with the U.S.  
7 Army Reserves.

8 10. At all times relevant herein, defendant ACME was aware that plaintiff was  
9 a member of the Army Reserves.

10 11. After accepting its offer of employment, plaintiff began working for  
11 defendant ACME as a risk manager on or about May 30, 2001.

12 12. On or about May 20, 2002, plaintiff was advised by the Company  
13 Commander of his Army Reserve unit that he was required to attend a mandatory  
14 training course for the Blackhawk helicopter.

15 13. After receiving his order to attend this military training course, plaintiff  
16 immediately notified his work superiors at ACME of his need to attend this  
17 training.

18 14. Plaintiff was then instructed by defendant to meet with various  
19 departments at ACME to make arrangements to delegate certain of his tasks while  
20 he was away at military training.

21 15. Plaintiff attended the Blackhawk helicopter training course which was held  
22 at a military school in North Carolina from June 5, 2002 until July 25, 2002.

23 16. While plaintiff was away at military training, he continued to participate in  
24 duties relating to his employment at ACME by calling into the office weekly, and  
25 communicating by email.

26 17. Less than 30 days after returning to work after completing his military  
27 training in Pennsylvania, defendant advised plaintiff on August 14, 2002, that it  
28 was terminating his employment which became effective on August 20, 2002.

1 **COUNT 1**

2 (Discrimination under 38 U.S.C. §4301 et seq.)

3 18. Plaintiff realleges and incorporates the allegations of Paragraphs 1 through  
4 17 of this complaint, as though fully set forth herein.

5 19. The Uniformed Services Employment and Reemployment Rights Act  
6 (“USERRA”) (38 U.S.C. §§4301-4333) prohibits discrimination in employment  
7 against individuals who have been called to duty in the uninformed services.

8 20. Defendants’ motive in terminating plaintiff’s employment was his  
9 participation in Army Reserve duty which constitutes a violation of USERRA.  
10 Defendants also violated USERRA by terminating plaintiff’s employment without  
11 good cause less than 180 days after his return to work after completing his Army  
12 Reserve duty.

13 21. As a direct and proximate result of the conduct of defendants as set forth  
14 in this count, plaintiff has suffered injuries and damages including but not limited  
15 to, loss of past and future earnings, loss of past and future benefits, all to his  
16 damage in the amount of \$250,000.00.

17 22. Plaintiff alleges such violations of USERRA were willful and requests  
18 liquidated damages pursuant to 38 U.S.C. §4323(d)(1)(C).

19 23. Pursuant to 38 U.S.C. §4323(h), plaintiff further requests an award of  
20 reasonable attorney's fees, expert witness fees, and other litigation expenses.

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22 **COUNT II**

23 (Discrimination under California Military and Veterans Code §394)

24 24. Plaintiff realleges and incorporates the allegations of Paragraphs 1 through  
25 17 of this complaint as well as Count I as if set forth fully herein.

26 25. Plaintiff brings this claim under California state law with federal court  
27 jurisdiction being conferred by 28 U.S.C. §1367(a).

28 26. California Military & Veterans Code §394 provides that no person shall

1 discriminate against any enlisted member of the military or naval forces of the  
2 United States because of that membership. Section 394 also provides that no  
3 employer or person shall discharge any person from employment because of the  
4 performance of any ordered military duty, or prejudice or harm him in any manner  
5 in his employment, position, or status by reason of performance of military service  
6 or duty.

7 27. Defendants' motive for terminating plaintiff's employment was his  
8 participation in Army Reserve duty which constitutes a violation of §394.

9 28. As a direct and proximate result of the conduct of defendants as set forth  
10 in this count, plaintiff has suffered injuries and damages including but not limited  
11 to, loss of past and future earnings, loss of past and future benefits, all to his  
12 damage in the amount of \$250,000.00.

13 29. As a further direct result of the conduct of defendants as set forth in this  
14 count, plaintiff suffered emotional distress including but not limited to, depression,  
15 frustration, anger, loss of self worth, and humiliation, all to his damage in the  
16 amount of \$750,000.00.

17 30. Defendants' acts as herein before described were committed maliciously,  
18 fraudulently or oppressively with the intent of injuring plaintiff, and/or with a  
19 willful and conscious disregard of plaintiff's right to be free of workplace  
20 discrimination. Because these acts were carried out by officers, directors and/or  
21 managing agents of defendants in a despicable, deliberate and intentional manner,  
22 plaintiff is entitled to recover punitive damages under California Civil Code §3294  
23 in the amount of \$750,000.00.

24 31. Pursuant to California Military and Veterans Code §394(g), plaintiff  
25 requests an award of attorney fees against defendants, and each of them.

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1 **COUNT III**

2 (Tortious Discharge in Violation of Public Policy)

3 32. Plaintiff realleges and incorporates the allegations of Paragraphs 1 through  
4 17 of this complaint as well as Counts I and II as if set forth fully herein.

5 33. Plaintiff brings this claim under California state law with federal court  
6 jurisdiction being conferred by 28 U.S.C. §1367(a).

7 34. Both the California Military and Veterans Code §394, which makes  
8 violations thereof a misdemeanor, and USERRA, 38 U.S.C. §§4301 et seq.,  
9 express the public policy of prohibiting discriminating against members of the  
10 uniformed services because of such status and/or participation in military service,  
11 by taking adverse employment actions against such persons.

12 35. As set forth in the complaint herein, defendants violated both of these code  
13 sections.

14 36. As a direct and proximate result of the conduct of defendants as set forth  
15 in this count, plaintiff has suffered injuries and damages including but not limited  
16 to, loss of past and future earnings, loss of past and future benefits, all to his  
17 damage in the amount of \$250,000.00.

18 37. As a further direct result of the conduct of defendants as set forth in this  
19 count, plaintiff suffered emotional distress including but not limited to, depression,  
20 frustration, anger, loss of self worth, and humiliation, all to his damage in the  
21 amount of \$750,000.00.

22 38. Defendants' acts as herein before described were committed maliciously,  
23 fraudulently or oppressively with the intent of injuring plaintiff, and/or with a  
24 willful and conscious disregard of plaintiff's right to be free of workplace  
25 discrimination. Because these acts were carried out by officers, directors and/or  
26 managing agents of defendants in a despicable, deliberate and intentional manner,  
27 plaintiff is entitled to recover punitive damages under California Civil Code §3294  
28 in the amount of \$750,000.00.

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**COUNT IV**

(Declaratory Relief)

39. Plaintiff realleges and incorporates the allegations of Paragraphs 1 through 17 of this complaint as well as Counts I, II and III as if set forth fully herein.

40. On or about February 10, 2003, counsel for defendant ACME first represented to plaintiff's counsel that plaintiff had entered into an agreement to arbitrate any claims arising from his employment with ACME. Plaintiff's counsel then requested that the defense produce a copy of the alleged agreement.

41. In response to plaintiff's request, defendant forwarded a copy of the alleged arbitration agreement to plaintiff of February 21, 2003. A genuine copy is attached hereto as Exhibit A, and incorporated herein by reference.

42. Plaintiff contends that the alleged arbitration agreement is void, voidable, or unenforceable on a multitude of grounds, including the fact that it is unconscionable and that the U.S. District courts have exclusive jurisdiction over USERRA claims (38 U.S.C. §4302(b); 38 U.S.C. §4323 (b) (3)).

43. An actual controversy exists because defendant ACME asserts that under the alleged arbitration agreement plaintiff is precluded from prosecuting any of his claims in the judicial forum, and is required to submit any claim arising from the employment which is the subject of this action to binding arbitration. By contrast, plaintiff contends that there is no valid and enforceable agreement that would require him to forego his right to proceed with this civil action and to submit his claims to binding arbitration.

44. Plaintiff has not and does not repudiate the alleged arbitration agreement. Instead he seeks a judgment declaring that the alleged agreement is void and/or unenforceable as to the claims presented herein by plaintiff. Alternatively, if the court determines that the alleged arbitration agreement is to any extent enforceable as to plaintiff's claims, plaintiff seeks to preserve his objections to the terms of the alleged arbitration agreement, and to seek severance of any unconscionable terms.





1 unconscionable under applicable law;

2 14. For a declaratory judgment that the arbitration agreement alleged by  
3 defendant ACME and incorporated herein by reference as Exhibit A is void and/or  
4 unenforceable as to any of plaintiff's claims presented herein;

5 15. For a declaratory judgment declaring void and unenforceable all  
6 unconscionable terms of that agreement in the event the court finds the arbitration  
7 agreement alleged by defendant ACME and incorporated herein by reference as  
8 Exhibit A to be to any extent enforceable as to plaintiff's claims presented in this  
9 action; and

10 16. For statutory attorneys fees.

11 **AS TO ALL CAUSES OF ACTION**

12 17. For costs of suit incurred;

13 18. For prejudgment interest:

14 19. For such other and further relief as this court may deem just and proper.

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16 Dated: March 28, 2003

17 \_\_\_\_\_  
18 **JAMES W. JOHNSTON**  
19 Attorney for Plaintiff,  
20 Philbert Smith

21 Plaintiff hereby demands a jury trial on all issues.

22  
23 Dated: March 28, 2003

24 \_\_\_\_\_  
25 **JAMES W. JOHNSTON**  
26 Attorney for Plaintiff,  
27 PHILBERT SMITH  
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