Employer's "Honest Belief" Defeats Military Reservists' USERRA Claim

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The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") applies to all public and private employers in the United States, regardless of size. This would include employers with only one employee, as well as states and their political subdivisions, such as counties, parishes, cities, towns and townships, villages and school districts.

USERRA provides two types of protections to employees. First, employees are protected against discrimination based on military affiliation or retaliation for pursuing rights available under the act. Employees are also provided job protection and return-to-work rights when they take a leave of absence from employment to perform military duty.

Employee protections under USERRA are quite considerable. They are not, however, absolute. In *Escher v. BWXT*, decided by the Sixth Circuit Court of Appeals on August 18, 2010, the court addressed the conflict between an employer's enforcement of policies prohibiting use of company computer equipment for non-work activities, and employee rights under USERRA. Escher was an engineering specialist who had worked for BWXT, a civilian technology firm. Escher also held leadership positions in the Navy Reserve, with BWXT's knowledge.

In 2004, BWXT changed its military leave policy, stopping a practice of allowing employees to take a partial week of unpaid military leave after exhausting their allotted 80 hours of military leave pay. Escher complained to a payroll employee in 2004 about the change and repeated his complaint to a senior human resources specialist in the summer of 2005.

In August 2005, BWXT received an anonymous complaint that Escher was using company time for his reserve work, the second such complaint the company received concerning Escher's work for the Naval Reserves. Investigation of the first complaint found no irregularity in Escher's Internet usage. However, investigation of the second

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complaint showed irregular e-mail use, and indicated that Escher was doing personal, Naval Reserve business while at BWXT. As a result, BWXT placed Escher on administrative leave to investigate the matter further, and terminated him on September 22, 2005.

Escher sued in U.S. District Court, alleging that his discharge was retaliatory for having complained about the change in the military leave policy in violation of USERRA and state law, but the trial court dismissed the case. On appeal, the Sixth Circuit Court of Appeals upheld the dismissal, finding no evidence of retaliation.

The Sixth Circuit began its analysis with an acknowledgement that the retaliation provision of USERRA prohibits an employer from discriminating in employment or taking adverse employment action against an individual who exercises rights provided for under USERRA. The court, citing prior Sixth Circuit precedent, also acknowledged that discriminatory motive under USERRA can be inferred from a number of circumstances, including (1) proximity in time between an employee's military activity and an adverse action, (2) inconsistencies between the proffered reason and other actions of the employer, (3) an employer's expressed hostility towards members protected by USERRA, and (4) disparate treatment of similarly situated employees.

Among other claims summarily rejected by the court, Escher argued that his discharge followed closely after he registering his second complaint about the company's military leave policy, thereby creating an inference of retaliation. To rebut such inference, it was necessary for BWXT to show that it would have terminated Escher anyway, for a valid reason. Upon review of the evidence, the court determined that the decision to terminate Escher's employment was made in response to an anonymous complaint, so the temporal proximity between the investigation of Escher's e-mail use and his complaints about military leave was insufficient to show discriminatory motivation.

The court also found that Escher failed to show any disparate treatment by the company or evidence that the stated reason for Escher's discharge was a pretext for unlawful retaliation. As both the district court and the Sixth Circuit noted, Escher's argument basically was that BWXT's reasons for firing him were a pretext for discriminating against him based upon his complaints. In the Sixth Circuit, which covers Michigan, the court has adopted in discrimination cases a "modified honest belief" rule, which states that "for an employer to avoid a finding that its claimed nondiscriminatory reason was pretextual, the employer must be able to establish its reasonable reliance on the particularized facts that were before it at the time the decision was made." In other words, when faced with a claim of pretext, the employer must be able to show that it made its decision based on an honestly held belief that a nondiscriminatory reason supported by specific facts after a thorough investigation warranted the action taken.

Since the Sixth Circuit determined that BWXT made its decision to terminate Escher's employment based on an honestly held belief, supported by facts discovered through a reasonably thorough investigation that he was doing work for his job in the Naval Reserves during company time, not because of complaints protected under USERRA, the court dismissed the case. This case demonstrates how thorough investigations and development of particularized facts prior to taking an adverse employment action can provide a defense to, or possible even avoid, lawsuits, even if the involved employee has engaged in protected activity.