

# on the job

TRACKING DEVELOPMENTS IN EMPLOYMENT LAW

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## A MILITARY PERSON CAN BE LEGITIMATELY TERMINATED EVEN THOUGH HE IS PROTECTED UNDER UNIFORM SERVICES EMPLOYMENT REEMPLOYMENT RIGHTS ACT (USERRA)

By: Caroline Grech-Clapper

In the recently published decision of *Escher v BWXT Y-12, LLC*, \_\_\_US COA \_\_\_ (10/15/10, 6<sup>th</sup> Cir), the court upheld a termination of a naval reserve employee for misusing the email of his non-military employer.

Escher's employer was the managing and operating contractor for the National Nuclear Security Administration. While Escher was employed, there were two complaints filed against him for performing his Naval Reserve work while working for his employer. The first complaint was investigated and it was found that his Internet use was not irregular. The second complaint triggered an investigation that showed irregular e-mail use, and revealed he was doing personal, Naval Reserve business while working for defendant. The investigation revealed that from 1999-2005, plaintiff organized thousands of e-mails relating to his Naval Reserve work into hundreds of folders and subfolders while at work for defendant. The evidence showed that plaintiff received and sent Navy-related correspondence throughout the business day and frequently it was extensive and amounted to multiple e-mails per day. After the investigation was completed, he was terminated.

Escher argued that he was terminated in retaliation for complaints he made about his employer's designation and accounting of his military leave time. In 2004, the employer changed its Military Leave Policy, and no longer allowed employees to enter a partial week of "unpaid military leave" once they had exhausted their 80 hours of military leave pay. Escher alleged he complained about this change twice after he returned from military leave with the Naval Reserve.

### SECRET WARDLE NOTES:

Before a court is likely to dismiss a retaliation claim, the facts will be thoroughly scrutinized. When terminating an employee who has made a complaint about one of his civil rights or protections of law, it is always important to conduct a thorough investigation before terminating him/her. In this case, the court found that a thorough investigation had taken place and plaintiff's use of company time to conduct his reserve official government business was an abuse of his employer's time and equipment. Therefore, his termination was not retaliation as alleged.

## CONTINUED...

Escher sued alleging violation of USERRA, a state law claim, and common law retaliation. The court agreed with the district court that Escher's claim that his Naval Reserve work constituted "official government business" for the company was disingenuous in light of the defendant's business policy and common sense. The phrase "official government business" did not permit him to work on separate Naval Reserve business while at work. Further, plaintiff's use of the BWXT e-mail system was not "incidental" by any definition of defendant's policies or any common understanding of the term.

The record showed that the person who decided to terminate Escher:

- Had no knowledge of his complaints about military leave;
- Made a reasonably thorough investigation; and
- Made the decision based on an honestly held belief that was supported by particularized facts, and based on her reading and interpretation of company policy.

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