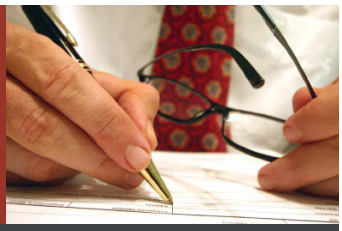
Labor & Employment Update



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Good Enough For Government Work?

By Charles J. Mataya

A recent decision from the United States Court of Appeals for the Sixth Circuit, *Escher v. BWXT Y-12, LLC*, highlights an important aspect of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), and also reminds us of the importance of having both a sensible computer usage policy and a reasonably clear conflict of interest policy. The case went the employer's way, but it might have been a different story without the correct policies.

The employer, BWXT Y-12, LLC, the managing and operating contractor for the National Nuclear Security Administration at the Y-12 National Security Complex in Oak Ridge, Tennessee, terminated an employee. He sued on various grounds, including the contention focused on here: that he was terminated in retaliation for complaints he made about BWXT's military leave policy. Contrary to the employee's contention, BWXT claimed he had been fired for performing work for his Naval Reserves position while on company time and with company resources. The district court granted summary judgment to BWXT. The Sixth Circuit affirmed.

USERRA's "no retaliation" provision, 38 U.S.C. § 4311(b), prohibits "adverse employment action against any person because such person . . . has taken an action to enforce a protection afforded [under USERRA]." In order to establish a USERRA retaliation claim, an employee bears the initial burden of showing, by a preponderance of the evidence, that his protected status was a motivating factor in the adverse employment action. Discriminatory motivation can be inferred from a variety of considerations, including proximity in time between the employee's military activity and the adverse employment action. Furthermore, the relevant decision maker, not merely some agent of the employer, must possess knowledge of the employee's protected activity. If the employee meets this burden, the employer then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the adverse action anyway, for a valid reason. At that time, the burden of production and the burden of persuasion shift to the employer.

A Naval Reserve Officer of relatively high rank, the employee had been targeted on two occasions by anonymous complaints that he was using company resources, including his time, to perform work for the Navy. On each occasion, the complaints triggered an investigation. The first time, nothing adverse happened to the employee. The second time, the employee was fired. The person making the termination decision, ironically, was a former naval officer.

In 2004, BWXT had changed its Military Leave Policy and ceased allowing employees to enter a partial week of "unpaid military leave" once they had exhausted their 80 hours of military leave pay (USERRA does not require paid leave). As luck would have it, the employee had complained at least twice about this change. He complained first more than a year before his discharge. He complained again less than a month before his discharge. Of course, the employee claimed his complaints had motivated his discharge. He argued several things to support the assertion. These were: (1) BWXT took no action on the first anonymous complaint about him, (2) the temporal proximity between his last complaint about the military leave policy (less than a month) and his discharge, (3) his actions had been approved by his supervisor, and (4) he had not violated the company's policies. The court determined each argument to be unpersuasive.

On the first argument, the court accepted the company's explanation that no adverse action resulted from the first anonymous complaint because it lacked specificity. The company had focused its investigation only on internet usage, and no violation had been found. The most

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recent anonymous complaint had specifically directed the company's attention to e-mail, Word and other computer usage. With a new focus, the investigation revealed the violation.

As to the timing, the court accepted the decision maker's assertion that she had no knowledge of either of the employee's complaints about the military leave policy. As such, temporal proximity could not carry the day.

On the third argument, the court accepted the company's determination that although the supervisor had provided the employee permission to perform some Naval Reserve work, the employee exceeded the threshold permitted. Among the findings, the employee had spent much of his work time preparing numerous naval related projects, including 18 PowerPoint Presentations, 75 Word documents, 38 Excel spreadsheets, 12 PDF documents, and 140 miscellaneous documents. He also sent out numerous e-mails throughout the workday. Many of these e-mails involved substantial correspondence.

Finally, the court rejected the employee's argument that the company's policies permitted his actions. The argument was based on language in the Employee Handbook prohibiting use of company computers for personal use, but permitting their use for "the conduct of official U.S. Government." The court dismissed the argument as disingenuous. While "official government use" was not specifically defined in the policy, as a government contractor BWXT's employees necessarily performed "official government business." However, common sense told employees the phrase did not include Naval Reserve business an employee brought from a separate employer. Moreover, the company's conflict of interest policy prohibited use of company resources for "outside business ventures." Here, the employee used company resources to benefit his employment status at the Naval Reserves.

There are some valuable lessons from the case. First, complaints relating to an employer's accommodation of an employee's military obligations must be treated in a manner similar to other legally protected activity. These should be fully investigated, remedied where mistakes have been made, and the employee should suffer no adverse action for making the complaint. Second, but just as importantly, employers should review their policies relating to use of company equipment, including computers, and also their conflict of interest policies to make sure these clearly define the limits of an employee's discretion when using company resources or working for other employers. While these may not prevent a lawsuit from a disgruntled former employee, good ones can help defend against such suits.

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