

# LAW REVIEW 1054

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### Don't Do Your Reserve Work on Your Employer's Time

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#### **1.1.1.8—USERRA Coverage of Federal Government**

#### **1.2—USERRA-Discrimination Prohibited**

#### **1.3.1.1—Left Job for Service and Gave Prior Notice**

#### **1.3.1.2—Character and Duration of Service**

#### **1.4—USERRA Enforcement**

*Escher v. BWXT 7-12 LLC, 627 F. 3d 1020 (6<sup>th</sup> Cir. 2010).*

Rudolph N. Escher, Jr. is a Captain in the Navy Reserve. As a civilian, he worked for BWXTY-12, LLC (BWXT) until he was fired in September 2005. He filed suit against the employer in the United States District Court for the Eastern District of Tennessee, contending that the firing violated section 4311(b) of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4311(b).

Captain Escher contended that he was terminated from his civilian job in retaliation for his complaints about how the employer had designated and accounted for his military leave time. BWXT contended that it had fired him for doing Navy Reserve work during company time and with company resources.

After the completion of the discovery process (depositions, interrogatories, document production, etc.), but before trial, BWXT filed a motion for summary judgment, under Rule 56(c)(2) of the Federal Rules of Civil Procedure. That rule provides that summary judgment is appropriate “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” The District Court granted the summary judgment motion, and Captain Escher appealed to the United States Court of Appeals for the Sixth Circuit, the federal appellate court that hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee. On Aug. 18, 2010, a three-judge panel of the 6<sup>th</sup> Circuit affirmed the summary judgment for the defendant employer.

In August 2005, someone filed an anonymous complaint with the company, alleging that Escher was doing Navy Reserve business on BWXT time and using BWXT resources. The BWXT investigation of the complaint showed that on the computer that the company had provided him Escher had archived 3,200 Navy Reserve e-mails, from 1999 to 2005, in more than 240 individually named folders and sub-folders. He had also used BWXT equipment, and apparently BWXT time, to prepare 18 PowerPoint presentations, 75 Word documents, 38 Excel spreadsheets, 12 PDF documents, and 140 miscellaneous documents, all pertaining to the Navy Reserve and not BWXT business. He had also used the BWXT telephone system to make 110 local calls and 574 long distance calls on Navy Reserve business.

BWXT's personnel director made the decision to fire Escher, based on his egregious abuse of BWXT time and equipment. BWXT contended, and the evidence produced in discovery affirmed, that the personnel director was not aware that Captain Escher had filed a complaint about the way that his military leave was characterized and accounted for, so the decision to fire him could not have been motivated by irritation against him for having filed a USERRA complaint. Moreover, the District Court found and the Court of Appeals affirmed that the employer *would have fired Escher anyway* for the egregious abuse of time and equipment, even if he had not been a member of a reserve component of the armed forces and even if he had not filed a USERRA complaint.

This is not the first case I am aware of involving a reservist getting into serious trouble for using employer time and equipment in activities related to a reserve component unit. My advice is simple: *Don't do it!* Do not give members of your unit your work telephone or work e-mail. Do not make or accept telephone calls at work that are related to your reserve unit, even if you are the commanding officer. Reserve Centers and Operational Support Centers and National Guard Armories: *Do not conduct recall exercises during civilian work hours.* Do not call reserve component members (not presently on active duty) at their civilian jobs, unless it is a real mobilization and you need to contact them immediately to order them to report. If you need routine access to the individual during work hours, you must put that individual on military orders for the entire day, and the individual must take time off from the civilian job.

USERRA gives you the right to *time off from your job* to perform service in the uniformed services. The law does not give you the right to perform uniformed service while on the clock for the employer, and it most certainly does not give you the right to use the employer's equipment and supplies to do work for the reserve unit or component.

In Law Review 0702 (Jan. 2007) and Law Review 1040 (June 2010), I strongly urged you *not* to use the employer's telephone or e-mail system or employer-paid time to call me or e-mail me or anyone else to complain about your civilian employer. Remember the first rule of the Hippocratic Oath: *primum non ouchum* or first, do no harm. If the employer is annoyed with you about your absences from work for military service, and if the employer is looking for an excuse to fire you, the *last* thing you want to do is to give the employer such an excuse. If you cannot afford a computer and Internet service at home, go to your local public library.

You can reach the Service Members Law Center toll-free at 800-809-9448, extension 730, or by e-mail at [SWright@roa.org](mailto:SWright@roa.org). I am generally at work at ROA between 0700 and 1700 Eastern Time, Monday through Friday. If you need to speak to me outside those hours, send me an e-mail and give me a good time and number to call. I will make arrangements to call you or to take your call outside your civilian work hours, even if I have to wake up in the middle of the night to do so. Yes, I think that your not calling me from work really is that important.

In the nine years since the terrorist attacks of Sept. 11, 2001, the transformation of the strategic reserve to the operational reserve has been completed. Employers are increasingly angry about repeated, lengthy mobilizations and voluntary active duty tours, on top of the traditional drill weekends and annual training. USERRA protects all these activities, and we can tell the civilian employer that it must accommodate these absences from work to perform uniformed service. The employer does have the right to insist that when you are on the clock at the civilian job you are concentrating solely on your civilian job responsibilities, not your reserve component responsibilities. I cannot overstate the importance of keeping your military activities separate from your civilian job hours.