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Don't Give Employer Excuse to Fire You

By Captain Samuel F. Wright, JAGC, USN (Ret.)

I recently heard from one of the attorneys to whom I frequently refer potential clients with cases under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The attorney represents an ROA member and has filed suit against an employer, alleging that the employer violated USERRA by failing to reemploy the individual properly when he returned from several years of active duty. The employer's attorney took the plaintiff's deposition, as permitted by the Federal Rules of Civil Procedure.

During the deposition, the defendant's attorney asked the plaintiff a series of questions about an e-mail that the plaintiff had sent, on the employer's computer and through the employer's e-mail system, to me, and my response. This report causes me to reiterate the advice I gave in Law Review 1040 and Law Review 1165. Do not use your employer's computer, e-mail system, telephone, or time to contact me, or Employer Support of the Guard and Reserve (ESGR), or the Department of Labor (DOL), or your attorney to complain about your employer or to seek advice or assistance in dealing with your employer.

Perhaps your employer is annoyed with you because you have been called to the colors five times since the terrorist attacks of September 11, 2001, and may be called up again. Perhaps the employer is looking for an excuse to fire you. If that is the case, the last thing that you should do is to give the employer such an excuse. USERRA gives you the right to time off (without pay) from your civilian job to do your military duties. USERRA does not give you the right to do your military duties while you are on the clock for your civilian employer, and it certainly does not give you the right to use the employer's telephone, computer, or other equipment to perform military functions.

I invite your attention to *Escher v. BWXT 7-12 LLC*, 627 F.3d 1020 (6th Cir. 2010). Rudolph N. Escher, Jr., a Navy Reserve Captain, was fired by his civilian employer for gross misuse of employer equipment and time for Navy Reserve purposes. The United States District Court for the Eastern District of Tennessee and the United States Court of Appeals for the 6th Circuit upheld the lawfulness of the firing. I discuss the Escher case in detail in Law Review 1054.

Captain Escher's abuse of employer equipment and time was egregious, but even a much more moderate misuse of equipment and time could be grounds for discipline. While you are on the clock with your employer, you should be doing the employer's business exclusively. Yes, I realize that there must be exceptions. If your child gets sick at school, the school must call you at work. All employees have such emergencies from time to time. There should not be additional "emergencies" because you are a member of the National Guard or Reserve.

The military full-timers who deal routinely with Reserve Component (RC) personnel need to understand that the RC member not on active duty should not be called at his or her civilian job except in a rare dire emergency. Civilian employers are putting up with a great deal since the terrorist attacks of September 11, 2001. Let's say employee Joe Smith has been called up five times in the past decade and is expecting a sixth call-up early next year. When he is not on active duty, do not tax the employer's patience still further by routinely calling him at work about military matters, and do not expect Joe to do military work while at his civilian job.

The other problem with using your employer's computer or telephone is that you must expect that communications on employer-owned equipment will be monitored by the employer. When you log onto your assigned computer at work, you probably have to click on a statement in which you acknowledge that you understand that the employer retains the right to monitor all communications that you send and receive on that computer. In legal terms, this means that you have "no justifiable expectation of privacy" when using the employer's computer and e-mail system.

Don't think that you can solve this problem by using the employer's computer and Internet Service Provider to access a web-based e-mail system like Yahoo. If you are using the employer's computer, you should assume that every e-mail you send and receive (even on your Yahoo account) is being read by your immediate supervisor and by the employer's personnel office.

You should get your own computer and Internet service, at home, to send and receive communications of this kind. If you cannot afford Internet service at home, go to your local public library. If you are going to call me or anyone else to complain about your employer, use your home telephone or your personal cell phone, not a cell phone provided by your employer.

I think that it is so important that RC personnel call me or e-mail me outside their civilian work hours that I am giving up two evenings per week to make myself available outside regular business hours. I am here at my post, answering telephone calls and e-mails, until 10 p.m. Eastern Time on Mondays and Thursdays, in addition to regular business hours. I have been doing this on Thursdays for more than two years, and I recently added the Monday evening availability. Neither ESGR nor DOL offers this after-hours service.

In 2011, I received and responded to 5,405 inquiries, by e-mail and telephone primarily, from service members, military family members, attorneys, employers, congressional staffers, reporters, and others, and 63% of the inquiries were about USERRA. This represents 450 contacts per month on average. In 2012, the pace of inquiries has increased still further, and I have started receiving more inquiries about subjects other than USERRA. I provide information to service members, without regard to whether they are members of or eligible to join ROA. When I hear from a service member who is eligible and not already a member, I always ask them to join, and they usually do.

I invite your attention to www.servicemembers-lawcenter.org. You will find more than 800 articles about USERRA and other military-pertinent laws, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week, putting them on the website and featuring them in "Reserve Voice," our weekly electronic newsletter transmitted by e-mail.

If you are not receiving "Reserve Voice" and other e-mail communications from ROA, that is probably because we do not have your correct e-mail address. Please call us toll-free at 800-809-9448 to provide us this information.