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Best Law Firms

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Employer's Thorough Investigation Defeats Military Member's Discrimination Claim

by Michael R. Blum

Many municipalities have employees who also serve in the military. Municipalities likely already know, then, that a federal law – the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") – provides additional protections for employees who are service-members. The USERRA applies to all public and private employers in the United States. So it applies to counties, cities, townships, and villages.

Among other protections, the USERRA provides two types of protections to employees-service members:

1. USERRA prohibits employers from discriminating against the employee-service member based on that employee-service member's military affiliation.

2. USERRA provides employees job protection – with return-to-work rights – when the employee-military service member takes a leave of absence from employment to perform military duty.

In our experience, the employee-service member and the municipality in the vast majority of times, just as with other non-service member employees, smoothly manage their work relationship and military service obligations. But like with any employee, things don't always go so smoothly. A municipality may be presented with a situation it believes warrants disciplining or terminating an employee-service member – due, for example, to the employee-service member's violation of the municipality's internal policies. However, given the USERRA, the municipality may be leery as to how to proceed, or wonder if it can even discipline or terminate an employee-service member given the USERRA? And if it can do so, are there steps that must be taken before doing so?

Preliminarily, it goes without saying that municipalities should have their own carefully drafted employee policies. And municipalities must heed their own employee policies before initiating any discipline toward employees. But assuming that's been done, one recent federal decision answers many questions that arise in these situations – including how a thorough investigation can benefit a municipality if faced with a claim that the municipality's termination of an employee-service member was unlawful.

A federal appellate court just upheld an employer's discharge of an employee-service member due to violations of the employer's computer use policy based on the employer's pre-discharge investigation. *Escher v. BWXT*, ___ F 3d __ (6th Cir., August 18, 2010). In that case, Escher was an engineering specialist who had worked for BWXT, a civilian technology firm. Escher also held leadership positions in the Navy Reserve. In 2004, the employer changed its military leave policy. Escher complained about the change to the employer twice – in 2004 and in the summer of 2005.

In August 2005, the employer received an anonymous complaint that Escher was using

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company time for his Naval Reserve work – the second complaint of that nature. The employer's investigation of the first complaint found no irregularity in Escher's Internet use. But the employer's investigation of the second complaint showed that Escher was violating the employer's computer use policy by doing personal, Naval Reserve business while at the job. The employer then placed Escher on administrative leave to investigate further, and after further investigation terminated him in September 2005.

Escher sued, alleging the employer violated USERRA by retaliating against him based on his complaints about the military leave policy change. The trial court dismissed the case.

The federal appellate court upheld the dismissal, siding with the employer. The court rejected Escher's claim that the employer discriminated against him. It noted that discriminatory motive can be inferred from many factors, including (1) if the discipline occurred very closely after an employee's military activity, (2) the employer's proffered reason for the discipline and the employer's other actions were inconsistent; (3) the employer expressed hostility towards the employee-service member; and (4) the employer treated similarly situated employees differently.

The Court acknowledged that the employer terminated Escher pretty closely after Escher's second complaint about the employer's military leave policy change. But that alone was not enough to pursue Escher's claim since the employer conducted a reasonably thorough investigation before terminating him. The Court explained that the "modified honest belief" rule protects the employer here. That rule states that an employer can defeat a claim of discrimination if it can show that its decision was based on an honestly held belief that a non-discriminatory reason – supported by specific facts after a thorough investigation – warranted the action taken. The Court noted that the employer met the "modified honest belief" rule since the employer acted on an anonymous complaint; conducted prompt investigations; and performed reasonably thorough investigations.

There are a few lessons from *Escher v BWXT*. First, employers should have carefully crafted, fair, employee policies. Second, employers must heed their own employee policies before initiating any discipline toward employees. Third, employers should follow their policies consistently. Finally, as *Escher* shows, prompt, thorough investigations and development of particularized facts before taking an adverse employment action can provide a defense to, or possibly even help avoid, a lawsuit – even if the involved employee is a service member, so long as the employer can demonstrate that the adverse action was taken for reasons other than the employee's involvement in the military. And, finally, employers can and should take the same action against all employees who engage in misconduct.

If you have any questions regarding this article, the USERRA, or employment issues, please contact Mike Blum at 248.785.4722 or mblum@fosterswift.com.