



DISCHARGE FOR “EXCESSIVE” MILITARY SERVICE ABSENCES VIOLATED USERRA

LABOR & EMPLOYMENT LAW — 08/20/09

The Merit Systems Protection Board (Board) erred in rejecting an employee’s claim that the Postal Service violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) when it terminated him due to his “excessive” use of military leave, ruled the Federal Circuit Court of Appeals. The employee worked for the Postal Service from 1988 until his termination in 2000, during which time he served in the Army National Guard Reserve. He was absent from his job for long periods of time while on active duty with the National Guard. He was absent for over 22 total months between 1991 and 1995. Between 1996 and the date of his discharge in 2000, he worked at his Postal Service job for no more than four days. (*Erickson v US Postal Service*, FedCir, 92 EPD ¶43,620)

In January 2000, a Postal Service labor relations specialist contacted the employee and asked him whether he intended to return to his position with the Postal Service. The employee responded that he would not return to work until he completed his current tour of duty in September 2001. Shortly thereafter, the Postal Service began proceedings to discharge the employee based on his “excessive use of military leave,” claiming that the employee exceeded USERRA’s five-year limit on the amount of military leave an employee may use while retaining his employment rights under the statute. The employee’s discharge was finalized on March 31, 2000. The Board ruled that the employee’s military service was not a motivating factor in his dismissal, finding the “real reason” was his absence from work regardless of its cause.

The Federal Circuit rejected the Board’s conclusion that the employee’s military service was not a motivating factor in his discharge. The appellate court pointed out that the Board’s rationale went against the very tenets of what the USERRA seeks to protect. An employer cannot escape liability by claiming that it was merely terminating an employee on the basis of his absence when that absence was for military service, the Federal Circuit ruled. Regarding the five-year cap, the appellate court noted that it was undisputed that the employee’s cumulative military absence at the time of his removal, after accounting for statutorily exempt service, did not exceed five years. Thus, the employee was protected under USERRA at the time the Postal Service removed him from employment.