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2951 Flowers Road South, Suite 217
Atlanta, GA 30341
Ph) 770-451-6222 / 800-533-7896
Fax) 770-216-4013
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Employer cover-up fools DOL, but not the jury.

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

Gerald Delay, a staff sergeant in the Air Force Reserve, was hired by Ace Heating of Seattle in August 2000. He was called to active duty in February 2003 and served in Iraq, Afghanistan, and other countries, as an Air Force loadmaster.

SSgt Delay came off active duty after two years and made a proper and timely application for reemployment at Ace Heating. He returned to work, but the company reduced his hours to only 30 per week, whereas he had been working a full 40-hour week before he was called to the colors. He requested advice and assistance from an Air Force legal assistance attorney at McChord AFB, Wash., and the attorney sent a letter to Timothy Hayes, the owner of Ace Heating. The letter explained that Ace Heating had violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) by denying SSgt Delay reinstatement into the full-time job he had before mobilization and almost certainly would have retained but for the mobilization.

Mr. Hayes fired SSgt Delay an hour after receiving the letter. SSgt Delay complained to the U.S. Department of Labor's Veterans' Employment and Training Service (DOLVETS), which conducted an investigation. Mr. Hayes contended that he had fired SSgt Delay because of his substandard work performance and because he had rejected work assignments. Mr. Hayes submitted to DOL-VETS the Ace Heating business records of problems with SSgt Delay leading up to the firing. Those records convinced DOL-VETS that SSgt Delay was properly fired for insubordination, and the agency closed its case without action.

After DOL-VETS turned him down, SSgt Delay hired a private attorney, James Beck with the firm of Gordon Thomas Honeywell Malanca Peterson & Daheim LLP of Tacoma. He discovered that Mr. Hayes created the records only after SSgt Delay complained to DOL-VETS, and then backdated them. A tip-off was that one record was dated Feb. 29, 2005, a non-leap year.

Mr. Hayes acknowledged creating the records after the fact and backdating them, but he insisted they accurately reflected problems with SSgt Delay's work performance after he returned from active duty.

The jury did not buy that argument and awarded SSgt Delay \$146,000 in lost pay and economic damages, plus another \$146,000 in liquidated damages, because the jury found the USERRA violation to have been willful. The jury also awarded SSgt Delay another \$250,000 for the defamation of the fraudulent documents accusing him of insubordination and shoddy work. As of this writing, Mr. Hayes had not yet determined if he would appeal.

Ace Heating is a small business, with only eight employees. That does not matter, because the reemployment statute has never had a threshold based on company size or the number of employees. An employer with only one employee is considered an employer for purposes of the reemployment statute. See *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992).

This article comes from a series entitled "Law Review," edited by Captain Samuel F. Wright JAGC USN (Ret) and published by the Reserve Officers Association of the United States and is re-printed with permission. The Law Review is the nation's most complete compilation of legal scholarship dealing with USERRA. The full series may be accessed on the Association's web site at <http://www.roa.org/userra>.

U.S. Labor Department secures more than \$688,000 in Overtime back wages for 238 employees of Quest

Following an investigation by the U.S. Department of Labor, New Jersey-based Quest Diagnostics Inc. has agreed to pay 238 employees across the country a total of \$688,772 in overtime back wages due under the federal Fair Labor Standards Act (FLSA).

The investigation by the department's Wage and Hour Division, involving the company's Cambridge, Mass., location, found that employees working in the positions of client systems analyst and senior client systems analyst were misclassified as being exempt from the FLSA's overtime requirements. The investigation also revealed that this same misclassification existed at all of the company's facilities nationwide.

Quest Diagnostics is a medical diagnostic testing company. After being informed of the investigation's findings, company management agreed to pay the affected employees back wages and also agreed to full future compliance with the requirements of the FLSA.

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