

7/7/06 3:45 PM

## **4th Circuit: Reservist's history of professional misconduct defeats USERRA claims**

**By Jennifer L. Bouman**

A Naval Reserve officer's claims of discrimination and retaliation under the Uniformed Services Employment and Reemployment Rights Act (USERRA) relating to a change in work schedule and ultimate termination could not stand in light of the reservist's history of professional misconduct, according to the [4th U.S. Circuit Court of Appeals](#).

Cheryl Francis worked for Booz Allen & Hamilton from 1996 to March 2003 as a computer technician. In that capacity, she provided three categories of services to one of Booz Allen's clients, the Environmental Protection Agency (EPA). Tier I services included lower-level call center work. Tier II services required face-to-face contact with the client and higher-level problem solving skills, while Tier III services involved more difficult networking assistance.

Francis also worked as a petty officer in the U.S. Navy Reserve. She was deployed on active duty on March 16, 2003, and returned to work five months later. Booz Allen reinstated Francis with the same job title, salary, consulting assignment and work location, although she performed almost no Tier III work because the EPA had elected to use another vendor for its networking assistance. Given the change in work assignments, Francis complained to Booz Allen that she felt her USERRA rights were violated.

Prior to her deployment and after returning to work, Francis would leave work early without authorization and would slam the telephone down after talking with customers. Several co-workers lodged complaints with managers about Francis's behavior and her attendance issues. Francis missed scheduled conference calls, and her supervisors found her to be evasive, non-responsive and uncommunicative.

Booz Allen gave Francis a probation notice in November 2003 that warned her that a failure to immediately improve her behavior would result in termination. Less than two weeks after receiving this notice, Francis again left the workplace early without authorization, and Booz Allen discharged her.

In her lawsuit against Booz Allen, Francis alleged various violations of USERRA. She claimed that Booz Allen did not have the right to change her work assignments or work schedule on her return to work. She also believed that she was fired without cause and in retaliation for trying to assert her USERRA rights. The lower court disagreed with Francis and granted summary judgment for Booz Allen. On appeal, the 4th Circuit found no violations of USERRA and affirmed the lower court's decision.

Booz Allen reinstated Francis to the same position she held prior to her deployment, and it was not until much later after her reinstatement that her schedule and responsibilities changed. In addition, the reduction in Tier III work was a direct result of a change in the EPA contract, and those changes applied to all employees in Francis' position.

The 4th Circuit concluded that Francis was not treated differently than other employees. Booz Allen had reinstated Francis properly as required by USERRA, and the court found that Booz Allen had not considered Francis's military status in its employment decisions.

Francis also relied on the provision of USERRA that precludes an employer from firing a veteran "except for cause." According to Francis, she was acting in a professional manner, and Booz Allen acted unreasonably when it fired her. For the retaliation piece of her claim, Francis relied heavily on the timing of events—that is, she complained that her rights were being violated in late August, and she received the probation notice in mid-November.

The 4th Circuit found Francis's arguments unpersuasive in light of Francis' troublesome behavior, which the court characterized as a "systematic history of professional misconduct." The appeals court also determined that Booz Allen had acted reasonably when it fired Francis after giving her fair warning and an opportunity to correct and improve her behavior.

[Francis v. Booz, Allen & Hamilton Inc., 4th Cir., No. 05-1523 \(June 22, 2006\).](#)

**Professional Pointer:** With so many servicemen and women returning home from active duty, this case serves as a timely reminder that employers should understand their re-employment obligations under USERRA. This case also demonstrates the importance of documenting performance issues accurately, consistently and uniformly to avoid later questions about an employer's motivations.

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