

## **LAW REVIEW 14064**

**May 2014**

**I Cannot Find a Job because I Am in the Army Reserve!**

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

### **1.2—USERRA forbids discrimination**

**Q: Most employers support hiring veterans. However, from my own personal experience since the terrorist attacks of September 11, 2001 I can say that most U.S. employers do not want to hire a military veteran who continues to serve the country and the community in the National Guard or Reserve.**

**I am a Staff Sergeant (SSG) in the Army Reserve, with almost 16 “good years” for Reserve retirement purposes, including eight years of active duty in several increments. My current enlistment expires at the end of September, and I am seriously contemplating not reenlisting. Yes, I want to stick around for at least another four years, in order to qualify for the pension check and medical benefits at age 60, but age 60 is a long way away and I need a full-time job *now*. I find that my service in the Army Reserve makes it most difficult for me to find and hold a full-time civilian job. My wife is pressing me to cut my losses with the Army so that I can get a stable civilian job and stay at home as our family grows.**

**I was working at a restaurant when I was called to active duty in 2003-04. While I was on active duty, the restaurant went out of business, so I had no job on my return. For almost a decade, I have been seeking full-time civilian work and not finding it. It certainly does not help that I live in a high-unemployment area, but my family and my wife’s family live here, and my wife has refused to consider our picking up**

stakes and moving to a distant city, especially without a firm job offer in the distant city.

For almost a decade, my principal source of support for myself and my family has been military duty. Two of the periods have been involuntary, and seven have been voluntary, of varying durations, plus drill weekends, annual training, and whatever “additional training” periods I can talk my way into. With the military drawdown and the bleak Department of Defense fiscal situation, I am concerned that these intermittent military opportunities are going to dry up, and how will I support my family?

Whenever I am between military periods, I visit the State Employment Service office at least once a week and follow up on every job lead for which I seem even remotely qualified. I have submitted hundreds of job applications, and I have been interviewed dozens of times, without ever having received a firm job offer.

Whenever I am interviewed, the subject of my military service always seems to come up, although I strenuously avoid raising the issue myself. I think that employers tell me “thank you for your service” and then throw my resume in the trash can because they do not want to accommodate the inconvenience of my drill weekends, annual training, and the possibility of mobilization. I think this is called “stealth discrimination.”

By doing an Internet search, I found your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other military-relevant laws.<sup>1</sup> Does USERRA make it unlawful for an employer to discriminate *in initial hiring*?

---

<sup>1</sup> We invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 1,055 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. ROA initiated

**A:** Yes, section 4311 of USERRA most definitely forbids discrimination against Reserve and National Guard personnel by civilian employers (federal, state, local, and private sector) making decisions about initial hiring, as well as discrimination with respect to firing, promotions, and benefits regarding individuals who are already on the payroll. Here is the entire text of section 4311:

§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service *shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment* by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited--

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is *a motivating factor in the employer's action*, unless the employer can *prove* that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.

38 U.S.C. 4311 (emphasis supplied).<sup>2</sup>

In Law Review 36 (December 2001), I explained that Congress amended the reemployment statute in 1986 to outlaw discrimination against National Guard and Reserve personnel *in initial hiring*. I also reported that in the intervening years there was only one published case about hiring discrimination, *Beattie v. Trump Shuttle*, 758 F. Supp. 30 (D.D.C. 1991). Fifteen years later, we saw a second case, *McLain v. City of Somerville*, 424 F. Supp. 2d 329 (D. Mass. 2006). I also invite the reader's attention to my Law Reviews 106 and 191.

---

<sup>2</sup> The citation means that you can find this provision in section 4311 of title 38 of the United States Code.

I explained the history of the reemployment statute in detail in Law Review 104. The statute can be traced back to 1940. For the first 15 years, the reemployment statute only applied to *active duty*. In 1955 and 1960, Congress expanded the law to apply to initial active duty training, active duty for training, and inactive duty training performed by National Guard and Reserve personnel. The right to reemployment was originally conceived as a once-in-a-lifetime occurrence: you get drafted, or you volunteer, and when you are honorably discharged you return to your civilian job.

Under the reemployment statute as originally conceived, there was no apparent need for a provision outlawing discrimination, but as Congress expanded the law to apply to *recurring* periods of military training, like active duty for training and inactive duty training, it became clear that protection from discrimination was necessary.

In 1968, Congress enacted what became section 2021(b)(3) of the Veterans' Reemployment Rights (VRR) law, 38 U.S.C. 2021(b)(3) (1988 edition of the United States Code). That subsection made it unlawful for an employer to deny retention in employment or any promotion or incident or advantage of employment because of the individual's obligations as a member of a Reserve Component of the Armed Forces (including the National Guard). In the 1980s, Congress became aware of examples of employers denying National Guard and Reserve personnel initial hiring, so in 1986 Congress amended section 2021(b)(3) to outlaw hiring discrimination as well.

In February 1988, Colonel Charles W. Beattie, USAFR<sup>3</sup>, requested leave from his civilian employer, Eastern Airlines, to attend a 10-month class of the Industrial College of the Armed Forces (ICAF), from August 1988 until June 1989. In October 1988, while Colonel Beattie was at ICAF, Donald Trump entered into an agreement with Eastern to purchase the

---

<sup>3</sup> Colonel Beattie was a life member of ROA. He is now deceased.

assets and operations of Eastern's shuttle division. Trump extended offers of employment to all Eastern personnel, by job position, with hiring preferences based on each applicant's seniority at Eastern. Trump ultimately hired approximately 200 Eastern pilots.

But Trump did not offer employment to Colonel Beattie, although the company admitted that he possessed the requisite seniority to have been selected from within the group of applicants for pilot positions. Trump informed Colonel Beattie that he would not be hired because of his expected unavailability for the airline's projected February 1989 commencement of operations. Because of unexpected delays the airline did not actually commence operations until June 1989.

Colonel Beattie sued Trump Shuttle in 1990, alleging that the company's refusal to hire him in 1989 violated section 2021(b)(3) of the VRR law, as amended by Congress in 1986. Citing the plain language of the section, buttressed by the legislative history of the 1986 amendment, Judge Thomas A. Flannery of the U.S. District Court for the District of Columbia rejected Trump's defense and ruled in favor of Colonel Beattie.

*Beattie v. Trump Shuttle* was decided more than three years before Congress enacted USERRA, but it is still good law because it is mentioned with approval in USERRA's legislative history. See H.R. Rep. No. 103-65, at 23 (1993). See also *McLain*, 424 F. Supp. 2d at 335; *Wrigglesworth v. Brumbaugh*, 121 F. Supp. 2d 1126, 1135 (W.D. Mich. 2000).

Thomas McLain was on active duty in the Army, nearing separation, when he applied to the City of Somerville, Massachusetts, for a position as a police officer. The city refused to hire him in the fall of 2001 because his expected date of release from active duty was about two months after the start of the police officer training academy. Mr. McLain sued the city, alleging that the refusal to hire him was based on

his obligations as a member of a uniformed service in violation of section 4311(a) of USERRA [38 U.S.C. 4311(a)]. Judge Reginald C. Lindsay ruled in his favor.

“Somerville [the city] first argues that it did not discriminate against McLain because of his membership in the uniformed services, but rather because of his unavailability to begin work at the time of the assigned police academy. This contention can be dispatched quickly: it ignores the plain language of section 4311(a), which prohibits discrimination based not only on a person's status as a member of the uniformed services, but also on the service member's ‘obligation to perform service.’ 38 U.S.C. 4311(a). McLain was not available on October 1, 2001, because he had an obligation to perform military service on that date.” *McLain*, 424 F. Supp. 2d at 333-34.

**Q: Just last week, I applied for a job that seemed right up my alley in terms of my knowledge, experience, and interests. The job application form asked about my military status, and I answered truthfully about my membership in the Army Reserve. The interview went well, and the interviewer did not say or ask anything about my military status, and I did not bring the subject up. After the interview, I was very optimistic that I would be hired, and I was very disappointed that I was not. The person who was selected has never served in the armed forces.**

**Is it unlawful for an employer to ask about Reserve Component status on a job application form?**

**A:** Asking such questions on job application forms or during job interviews is not unlawful, but perhaps it should be.

If you sue about the non-selection, alleging that you were discriminated against based on your military status and obligations, you are required to prove, in order to prevail, that your military status and obligations

constituted *a motivating factor* in the employer's decision to hire the other candidate instead of you. You are not required to prove that your military service was *the sole reason* for your non-selection.

Under section 4311(c) of USERRA, quoted above, if you prove that your military service was *a motivating factor* in the employer's decision, the burden of proof shifts to the employer to *prove* (not just say) that you would not have been hired anyway, for lawful reasons unrelated to your service, even if your service had not been considered or even if you had not been a member of the Army Reserve.

By asking about your military status on the job application form, the employer just proved your case for you. If your military status had been irrelevant to the hiring decision, the employer would not have asked about it on the form.

**Q: Do you think that I should reenlist in the Army Reserve?**

**A:** Most definitely yes. Our nation needs experienced NCOs like you to keep serving all the way to retirement eligibility and beyond. Moreover, if you do not continue serving at least long enough to qualify for the Reserve Retirement at age 60, you will definitely kick yourself when you reach that age.<sup>4</sup>

If you quit the Army Reserve at the 16-year point in order to make yourself more attractive to civilian employers, I think that you will be sorely disappointed. Prospective employers will not believe that you really have quit the Army Reserve and that you will not be rejoining.

**Q: What do you suggest that I do now?**

---

<sup>4</sup> As I explained in Law Review 1007 (January 2010), you are most likely eligible to start drawing your Army Reserve retired pay at least a few months prior to your 60<sup>th</sup> birthday, based on a 2008 statutory amendment and based on contingency service that you have performed after January 28, 2008.

**A:** What you really need is a job, not a lawsuit. I suggest that you contact ROA life member Captain Ted Daywalt, USNR (Ret.), the Executive Director of VETJOBS. His e-mail is [tdaywalt@vetjobs.com](mailto:tdaywalt@vetjobs.com). His toll-free telephone number is 877-VET-JOBS. You can find his organization's website at [www.vetjobs.com](http://www.vetjobs.com).

I think that you need to seriously consider moving to find a civilian job, but don't move *in hopes of* finding a job. Using VETJOBS or a similar service, you can find a job in a distant city and then move there to start the job.

Based on your Army Reserve service, you almost certainly have a current security clearance. Here in our nation's capital and in other military-heavy places (Norfolk, San Diego, etc.), a current security clearance is an enormous asset in finding a good job. Good luck.