

**Number 11, July 1999 (updated March 2003):
Discrimination Against Reservists**

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Q: I have enjoyed your series of articles, beginning June 1998, concerning the Uniformed Services Employment and Re-employment Rights Act (USERRA). I recently left active duty after almost ten years, and I have affiliated with the Naval Reserve. I am currently searching for a civilian job. Several prospective employers have asked me via the employment application form or the job interview, about my Reserve status. Is it unlawful for a prospective employer to ask such a question? What protection do I have against an employer refusing to hire me because of my Naval Reserve obligations?

A: Asking the question is not unlawful, but USERRA makes it unlawful for an employer or prospective employer to deny you initial employment, re-employment, retention in employment, promotion, or any benefit of employment because you are a member of, apply to be a member of, or have been a member of a uniformed service or because you perform, have performed, apply to perform, or have an obligation to perform service in the uniformed services. 38 U.S.C. 4311 (a).

Q: To prove a violation of 38 U.S.C. 4311, is it necessary for me to prove that I was denied employment solely because of my Naval Reserve affiliation?

A: No. Under USERRA, it is sufficient for you to prove that your Naval Reserve affiliation was a motivating factor in the prospective employer's decision not to hire you. If you prove that, the burden of proof shifts to employer to prove that, even If you had not been a Reservist, you would not have been hired, for a lawful reason unrelated to your Naval Reserve affiliation. 38 U.S. C. 4311 (b).

In my opinion, showing that the prospective employer asked the question on the application form, or during the interview, is sufficient to shift the burden of proof to the employer. Every question on an employment application form is put there because the employer plans to use the answer in deciding whom to hire.

Note to Readers: If your employer is giving you a hard time about time away from work for Reserve component training or service, or if you believe that an employer or prospective employer has denied you a benefit to which you believe yourself entitled under USERRA, I suggest that you contact the National Committee for Employer Support of the Guard and Reserve (NCESGR) at 1-800-336-4590. You may also wish to visit the NCESGR~ Web site at www.esgr.com.