

Number 64, January/February 2003: Discrimination in Hiring

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Q: I was on active duty for seven years, until March 2001. I was hired by a major airline and was the first officer (co-pilot) for only a short time before I was laid off in the immediate aftermath of 11 September. I have not been recalled by the airline, and I have been actively seeking employment elsewhere, both inside and outside the airline industry. Since September 2001, I have had no income except for my Air Force Reserve drill pay and unemployment compensation, which has expired.

Every time I get a job interview, the company official asks me about my Reserve status and the possibility of my being recalled to active duty. (Usually, the question immediately follows a remark about my military haircut.) I always answer truthfully, saying that I am an active member of the Air Force Reserve and that it is certainly possible that I will be recalled. About that time, I get told, "Don't call us, we'll call you." Is discrimination in hiring unlawful?

A: Yes, under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The pertinent section is as follows: "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." 38 U.S.C. 4311(a) (emphasis supplied).

USERRA was enacted in 1994, and it replaced the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. The VRR law was amended in 1986 to outlaw discrimination in hiring, so such discrimination has been unlawful for more than 16 years. Surprisingly, there is only one reported (published) case about hiring discrimination: *Beattie v. Trump Shuttle, Inc.*, 758 F. Supp. 30 (D.D.C. 1991).

I am at a loss to explain why there are not more cases on hiring discrimination. Perhaps most Reserve-component members are unaware of this prohibition or believe that it would be too hard to prove. Also, I can understand that a person would not want to start a new job with a new employer by suing that employer.

Q: Would I be required to prove that my Air Force Reserve membership was the sole reason why I was not hired?

A: No. It would be sufficient for you to prove that your Reserve membership was a "motivating factor" in the employer's decision not to hire you. If you

prove that, the burden of proof shifts to the employer to prove (not just say) that "the action [not hiring you] would have been taken in the absence of such membership." 38 U.S.C. 4311(c)(1). See also House Report No. 103-65, 1994 United States Code Congressional and Administrative News, pages 2449, 2457.

Q: Is it unlawful for a prospective employer to ask me about my Reserve affiliation on an employment application form or during an interview?

A: No, asking the question is not unlawful. However, asking the question may be enough to shift the burden of proof to the employer, under 38 U.S.C. 4311(c)(1). Every question on an employment application form is put there for a reason. If the employer put a question on the form about Reserve component membership, that is sufficient (in my view) to prove that your Reserve membership was a motivating factor in the employer's decision not to hire you.

If you made a proper and timely application for the position, and if you met the employer's stated minimum qualifications for the position, and if the employer asked about your Reserve-component membership and you answered truthfully, you should win, unless the employer can prove that you would not have been hired even if you had not been a member of a Reserve component.

response to the Marine Corps' operational requirements is a tribute to the dedication, professionalism and warrior spirit of every member of MarForRes. Our future success relies firmly on the Marine Corps' most valuable asset: our Marines and their families.

We need a truly "portable" health-care system that will allow our Reservists to move freely between full-time and part-time service without jeopardizing their family health care. The absence of a truly portable family health-care system is the showstopper for a true "continuum of service." The Reservist must have the flexibility to move across the availability spectrum. Breaks in family health care frustrate that movement.

We also continue to seek congressional approval to expand Montgomery GI Bill eligibility. Currently, the MGIB requires a six-year drilling Reserve commitment with a two-year non-drilling Ready Reserve commitment. The incentive should be expanded to include the four-year drilling Reserve/four-year Ready Reserve commitment payback so that it better matches the benefit it provides: financial assistance for a four-year college education. The Marine Corps has a large percentage of young, non-prior-service enlistments and this will enhance retention.

The Marine Corps Reserve is an integral part of the Marine Corps Total Force and the transformation of Marine Forces Reserve must be complementary to that of our active-duty operating forces to provide the greatest and most-needed capability. Our efforts to transform our training, organizations, and

support systems will ensure that the Marine Corps Reserve retains its relevancy into the 21st century. --ROA

* Military title used for purposes of identification only. The views expressed in these articles are the personal views of the author and are not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Defense or the U.S. government.