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CATEGORY: USERRA Discrimination
USERRA Forbids Discrimination in Initial Hiring

1.2 -- Discrimination Prohibited

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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 had been only one published case about hiring discrimination, *Beattie v. Trump Shuttle,* 758 F. Supp. 30 (D.D.C. 1991). There is now 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.

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, Col Charles W. Beattie, USAFR, 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 Col Beattie was at ICAF, Donald Trump entered into an agreement with Eastern to purchase the 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 Col 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 Col 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.

Col 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 Col 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, Mass., 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 Oct. 1, 2001, because he had an obligation to perform military service on that date." *McLain,* 424 F. Supp. 2d at 333-34.

Judge Flannery similarly dismissed the city's argument that USERRA's protections only applied to National Guard and Reserve members. "By their plain terms, sections 4311 and 4312 protect the same category of beneficiaries, people performing service in the "uniformed services" … The statute defines "uniformed services" broadly to include active duty, training, and National Guard duty. … Although resort to the legislative history of USERRA is unnecessary given the plain naming of its terms, that history removes even the most fanciful doubt as to whether Congress intended the benefits of USERRA to apply to both Reservists and Active Duty personnel." *McLain,* 424 F. Supp. 2d at 434.