

LAW REVIEW¹ 0801
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**Supreme Court Case: High court holds that veterans' preference
is not sex discrimination.**

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8.0—Veterans Preference

10.2—Other Supreme Court Cases

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979). The federal Veterans' Preference Act (VPA), as explained in Law Review 0721 (May 2007), gives certain veterans an advantage in securing federal civil service jobs. Veterans of wars and campaigns receive an extra five points, with seriously disabled veterans getting 10 points. The VPA does not apply to state and local government employment, but most states have their own veterans' preference laws that apply to the state and its political subdivisions (counties, cities, school districts).

Those state laws are not identical to the federal VPA; some are even more generous to the veteran. For example, the Massachusetts law at issue in *Feeney* was an *absolute preference* for any veteran who meets the minimum qualifications for the job. For example, let us say the

¹I invite the reader's attention to <https://www.roa.org/page/LawCenter>. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

minimum passing score on the entrance exam is 70. Mr. Smith, a qualified veteran, scored 70 and Mr. Jones, a non-veteran, scored 100, but Mr. Smith would still get the job with the veteran's preference.

Helen B. Feeney, a non-veteran, sued the Commonwealth of Massachusetts under 42 U.S.C. 1983, alleging that Massachusetts' veterans' preference law was unconstitutional because it discriminated against women like herself. There are women veterans, but the vast majority of living veterans are male. At the time this litigation was commenced, more than 98 percent of Massachusetts' veterans were male (*Feeney*, 442 U.S. at 270). That percentage is not quite as overwhelming today as it was in 1979, but it is still a large majority.

Because her suit was against a state and related to the constitutionality of a state law, her case was decided by a three-judge Federal District Court, with direct appeal to the U.S. Supreme Court. Ms. Feeney prevailed in the District Court, in a 2-1 decision. See *Anthony v. Massachusetts*, 415 F. Supp. 485 (D. Mass. 1976).

However, in a 7-2 decision written by Justice Potter Stewart, the Supreme Court reversed. "[T]he purposes of the [veterans' preference] statute provide the surest explanation for its impact. Just as there are cases in which impact alone can unmask an invidious classification, cf. *Yick Wo v. Hopkins*, 118 U.S. 356, there are others in which- notwithstanding impact-the legitimate noninvidious purposes of a law cannot be missed. This is one. The distinction made by ch. 31, section 23, is, as it seems to be, quite simply between veterans and nonveterans, not between men and women" (*Feeney*, 442 U.S. at 275).

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Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

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