

## LAW REVIEW 1182

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### Does USERRA Apply to Me?

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1.2—USERRA Discrimination

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**Q: I served on active duty in the Coast Guard from 1982 to 1986. I got out completely and have had no further military affiliation since I received my honorable discharge in 1990. I am proud of my military service, and I consider myself a veteran. I took a federal civilian job in late 2010. After just 11 months on the job, I was fired. I think that the firing was most unfair, and I want to appeal to the Merit Systems Protection Board (MSPB), but I have been told that such an appeal is not available to me because I have not worked for the Federal Government as a civilian employee for at least a year.**

**I have read your Law Review articles at [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org), and I am particularly interested in your articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I read in Law Review 0719 that USERRA applies to regular military service, as well as service in the National Guard or Reserve. I read that new federal employees, who cannot otherwise get to the MSPB to appeal a firing, can get there by claiming a USERRA violation. Does this apply to me?**

**A:** Perhaps.

Section 4311(a) of USERRA [38 U.S.C. 4311(a)] provides:

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.

(Emphasis supplied.)

Under section 4311(c), you do not have to prove that your Coast Guard service was *the sole reason* for the firing, but you do need to prove that it was *a motivating factor*.

If you are claiming that the agency fired you *because of* your 1982-86 Coast Guard service, you are entitled to a hearing before an Administrative Judge (AJ) of the MSPB. But if you do not have *evidence* that the supervisor who decided to fire you was *motivated* to fire you by your Coast Guard service, please do not waste everyone's time and resources (especially the MSPB's) by making a frivolous claim.

More than 99% of the successful section 4311 claims involve members of the National Guard or Reserve. If you were actively serving in the Coast Guard Reserve today, and asking for time off from work for training and service, it is easy to see how your civilian employer might be tempted to discriminate against you based on your military service and obligations. In your case, however, your military service ended 25 years ago, and you have no continuing occasion to ask for time off from work for military service.

Because your long-ago military service in no way impinges on your employer's interests, it is most difficult to see why an employer would discriminate against you on that basis. I can envision a very liberal college campus where the professors hate the military so much that they would be tempted to discriminate against an employee or applicant

for employment based on military service, even if the service in no way affects the employer. I simply cannot envision that kind of mindless anti-military animus in a federal agency.

**Q: What about the Veterans' Preference Act?**

**A:** Because your military service began after the end of the Vietnam Era and ended before the 1990 Iraqi invasion of Kuwait, you are not eligible for veteran's preference, unless you suffered a service-connected disability or unless you served in a campaign or expedition for which a service medal was awarded.