LAW REVIEW 15107[1]
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Section 4311 of USERRA Protects Veterans as well as Currently Serving Reserve Component Members

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.2—USERRA forbids discrimination
8.0—Veterans' preference in employment

Q: I have read with great interest your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I found the articles by doing an Internet search. I am particularly interested in your articles about section 4311 of USERRA, which outlaws employment discrimination based on the individual's service to our country in uniform. I note that most of your articles deal with discrimination against persons currently serving in the Reserve Components (RC) of the armed forces. Does section 4311 also outlaw discrimination against a person (like me) who served in the military almost half a century ago?

I was born in 1946, the first year of the "baby boom." I graduated from high school in 1964, and I was drafted in 1966. I served two years in the Army, including a year in Vietnam. I

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,400 "Law Review" articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997.

[2] Captain Wright is the author or co-author of more than 1,200 of the more than 1,400 "Law Review" articles available at www.servicemembers-lawcenter.org. He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

served in combat, but fortunately I was not wounded. I saw two good friends killed in action. I still have occasional nightmares about Vietnam.

I worked for many years for a corporation that went bankrupt in the 2008 recession. I turn 70 next year, but I am not ready to retire, financially or psychologically. For more than seven years, I have been diligently seeking full-time employment in the Federal Government, in our state government, in local government, and in several private sector industries. I have found nothing, and more often than not my applications are not even acknowledged. I believe that employers discriminate against me[3] because I served in the Army in Vietnam almost half a century ago. Does such discrimination violate section 4311?

A: Yes. Section 4311 makes it unlawful for an employer or prospective employer (federal, state, local, or private sector) to deny an individual initial employment on the basis of the fact that the individual "has performed" service in the uniformed service. Section 4311 sets no time limit on the lag time between when the individual served and when the alleged employment discrimination occurred. If you can establish that an employer decided not to hire you in 2015 because you served in the Army in 1966-68, that would be a violation of section 4311. Here is the text of section 4311:

> § 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited
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> (a) 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.
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> (b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

[3] First, let me advise you that it does no good to carp about discrimination by employers in general. You need to identify a specific job for which you applied, and for which you were particularly well qualified, but you did not get.

(c) *An employer shall be considered to have engaged in actions prohibited*--

(1) under subsection (a), if the person's membership, application for membership, *service,* application for service, or obligation for service in the uniformed services is *a motivating factor* in the employer's action, unless the employer can *prove* that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.[4]

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA). Congress enacted the VRRA in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of more than ten million young men (including my late father) for World War II.[5]

The VRRA had an anti-discrimination provision that was much more limited than section 4311 of USERRA. Here is the text of the VRRA provision:

> Any person who *seeks or* holds a position described in clause (A)[6] or (B)[7] of subsection (a) of this section shall not be denied *hiring,* retention in employment, or any promotion or other incident or advantage of employment *because of any obligation as a member of a Reserve component of the Armed Forces.*[8]

Your claim that you have been denied initial employment based on long-completed military service would not have been cognizable under section 4321(b)(3) of the VRRA, but it is

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[4] 38 U.S.C. 4311 (emphasis supplied).

[5] As originally enacted in 1940, the VRRA only applied to those who were drafted. In 1941, as part of the Service Extension Act, Congress expanded the VRRA to make it apply to voluntary enlistees as well as draftees. Almost from the very beginning, the reemployment statute has applied to voluntary as well as involuntary service.

[6] Clause A refers to positions in the United States Government, its territories or possessions and political subdivisions thereof, and the District of Columbia Government.

[7] Clause B refers to positions in state governments and the governments of political subdivisions of states and private employers.

[8] 38 U.S.C. 4321(b)(3) (1988 edition of the United States Code) (emphasis supplied).

cognizable under section 4311 of USERRA, which was written much more broadly. To prevail in a section 4311 claim, or even to survive the employer's inevitable motion to dismiss, you need to start with a logical and credible explanation as to why the employer is treating your long-past Army service as a motivating factor in the decision not to hire you.

More than 99% of the successful section 4311 cases involve alleged discrimination against currently serving RC members. It is not terribly difficult to convince a judge or jury that an employer might be tempted to discriminate against a currently serving RC member with respect to initial hiring, firing, or promotion. The employer may be concerned with or annoyed about the RC member's periodic and potentially lengthy absences from work for military training or service. The employer may seek to avoid the inconvenience and expense by avoiding hiring RC members or by firing those who are already employed.

In your case, you completed your military obligation almost half a century ago. You will not be asking the employer for time off for drill weekends or annual training in the National Guard or Reserve. You are not subject to involuntary call-up for military service, and if you were to volunteer to return to active duty at this stage in your life the Army would certainly say "no thanks." Why would an employer care about your military service? Why would an employer be tempted to discriminate against you on the basis of that service? Unless you can come up with a logical and credible answer to those questions, your lawsuit will likely not survive the motion to dismiss stage.

I am aware of two published cases involving successful section 4311 claims by individuals who were not currently serving RC members at the time of the alleged discrimination. The first case is *Carter v. Siemens Business Services LLC.*[9] Thomas Carter (plaintiff in that case) is a life member of the Reserve Officers Association (ROA). He served in the Army on active duty as an enlisted soldier for ten years. After he left active duty, he was commissioned a junior officer in the Army Reserve (USAR) and served part-time for another ten years. He retired from the USAR several years before he began work at Siemens Business Services LLC. While employed by the company, he had no ongoing military obligations and he missed no work because of military training or service.

One of Carter's colleagues at Siemens alleged that Carter had threatened to shoot their mutual supervisor, during a telephone conversation with the colleague. Carter vehemently denied having made any such threat, and there were several things about the colleague's allegation

[9] 2010 U.S. Dist. LEXIS 92354 (N.D. Ill. September 2, 2010). I discuss that case in detail in Law Review 15016 (February 2015).

that made the allegation seem incredible.[10] A Siemens supervisor credited the allegation and decided to fire Carter because he had served in the Army "in a unit that specializes in killing."[11] By crediting an otherwise incredible account, and by acting on that account to fire Carter, simply because Carter had served our country in uniform, Siemens violated section 4311.[12]

The other successful section 4311 claim by a plaintiff who was not an actively serving RC member at the time of the alleged discrimination is *Angiuoni v. Town of Billerica.*[13] Joseph Angiuoni served in the Army from 2003 to 2008, when he was honorably discharged, before he began his job as a police officer for the Town of Billerica, Massachusetts. While serving in the Army, he was deployed to Iraq, and during the deployment he suffered a back injury in the line of duty. Under Massachusetts law, Angiuoni would be entitled to veterans' preference against layoff, without regard to seniority, during any future budget related reduction in force in the police department, but only if he first survived the probationary period. Senior police officers (including those who were responsible for training Angiuoni and evaluating his performance as a probationary police officer) set out to ensure that Angiuoni would not complete the probationary period, in order to prevent him from gaining an advantage over them in any future reductions in force. This was Angiuoni's theory, and it was a credible explanation as to why there may have been discrimination against him despite the fact that he was not an RC member when he was a rookie police officer.

If you have a credible explanation as to why a particular prospective employer may have discriminated against you based on your long-ago Army service, it may be worthwhile to bring a section 4311 claim against that employer, assuming of course that you made a timely application with that employer, for a position for which you were qualified. Without such an explanation, such a suit is not worth bringing.

Q: Is it true that I am entitled to veterans' preference because I served on active duty in the Army during wartime?

A: Yes. In Law Review 0957 (October 2009), I explained the Veterans' Preference Act of 1944 (VPA). A person who served on active duty (not active duty for training) for more than 180

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[10] The colleague waited more than 48 hours after the alleged statement to report it, and when she did report it she made reference to a dream that she had the night before her report. It was unclear whether she was alleging that Carter had made the threatening statement in real life or only in her dream.

[11] The supervisor was apparently referring to a photograph of Carter, in his Army dress uniform, at the Special Forces Ball. In fact, Carter had never served in Special Forces, but as a finance officer he had assisted a Special Forces unit with their travel claims, and he was invited to attend and did attend the ball.

[12] In the cited case, Carter survived the employer's motion for summary judgment. The case then settled for an undisclosed amount. Settling a case does not amount to an admission of liability, and we will never know for sure what really happened in this weird case.

[13] 999 F. Supp. 2d 318 (D. Mass. 2014). I discuss that case in detail in Law Review 15062 (July 2015).

consecutive days any part of which was between January 31, 1955 and October 15, 1976 (the "Vietnam Era") is entitled to a five-point preference in federal civilian employment. As I explained in Law Review 0850 (October 2008), the Veterans' Employment Opportunities Act (VEOA) provides an enforcement mechanism for VPA claims by applicants for federal employment, but that enforcement mechanism is cumbersome and ineffective.

Most federal civilian hiring officials systematically flout VPA requirements. The VPA was enacted based on a paradigm for hiring that no longer exists in federal civilian employment. The paradigm involved taking a written employment application and receiving a numerical score. Such written employment applications are almost never used today.

For example, let us assume that Jones and Smith both took the same employment test, and Jones scored 79 while Smith scored 80. Jones is a veteran entitled to the five-point preference, while Smith has never served in the armed forces. Jones' score of 79 beats Smith's 80 when the five-point preference is added. In the absence of objective numerical scores, it is easy for federal hiring officials to flout veterans' preference.

As an honorably separated veteran who served on active duty during wartime, you are entitled to "emphasis" in hiring by federal contractors and subcontractors, under section 4212 of title 38 of the United States Code. Here is the text of that section:

> § 4212. Veterans' employment emphasis under Federal contracts
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> (a)
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> (1) Any contract in the amount of $ 100,000 or more entered into by any department or agency of the United States for the procurement of personal property and nonpersonal services (including construction) for the United States, shall contain a provision requiring that the party contracting with the United States take affirmative action to employ and advance in employment qualified covered veterans. This section applies to any subcontract in the amount of $ 100,000 or more entered into by a prime contractor in carrying out any such contract.
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> (2) In addition to requiring affirmative action to employ such qualified covered veterans under such contracts and subcontracts and in order to promote the implementation of such requirement, the Secretary of Labor shall prescribe regulations requiring that--
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> (A) each such contractor for each such contract shall immediately list all of its employment openings with the appropriate employment service delivery system (as defined in section 4101(7) of this title), and may also list such openings with one-stop career centers under the Workforce Investment Act of 1998, other appropriate service delivery points, or America's Job Bank (or any additional or subsequent national electronic job bank established by the Department of Labor), except that the contractor

may exclude openings for executive and senior management positions and positions which are to be filled from within the contractor's organization and positions lasting three days or less;

(B) each such employment service delivery system shall give such qualified covered veterans priority in referral to such employment openings; and

(C) each such employment service delivery system shall provide a list of such employment openings to States, political subdivisions of States, or any private entities or organizations under contract to carry out employment, training, and placement services under chapter 41 of this title.

(3) In this section:

(A) The term "covered veteran" means any of the following veterans:

(i) Disabled veterans.

(ii) *Veterans who served on active duty in the Armed Forces during a war* or in a campaign or expedition for which a campaign badge has been authorized.

(iii) Veterans who, while serving on active duty in the Armed Forces, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order No. 12985.

(iv) Recently separated veterans.

(B) The term "qualified", with respect to an employment position, means having the ability to perform the essential functions of the position with or without reasonable accommodation for an individual with a disability.

(b) If any veteran covered by the first sentence of subsection (a) believes any contractor of the United States has failed to comply or refuses to comply with the provisions of the contractor's contract relating to the employment of veterans, the veteran may file a complaint with the Secretary of Labor, who shall promptly investigate such complaint and take appropriate action in accordance with the terms of the contract and applicable laws and regulations.

(c) The Secretary of Labor shall include as part of the annual report required by section 4107(c) of this title the number of complaints filed pursuant to subsection (b) of this section, the actions taken thereon and the resolutions thereof. Such report shall also include the number of contractors listing employment openings, the nature, types, and number of positions listed and the number of veterans receiving priority pursuant to subsection (a)(2)(B).

(d)

(1) Each contractor to whom subsection (a) applies shall, in accordance with regulations which the Secretary of Labor shall prescribe, report at least annually to the Secretary of Labor on--

(A) the number of employees in the workforce of such contractor, by job category and hiring location, and the number of such employees, by job category and hiring location, who are qualified covered veterans;

(B) the total number of new employees hired by the contractor during the period covered by the report and the number of such employees who are qualified covered veterans; and

(C) the maximum number and the minimum number of employees of such contractor during the period covered by the report.

(2) The Secretary of Labor shall ensure that the administration of the reporting requirement under paragraph (1) is coordinated with respect to any requirement for the contractor to make any other report to the Secretary of Labor.

(3) The Secretary of Labor shall establish and maintain an Internet website on which the Secretary of Labor shall publicly disclose the information reported to the Secretary of Labor by contractors under paragraph (1).[14]

The Office of Federal Contract Compliance Programs (OFCCP), in the United States Department of Labor (DOL), is responsible for enforcing section 4212. OFCCP enforcement of this section has not been particularly effective.

The federal VPA does not apply to state and local governments, but more than 40 states have their own laws mandating veterans' preference in state and local government employment. Please see Law Review 0801 (January 2008) for a discussion of the veterans' preference law of the Commonwealth of Massachusetts and Law Review 14031 (March 2014) for a discussion of the law for the State of Washington.

[14] 38 U.S.C. 4212 (emphasis supplied).