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West Virginia Legislature Enacts Confusing New Law on Veterans' Preference in Private Sector Employment

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Update on Sam Wright

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On March 24, 2016, West Virginia Governor Earl Ray Tomblin signed into law House Bill 4507. This new enactment goes into effect June 11, 2016 and enacts a new section of the *Code of West Virginia,* as follows:

> 5-11-9a: **Veterans preference not a violation of equal employment opportunity under certain circumstances**
> An employer *may* [italics supplied] grant preference in hiring to a veteran or disabled veteran who has been honorably discharged from the United States Armed Services: *Provided,* [italics in original], That the veteran meets all of the knowledge, skills, and eligibility requirements of the job, and provided further that granting the preference does not violate any state equal employment opportunity law. For purposes of this section, the term "veteran" means any person *who has received an honorable discharge* and: Has provided more than one hundred eighty consecutive days of full-time, active duty service in the United States Armed Services or Reserve components, including the National Guard; or (b) has a service-connected disability rating fixed by the United States Department of Veterans Affairs.[3]

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1400 "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. I am the author of more than 1200 of the articles.

[2] BA 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 and retired in 2007. I am a life member of ROA. From 2009 to 2015, I was the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. After ROA disestablished the SMLC last year, I returned to Tully Rinckey PLLC, this time in an "of counsel" role. To arrange for a consultation with me or another Tully Rinckey PLLC attorney, please call Ms. JoAnne Perniciaro (the firm's Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

[3] Code of West Virginia, section 5-11-9a (emphasis supplied).

This section is poorly drafted and should be amended to clarify its intended purpose and effect. In the first place, the requirement that the person have been "honorably discharged" disqualifies me and thousands of other Reserve Officers Association (ROA) members.

I was commissioned an Ensign in the Navy Reserve (not on active duty) in November 1973, shortly after I started law school at the University of Houston. I entered active duty as a Lieutenant (junior grade) in January 1977, after I graduated from law school and passed the bar exam. I remained on active duty for about 1200 days and was *released from active duty* (not discharged) in March 1980, after completing my initial active duty commitment. In March 1980 I received a DD-214, not an honorable discharge.

I affiliated actively with the Navy Reserve after I left active duty, and I have 14 more periods (most of them 179 days in length) for which I received a DD-214, plus many shorter periods for which I did not receive a DD-214. I was never discharged from the Navy Reserve. In 2007, I reached my mandatory retirement date and transferred to the Inactive Status List, also called the "gray area retiree" list. I turned 60 and transferred to the retired list in 2011.

I qualify as a veteran because my 1977-80 active duty period lasted more than 180 consecutive days, but if the "honorable discharge" requirement is applied literally I do not qualify. This requirement should be clarified.

More broadly, the purpose and effect of section 5-11-9a is unclear and should be clarified. This section does not require a private sector employer in West Virginia to grant a preference to veterans generally or to disabled veterans specifically when hiring employees. Section 5-11-9a merely *permits* private sector employers to confer a hiring preference on veterans. Why do employers need such permission? The apparent purpose of section 5-11-9a was to preclude a disparate impact claim that veterans preference amounts to discrimination against women, based on the fact that the large majority of veterans are male.

I invite the reader's attention to *Personnel Administrator of Massachusetts v. Feeney.*[4] At the time, Massachusetts had a veterans' preference law governing employment by the Commonwealth of Massachusetts and its political subdivisions (counties, cities, school districts, etc.). Unlike the federal Veterans Preference Act (which applies to federal civilian employment and which grants a five-point preference to veterans and a ten-point preference to disabled veterans), the Massachusetts law granted an *absolute* hiring preference to any veteran who met the minimum qualifications for the job. That Massachusetts statute is still in effect.

[4] 442 U.S. 256 (1979). The citation means that you can find this Supreme Court decision in Volume 442 of *United States Reports,* starting on page 256.

For example, let us assume that the minimum passing score on the entrance examination was 70. Joe Smith, a veteran, scored 70. He gets the job over Mary Jones, a non-veteran, who scored 100.

At the time (1970s), more than 98% of Massachusetts veterans were male.[5] Ms. Feeney, a non-veteran, challenged the constitutionality of the Massachusetts veterans' preference statute, asserting that it amounted to sex discrimination. A three-judge federal district court panel agreed with Ms. Feeney and held the statute to be unconstitutional. Massachusetts appealed to the United States Supreme Court and prevailed. Writing for a 7-2 majority, Justice Potter Stewart wrote:

> The 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 discrimination, *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 chapter 31, section 23 [the Massachusetts veterans' preference statute] is, as it seems to be, between veterans and nonveterans, not between men and women.[6]

The Supreme Court enunciated the "disparate impact" theory of discrimination in *Griggs v. Duke Power Co.*[7] That case arose under Title 7 of the Civil Rights Act of 1964,[8] not under the United States Constitution. The employer (Duke Power) maintained a hiring qualification for "lineman" jobs of a high school diploma. There was no evidence that the company established the diploma requirement for the purpose of discriminating against black job applicants, but in the years immediately following the end of the lamentable "Jim Crow" era a high school diploma requirement disqualified a much greater percentage of black applicants than white applicants.

In *Griggs,* the Supreme Court held that a job qualification that has a disparate impact on a protected class (like African Americans) is unlawful under Title 7 if there is no legitimate business necessity for the qualification. There is a concern that a court could apply the same sort of disparate impact analysis to a veterans' preference policy and hold the policy to be unlawful based on the fact that the great majority of veterans are male. Of course, the West Virginia Legislature lacks the constitutional authority to change a federal statute like Title 7. The apparent purpose of newly enacted section 5-11-9a is to preclude a challenge to an employer's voluntary veterans' preference policy under West Virginia's own version of Title 7.

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[5] The male percentage among veterans is substantially less today but still in excess of 80%.
[6] *Feeney,* 442 U.S. at 275.
[7] 401 U.S. 424 (1971),
[8] Title 7 forbids discrimination in employment based on race, colors, sex, religion, or national origin.

Section 4311(a) of the Uniformed Services Employment and Reemployment Rights Act (USERRA)[9] makes it unlawful for an employer[10] to *discriminate* in initial employment (as well as retention of employment, promotions, and benefits) based on the applicant's or employee's membership in a uniformed service (including a Reserve Component of a uniformed service), application to join a uniformed service, past or present performance of uniformed service, or application or obligation to perform future service. Section 4311(a) does not require an employer to provide a *preference* to those who are serving or have served in the uniformed services, but section 4311(a) does not forbid granting a preference to veterans.

[9] 38 U.S.C. 4311(a). USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35).

[10] USERRA applies to private employers regardless of size and also to the Federal Government and state and local governments.