Number 162, March 2005:

Discrimination against Recently Separated Veterans

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Q: I recently left Marine Corps active duty and found a job with the Department of Juvenile Justice Services (DJJS) of our state government. I was a guard/counselor at a detention facility for adjudicated juvenile delinquents. All new employees of DJJS are required to submit to a psychological evaluation after about a month on the job. Until recently, this was considered to be essentially a formality; it has been many years since an employee of DJJS lost his or her job because of the psychological evaluation. But I lost my job on this basis, and so did another new DJJS employee who was a veteran of the Iraq war. I was in heavy combat, in the Marine Corps, in Iraq in the March 2003 timeframe. The other veteran who lost his job was in Iraq in the Army at almost the same time.

The psychological evaluation consisted of a series of yes or no questions, with no explanations permitted. One of the questions was, "Have you ever tried to hurt somebody?" I truthfully answered, "Yes. I was on active duty in Iraq. I tried to kill the enemy, and I know that I killed at least one of them." I was told that I had flunked the psychological evaluation, that no one who answers "yes" to this question is permitted to work for DJJS. So I have lost my job and my livelihood, and the state has made me unemployable by labeling me a "nut case" who flunked the psychological exam.

I tried to appeal, but the DJJS personnel office told me that the results of a psychological exam cannot be appealed and that I am a probationary employee with no appeal rights. Help!

A: The law that applies here is the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA was enacted in 1994, as a complete rewrite of and replacement for a law that can be traced back to 1940. USERRA is codified in Title 38, United States Code, sections 4301-4334 (38 U.S.C. 4301-4334). The pertinent section is section 4311(a), which provides as follows: "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 the uniformed services 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." [38 U.S.C. 4311(a) (emphasis supplied).] I have discussed section 4311 in Law Reviews 11, 35, 36, 64, 113, 122, and 150.

USERRA is one of many statutes enacted by Congress in recent decades outlawing discrimination in employment on the basis of race, sex, religion, national origin, age,

disability, union or concerted activities, etc. The most important such law, in terms of the number of persons affected, is Title VII of the Civil Rights Act of 1964, which forbids employment discrimination on the basis of race, color, sex, religion, or national origin. Title VII outlaws disparate treatment of employees or potential employees on the basis of one of these protected categories.

The Supreme Court has also held that Title VII outlaws the imposition of facially neutral criteria that have a disparate impact on persons in one of these protected categories. See Griggs v. Duke Power Co., 401 U.S. 424 (1971). The criterion at issue in Griggs was a requirement, for power company linemen, that they have high school diplomas. There was no evidence that the employer established this requirement with the intent to discriminate against African-Americans, but in North Carolina, just a few years after the end of the lamentable "Jim Crow" era, this requirement served to disqualify a much greater proportion of blacks than whites. The power company was unable to convince the court that there was a business necessity for the high school diploma requirement, as applied to the lineman job. Accordingly, the Supreme Court held that imposing the requirement was a violation of Title VII.

I think that this disparate impact analysis should apply under USERRA, just as it applies under Title VII. The criterion in your case is a requirement by DJJS that an employee truthfully respond "no" to the question, "Have you ever tried to hurt somebody?" Certainly, it is hard to quibble with that requirement in general. I contend that an employer cannot apply this standard to those who have tried to hurt or kill the enemy while serving in the U.S. armed forces. Doing so has a disparate impact on those who have served in our armed forces.

The fact that you are probationary because you are new in the civilian job is of no consequence. The re-employment statute has always applied to probationary jobs. See Collins v. Weirton Steel Corp., 398 F.2d 305 (4th Cir. 1968). I also invite your attention to Law Review 108. The fact that, for most employees, the results of a psychological evaluation are not appealable through the grievance process is of no consequence. USERRA is a federal statute, and the state has no right to shield a state employment practice from scrutiny under federal law. Under Article VI, clause 2 of the U.S. Constitution, commonly called the "Supremacy Clause," federal law trumps conflicting state law. Section 4302(b) of USERRA, 38 U.S.C. 4302(b), explicitly provides that USERRA overrides state laws that limit USERRA rights or that impose additional perquisites upon the exercise of USERRA rights. I also invite your attention to Law Reviews 18, 119, and 149.

Q: The state agency's lawyer said that USERRA does not apply to me because I did not work for DJJS before I went on active duty in the Marine Corps and because I was on active duty for more than five years. Does that matter?

A: No, that does not matter. If this were a reinstatement case under section 4312, you

would be required to prove that you meet USERRA's eligibility criteria for re-employment. Please see Law Review 61. But this is not such a case. Yours is a discrimination case under Section 4311, not a reinstatement case under Section 4312. To prevail under Section 4311, you are required to prove that your membership in a uniformed service, or your past, present, or future service was a motivating factor (not necessarily the one and only one reason) for the employer's decision to deny you retention in employment (i.e., to fire you). The disparate impact of the employer's policy is more than sufficient to establish a prima facie case of a 4311 violation, in my view.

Q: The employer's lawyer has also argued that USERRA does not apply to me because I was in the regular Marine Corps, not the Marine Corps Reserve. Does that matter?

A: No. USERRA applies to anyone who performs "service in the uniformed services" voluntarily or involuntarily. USERRA applies to the Active Components as well as the Reserve Components of the armed forces. Please see Law Reviews 30, 121, 136, and 139.

Q: Where do I go from here?

I suggest that you contact the National Committee for Employer Support of the Guard and Reserve (ESGR), a Department of Defense organization, at 1-800-336-4590. You can find the ESGR Web site at www.esgr.org. An ESGR volunteer can explain the law to your employer. If necessary, ESGR can bring this matter to the attention of the governor. I am confident that your governor would firmly disapprove of the way that DJJS has treated at least two recently separated veterans of the Iraq war.

* Military title used for purposes of identification only. The views expressed herein are the personal views of the authors and should not be attributed to the U.S. Marine Corps, the Department of the Navy, the Department of Defense, or the U.S. government. The best way to reach Captain Wright is by e-mail, at **samwright50@yahoo.com**.