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Mobilization Interrupts Start of New Job

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1.1.1.7—USERRA applies to state and local governments
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Q: I am the Sheriff of a major metropolitan county. Each year, we graduate a new crop of new deputy sheriffs from our police academy. Our most recent police academy class began in January 2019 and graduated in July. The new deputies then serve one year as deputy sheriff trainees, riding with an experienced deputy for on-the-job training. Our training program is rigorous, and not everybody passes. About 20% of those who start the police academy do not graduate. Another 15% of those who start the one-year on-the-job training program do not

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1800 "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 very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1600 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 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.

complete it. A new deputy is considered a full-fledged deputy sheriff only when he or she completes the one-year of training that follows the police academy, and his or her seniority dates from that point. Of the 50 trainees who began the police academy in January 2019, about 30-35 will become full-fledged deputy sheriffs in July 2020.

Because we offer excellent pay and benefits and have an excellent reputation, we have a lot more applicants than we have police academy slots. We have a very competitive and lengthy process for deciding which applicants to select for the police academy class. The process takes about six months and involves multiple tests and interviews.

Last year, we had a highly qualified candidate—let's call him Joe Smith. I knew that Smith had served in the Army for four years, including a year in Afghanistan. I did not know that Smith was actively participating in the Army Reserve when he applied for a job here as a deputy sheriff trainee. If I had known that, I never would have let him get past the first step of our selection process.

On 11/15/2018, we notified Smith and 49 other highly qualified candidates that they had been selected to attend our police academy class that was scheduled to convene and did convene of 1/7/2019. On 11/17/2018, Smith notified me that he was a member of an Army Reserve unit that had been called to active duty, with a report date of 2/1/2019. I thanked him for letting me know so promptly, but I also criticized him for failing to disclose his Army Reserve membership when he applied for a position here. I selected the first alternate to attend the January 2019 class in Smith's place.

I was recently visited by a volunteer ombudsman for the Department of Defense (DOD) organization called "Employer Support of the Guard and Reserve" (ESGR). The ombudsman told me that I, as the Sheriff, am required to reinstate Smith in the next police academy class that starts after he returns from active duty in December 2019 and that when Smith completes his 18-month training program he will be entitled to have his seniority date as a full-fledged deputy sheriff backdated to July 2020, when the other members of the January 2019 police academy class earned seniority dates after completing their training.

The ombudsman referred me to your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), and I looked through the Subject Index but did not find an article directly on point. How do you think USERRA applies to Smith's situation?

Answer, bottom line up front

Section 4311 of USERRA makes it unlawful for employers (federal, state, local, and private sector) to discriminate against those who serve or have served our country in uniform,

including those who serve part-time in the National Guard or Reserve. Since 1986, the prohibition on discrimination has applied to *discrimination in hiring,* as well as discrimination against those already employed, with respect to retention, promotion, and benefits of employment.

You have effectively admitted that you routinely violate section 4311 when you stated that if you had known that Smith was serving in the Army Reserve you never would have let him get past the first step in the hiring process. It is reasonable to infer that you have been systematically excluding Reserve Component[3] (RC) personnel from serious hiring discrimination by dismissing them from consideration at the first step of a long process.[4]

Moreover, Smith was and is an employee of your organization as of 11/15/2018, when you made him an unambiguous job offer with a January 2019 start date and he unambiguously accepted your offer. It does not matter that the start date had not yet happened when he learned of the call-up.[5]

Smith did you a big favor by informing you in November of his expected call to the colors in January. He could have reported to the police academy class on its convocation date and then informed you of the call-up. By giving you notice in November instead of waiting until January, he enabled you to fit in the first alternate in the academy class that began in January. You are estopped to deny Smith his USERRA rights because of his good faith in giving you ample notice.

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[3] Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The Army National Guard and Air National Guard are hybrid federal-state entities, while the other five components are purely federal entities. The number of men and women serving part-time in the seven Reserve Components is almost equal to the number of personnel serving full-time in the Active Component of the armed forces. Thus, Reserve and National Guard personnel make up almost half of our nation's pool of available, trained personnel for a national emergency. In the last 30 years, the Reserve Components have been transformed from a "strategic reserve" available only for World War III (which thankfully never happened) to an "operational reserve" that is called upon routinely for intermediate military operations like Iraq and Afghanistan. Now more than ever, our nation depends upon the Reserve Components to defend our country and our way of life.

[4] Excluding RC personnel from the hiring process at its first stage is an egregious and willful violation of USERRA. Please see Law Review 19038 (April 2019).

[5] I acknowledge that *Quick v. Frontier Airlines, Inc.,* 544 F. Supp. 3d 1197 (D. Colo. 2008) is to some extent inconsistent with my argument that a person begins an employment relationship when he or she accepts an employer's offer of employment, even if the projected start date has not arrived at the time the person is called to the colors in the National Guard or Reserve. As I explained in detail in Law Review 12102 (October 2012), I believe that *Quick* was wrongly decided, and Quick was denied the opportunity to appeal by Frontier Airlines' bankruptcy proceeding. Moreover, I think that *Quick* is distinguishable from Smith's situation. Smith had accepted an unambiguous job offer with a start date in the immediate future. By contrast, Quick was a member of the "hiring pool" who might be called to work at some point in the indefinite future when he volunteered to return to active duty.

When Smith leaves active duty at the end of this calendar year, he will almost certainly meet the five conditions for reemployment under USERRA.[6] In that case, he will be entitled to reemployment as a member of the police academy class that convenes in January 2020. If he completes the police academy and the one-year on-the-job training requirement in July 2021, he will then be entitled to have his seniority date as a full-fledged police officer backdated to July 2020. Under these circumstances, it is reasonable to infer that Smith would have completed the training requirements in July 2020 but for his call to the colors.

Explanation

USERRA forbids discrimination

As I have explained in footnote 2 and in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. Under the VRRA, a person who was drafted or who voluntarily enlisted in the armed forces was entitled to reemployment in the pre-service civilian job after honorable service. In 1955 and 1960, Congress expanded the VRRA to apply also to initial active duty training, active duty for training, and inactive duty training performed by Reserve and National Guard members.

When leaving a job for service and returning to the job became a recurring phenomenon rather than a once-in-a-lifetime experience, Congress amended the VRRA in 1968, adding a provision making it unlawful for an employer to fire a Reserve Component service member or to deny such a person promotions or "incidents or advantages of employment" based on "any obligation as a member of a Reserve Component of the Armed Forces." *In 1986, Congress amended this provision to forbid discrimination in hiring.*

The VRRA only forbade discrimination based on "any obligation as a member of a Reserve Component of the armed forces." USERRA's anti-discrimination provision is much broader. It forbids the denial of initial employment, retention in employment, promotion, or a benefit of employment based on membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service.[7]

Just prior to the enactment of USERRA in 1994, the pertinent section of the VRRA read as follows:

> Any person who seeks or holds a position described in clause (A) [a position with the United States Government, any territory or possession of the United States or a political

[6] I will discuss those five conditions below.
[7] 38 U.S.C. 4311(a).

subdivision of a territory or possession, or the Government of the District of Columbia] or (B) [a state, a political subdivision of a state, or a private employer] 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]

USERRA (enacted in 1994) contains a much broader and stronger anti-discrimination provision, as follows:

> § 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

- **(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.

(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.

- **(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

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

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.[9]

Section 4321(b)(3) of the VRRA forbade discrimination by employers only if such discrimination was "because of any obligation as a member of a Reserve component of the Armed Forces." Section 4311 of USERRA forbids discrimination based on any one of the following statuses or activities:

a. Membership in a uniformed service.[10]
b. Application to join a uniformed service.
c. Performing uniformed service.
d. Having performed uniformed service in the past.
e. Application to perform uniformed service.
f. Obligation to perform uniformed service.
g. Having taken an action to enforce a USERRA protection for any person.
h. Having testified or otherwise made a statement in or in connection with a USERRA proceeding.
i. Having assisted or otherwise participated in a USERRA investigation.
j. Having exercised a USERRA right.

Under section 4311(c) of USERRA,[11] it is not necessary to prove that one of the protected statuses or activities was *the reason* for the firing, denial of initial employment, or denial of a promotion or a benefit of employment. It is enough to prove that one of the protected activities or statuses was *a motivating factor* in the employer's decision. If the plaintiff proves motivating factor, the *burden of proof shifts to the employer to prove (not just say) that it would have made the same decision in the absence of the protected status or activity.*

USERRA's legislative history explains section 4311 as follows:

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[9] 38 U.S.C. 4311 (emphasis supplied).

[10] As defined by USERRA, the uniformed services include the Army, Navy, Marine Corps, Air Force, and Coast Guard, as well as the commissioned corps of the Public Health Service (PHS). 38 U.S.C. 4303(16). The commissioned corps of the National Oceanic and Atmospheric Administration (NOAA) is not a uniformed service for USERRA purposes, although it is a uniformed service as defined in 10 U.S.C. 101(a)(5). Please see Law Review 15002 (January 2015) for an explanation of how it came to pass that USERRA applies to the PHS Corps but not the NOAA Corps. Under more recent amendments, Intermittent Disaster Response Appointees of the National Disaster Medical System under the cognizance of the Department of Health and Human Services and persons who serve in the National Urban Search and Rescue Response System under the cognizance of the Federal Emergency Management Agency in the Department of Homeland Security have reemployment rights under USERRA. Please see Law Review 17011 (February 2017).

[11] 38 U.S.C. 4311(c).

Current law [the VRRA] protects Reserve and National Guard personnel from termination from their civilian employment or other forms of discrimination based on their military obligations. Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment (*see Beattie v. The Trump Shuttle, Inc.,* 758 F. Supp. 30 (D.D.C. 1991), current employees who are active or inactive members of Reserve or National Guard units, current employees who seek to join Reserve or National Guard units (*see Boyle v. Burke,* 925 F.2d 497 (1st Cir. 1991), or employees who have a military obligation in the future such as a person who enlists in the Delayed Entry Program which does not require leaving the job for several months. *See Trulson v. Trane Co.,* 738 F.2d 770, 775 (7th Cir. 1984). The Committee [House Committee on Veterans' Affairs] intends that these anti-discrimination provisions be broadly construed and strictly enforced. The definition of employee, which also includes former employees, would protect those persons who were formerly employed by an employer and who have had adverse action taken against them by the former employer since leaving the former employment.

If the employee is unlawfully discharged under the terms of this section prior to leaving for military service, such as under the Delayed Entry Program, that employee would be entitled to reinstatement for the remainder of the time the employee would have continued to work plus lost wages. Such a claim can be pursued before or during the employee's military service, even if only for lost wages.

Section 4311(b) [now 4311(c), as amended in 1996] would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called "but for" test and that the burden of proof is on the employer, once a prima facie case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted current section 2021(b)(3) [later renumbered 4321(b)(3)] of title 38, in 1968. *See* Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Session at 5320 (February 23, 1966). In 1986, when Congress amended section 2021(b)(3) to prohibit initial hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and Chairman of the House Committee on Veterans' Affairs) explained that, in accordance with the 1968 legislative intent cited above, the courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. *See* 132 Cong. Rec. 29226 (October 7, 1986) (statement of Cong. Montgomery) citing *National Labor Relations Board v. Transportation Management Corp.,* 462 U.S. 393 (1983).

This standard and burden of proof is applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that courts have relied on dicta from the Supreme Court's decision in *Monroe v. Standard Oil Co.,* 452 U.S. 549, 559 (1981), that a violation can occur only if the military obligation is the sole factor (*see Sawyer v. Swift & Co.,* 836 F.2d 1257, 1261 (10th Cir. 1988), those decisions

have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.[12]

USERRA Regulations

Two sections of the Department of Labor (DOL) USERRA Regulations address how to prove a violation of section 4311:

§ 1002.22 Who has the burden of proving discrimination or retaliation in violation of USERRA?

The individual has the burden of proving that a status or activity protected by USERRA was one of the reasons that the employer took action against him or her, in order to establish that the action was discrimination or retaliation in violation of USERRA. If the individual succeeds in proving that the status or activity protected by USERRA was one of the reasons the employer took action against him or her, the employer has the burden to prove the affirmative defense that it would have taken the action anyway.[13]

§ 1002.23 What must the individual show to carry the burden of proving that the employer discriminated or retaliated against him or her?

- **(a)** In order to prove that the employer discriminated or retaliated against the individual, he or she must first show that the employer's action was motivated by one or more of the following:
  - **(1)** Membership or application for membership in a uniformed service;
  - **(2)** Performance of service, application for service, or obligation for service in a uniformed service;
  - **(3)** Action taken to enforce a protection afforded any person under USERRA;
  - **(4)** Testimony or statement made in or in connection with a USERRA proceeding;
  - **(5)** Assistance or participation in a USERRA investigation; or,
  - **(6)** Exercise of a right provided for by USERRA.

- **(b)** If the individual proves that the employer's action was based on one of the prohibited motives listed in paragraph (a) of this section, the employer has the burden to prove the affirmative defense that the action would have been taken anyway absent the USERRA-protected status or activity.[14]

USERRA forbids discrimination in initial hiring

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[12] House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1), reprinted in Appendix B-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on pages 665-66 of the 2016 edition of the *Manual.*

[13] 20 C.F.R. 1002.22 (bold question in original).

[14] 20 C.F.R. 1002.23 (bold question in original).

I developed my interest and expertise in the reemployment statute during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. In the 1985-86 time period, I was involved in drafting and pushing for the VRRA amendment that made it unlawful for employers to discriminate against RC personnel *in hiring.*

Even in the "good old days" when RC service was generally limited to "one weekend per month and two weeks in the summer," some employers strenuously objected to the inconvenience and expense of giving employees time off (even without pay) for National Guard and Reserve training. Employers came to realize that they were required to give employees the time off and that it was unlawful to fire employees for taking time off for RC training. Employers reacted by systematically excluding RC members from being hired in the first place. At a 1986 congressional hearing, we (DOL) provided four witnesses who were RC members and who were at least tentatively offered civilian jobs, only to have the employers withdraw the job offers when they became aware of the applicant's RC status.

In the 33 years since Congress made it unlawful for employers to discriminate against RC members in initial employment, I am aware of only four cases in which RC members successfully sued for hiring discrimination. I will discuss each of those four cases below.

As I have explained in detail in Law Review 17068 (June 2017), the definitive treatise on USERRA is *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. In their book, Piscitelli and Still explain the paucity of reported cases on hiring discrimination as follows:

> Reported cases on hiring discrimination under USERRA are fairly rare. There are several possible explanations. First, job applicants may be unaware of their rights under USERRA. Second, rejected applicants may lack evidence of discrimination. For instance, they might not know of the successful candidate's comparative qualifications or status as a veteran or non-veteran. Third, employers possibly do not have an initial bias against service members. As one court observed, "If an employer is unaware of when and how often an applicant will be away on reserve duty, then it is unlikely to take into account the applicant's military status at the time of hiring." However, with increased numbers of Reserve and National Guard units deployed and kept in service for long periods since 9/11, employer wariness at the hiring stage reportedly is common.[15]

I can think of another reason for the paucity of cases about hiring discrimination. I think that most people would not choose to start a new job with a new employer by suing or threatening to sue, unless no other suitable employment can be found. Over the last three decades, I can recall three conversations with potential plaintiffs who considered bringing hiring

[15] *The USERRA Manual,* June 2018 edition, pages 275-76.

discrimination suits and decided against it because they dreaded entering a new employment relationship that seemed likely to be permanently adversarial.

VRRA and USERRA cases about hiring discrimination

***Beattie v. Trump Shuttle, Inc.*[16]**

Charles W. Beattie was a Colonel in the Air Force Reserve (USAFR) and a pilot for Eastern Airlines (EAL). Beattie was away from his civilian job for several months of USAFR training at the Industrial College of the Armed Forces in Washington, DC. While Beattie was away from his civilian job for military training, Donald Trump purchased the shuttle operation from EAL and opened Trump Shuttle. Pursuant to his agreement with EAL, Trump offered positions with his new airline to the EAL pilots and other EAL employees who had been working on EAL's shuttle operation, based on seniority. Trump acknowledged that Beattie's EAL seniority was such that he would have been offered Trump Shuttle employment, but for the fact that he was not available to start on Trump's expected start date because his USAFR training was scheduled to last for many more weeks after the projected start date. Trump declined to offer employment to Beattie because of his unavailability to start immediately, and Beattie sued Trump in the United States District Court for the District of Columbia. All of this happened shortly after Congress amended the VRRA to outlaw hiring discrimination.

The facts were not in dispute and the case was decided on cross motions for summary judgment. In ruling for Beattie and against Trump, Judge Thomas A. Flannery wrote:

> Beattie argues that section 2021(b)(3) [of title 38 of the United States Code, as it existed at the time] provides an absolute bar against employer discrimination in initial hiring decisions based upon an applicant's military reserve obligations. Beattie contends that Trump acted in violation of the VRRA by failing to hire Beattie based solely upon his military reserve commitment.
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> Trump raises a number of arguments in response. First, he argues that Beattie's attendance at the Industrial College was not an "obligation" within the meaning of section 2021(b)(3). Second, Trump contends that even if it were an "obligation," section 2021(b)(3) protects only Beattie's right to reinstatement to his former position by his former employer. Finally, Trump interprets the relevant provision only to prohibit employers from discriminating against applicants who are presently available to begin work.

[16] 758 F. Supp.30 (D.D.C. 1991).

The arguments advanced by the parties present the Court with questions of statutory interpretation. As in any case of statutory interpretation, the Court begins by examining the text of the statute. The plain language of section 2021(b)(3) quickly disposes of Trump's argument that the VRRA protects only Beattie's right to reinstatement. Section 2021(b)(3) clearly provides protection against discrimination to any reservist "who *seeks* or holds" an employment position. 38 U.S.C. § 2021(b)(3) (emphasis added). The provision also provides that a reservist "shall not be denied *hiring*, retention in employment, or any promotion . . . ." *Id*. (emphasis added). Clearly, section 2021(b)(3) prohibits discrimination based upon reserve obligations against the first-time job applicant as well as against the employee seeking to return to his or her previous position.

The legislative history of section 2021(b)(3) confirms this result. Section 2021(b)(3) of the VRRA was amended in 1986. The amendment was introduced as H.R. 2798, 99th Cong., 1st Sess., passed by the House on June 17, 1986, and adopted in Conference on October 8, 1986. *See* 1986 U.S. Code Cong. & Admin. News 5468, 5572, 5594 (1986). There had been no comparable Senate bill. *Id*. at 5594.

The legislative history of the 1986 amendment, *see* H.R. Rep. No. 99-626, 99th Cong., 2d Sess., (1986), suggests that it was intended to close a loophole in the existing version of the VRRA, namely, that the law protected reservists seeking to return to previously held jobs but did not protect reservists from discrimination in initial job applications. "Current law . . . provides no protection for members of the Guard and Reserve against discrimination in initial employment because a job seeker is a member of a reserve component." *Id*. at 2. Congress feared that some employers would be reluctant to hire reservists because of their military commitments. *Id*. at 2, 4. The 1986 amendment was designed to prevent such employment discrimination. "We agree with the purpose of the bill. We believe that as in the situation of veterans' reemployment, no person should be denied initial employment because of a Reserve or National Guard commitment." *Id*. at 5 (Statement of Donald E. Shasteen, Ass't Sec'y for Veterans' Employment and Training, Dep't of Labor).[17]

Thus, the legislative history of the amendment to section 2021(b)(3) confirms what the plain language of the statute makes clear -- that the section protects reservists from discrimination when initially applying for employment as well as when returning to a previously held position.[18]

***McLain v. City of Somerville*[19]**

[17] As a DOL attorney at the time, I drafted Mr. Shasteen's statement.
[18] *Beattie,* 758 F. Supp. at 32-33.
[19] 424 F. Supp. 2d 329 (D. Mass. 2006).

Thomas McLain enlisted in the United States Army and entered active duty on 1/5/2000. His active duty period was expected to last only two years, and he expected to be released on 1/4/2002. He was stationed at Fort Lewis in the State of Washington. In May 1999, before he enlisted, McLain took and passed the civil service exam to become a police officer.

In Massachusetts (MA), the employment of local police officers is governed by state (Commonwealth of Massachusetts) law and by state agencies.[20] On 10/12/2000, the City of Somerville (City) notified the MA Human Resources Division (HRD) that it was seeking to hire five new police officers. On 1/11/2001, the HRD approved the City's request for five new police officers and sent the City an "eligible list" of five persons that the City could lawfully appoint as new police officers. McLain's name was fourth on that list.

The City did not appoint any new police officers in early 2001 but kept pressing the HRD to send it new candidates, which the HRD did. By August 2001, the City had 11 police officer vacancies. The HRD told the City that it must fill its vacancies from the existing list by 8/31/2001.

In August 2001, Kathleen DiCaccio, the City's Assistant Personnel Director, contacted McLain by telephone and informed him that he had been selected to be a new police officer, pending his availability to attend the Police Academy scheduled to start on 10/1/2001.[21] McLain told DiCaccio that he would still be on active duty on 10/1/2001. He said that he expected early release, but not by 10/1/2001.[22] The City informed McLain that it would not hire him because he was not available by 10/1/2001.[23] On 11/1/2001, McLain sent DiCaccio a letter, thanking her for her assistance and expressing his continued desire to become a police officer for the City of Somerville.

McLain completed his Army active duty assignment and returned home to MA in late 2001. The CJTC had scheduled four new police academy classes that McLain could have attended.[24] But the City did no new police officer hiring after the fall of 2001. As of 1/5/2005, McLain was still on the "eligible list" for the City. McLain had since attended the police academy and was employed as a police officer for the MA Bay Transit Authority, but he still wanted to be a police officer for the City of Somerville.

McLain sued, claiming that the City violated USERRA by refusing to hire him simply because he was not available to start the police academy on 10/1/2001. The facts were not in dispute, so

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[20] MA law requires new police officers to attend a 20-week police academy run by the state.
[21] In MA, a state agency called the MA Criminal Justice Training Council (CJTC) runs the police academy for both state and local police forces. The CJTC scheduled the 10/1/2001 start date without input from the City.
[22] The terrorist attacks of 9/11/2001 probably nixed McLain's expectation of early release.
[23] In a deposition for this case, DiCaccio testified that McLain was an outstanding candidate and that she would have hired him if he had been available to start the police academy on 10/1/2001.
[24] Two classes started on 12/7/2001. One started on 1/14/2002 and one on 1/28/2002.

the case was decided on cross motions for summary judgment. In his scholarly opinion, Judge Reginald C. Lindsay wrote:

> In 1994, Congress enacted USERRA, superseding the Veterans' Reemployment Rights Act of 1968, 38 U.S.C. §§ 2021-2026 (1991) ("VRRA"), in order to "clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions." H.R. Rep. No. 103-65, at 18 (1993). Congress identified the purposes of USERRA:
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> (1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;
> (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and
> (3) to prohibit discrimination against persons because of their service in the uniformed services. 38 U.S.C. § 4301(a).
>
> McLain's basic argument is that Somerville violated his rights under USERRA when it failed to hire him because his military service prevented him from being available on the day Somerville wanted him to start work. The parties do not dispute that McLain would have been hired had he been available for the training academy on October 1, 2001, and that he was not available on that date because of his active service in the Army. The sole question is whether USERRA prevents discrimination in initial hiring on the basis of unavailability due to active service in the military. This appears to be a case of first impression.
>
> The starting point for the legal analysis, of course, is the language of USERRA itself: "if statutory language is plain, permitting only one construction, there is no occasion to seek out congressional intent by reference to legislative history or other extrinsic aids." *Lapine v. Town of Wellesley*, 304 F.3d 90, 96 (1st Cir. 2002). The relevant provision of USERRA is § 4311(a), which 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.
>
> 38 U.S.C. § 4311(a).
>
> USERRA defines an "employer" as "any person, institution, organization, or other entity that pays salary or wages for work performed," 38 U.S.C. § 4303(4)(A); defines

"uniformed services" to include the Army, 38 U.S.C. § 4303(16); and defines "service in the uniformed services" as "the performance of duty on a voluntary or involuntary basis in a uniformed service . . . including active duty," 38 U.S.C. § 4303(13).

By USERRA's plain terms, then, Somerville's failure to hire McLain violated the statute: Somerville, a covered employer, denied initial employment to McLain, a member of the Army, because of McLain's obligation to perform service in that uniformed service in the fall of 2001.

Somerville first argues that it did not discriminate against McLain because of his membership in the uniformed services, but rather because of his unavailability to begin work at the time of the assigned police academy. This contention can be dispatched quickly: it ignores the plain language of § 4311(a), which prohibits discrimination based not only on a person's status as a member of the uniformed services, but also on the service member's "obligation to perform service." 38 U.S.C. § 4311(a). McLain was not available on October 1, 2001, because he had an obligation to perform military service on that date.

Somerville next argues that USERRA distinguishes between military personnel on active duty, on the one hand, and national guardsmen and reservists on the other. Somerville claims that the anti-discrimination provision of § 4311 apply only to reservists and guardsmen, while § 4312, which concerns reemployment rights, applies to active duty personnel who have completed their term of service. Somerville points to no statutory language supporting this interpretation of USERRA. By their plain terms, both §§ 4311 and 4312 protect the same category of beneficiaries, people performing service in the "uniformed services," *compare* 38 U.S.C. § 4311(a) *with* 38 U.S.C. § 4312(a). The statute defines the "uniformed services" broadly to include active duty, training, and National Guard duty. *See* 38 U.S.C. § 4303(13), (16). It is axiomatic that identical terms within a statute should be given the same meaning. *See Textron Inc. v. Comm'r*, 336 F.3d 26, 33 (1st Cir. 2003).

Somerville argues, however, that "there appears to be a logical presumption that those on active duty are otherwise occupied full time in the service of the country and not available for full -- time civilian employment during that very same period." (Somerville's Br. 3.) The statute that USERRA replaced, VRRA, did have a more limited anti-discrimination clause, preventing hiring discrimination only on the basis of a prospective employee's "obligation as a member of a Reserve component of the Armed Forces." 38 U.S.C. § 2021(b)(3) (1991). But by changing the language of the anti-discrimination provision in USERRA, Congress signaled that it intended to change the provision's effect. *See Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 263, 112 S. Ct. 2465, 120 L. Ed. 2d 201 (1992) (noting the "canon of statutory construction requiring a change in language to be read, if possible, to have some effect . . .").

Although resort to the legislative history of USERRA is unnecessary given the plain naming of its terms, that history removes even the most fanciful doubt as to whether Congress intended the benefits of USERRA to apply to both reservists and active duty personnel: "Under . . . [VRRA], entitlements and eligibility criteria for reemployment rights differ based upon categories of military training or duty. It is the Committee's view that those distinctions are no longer appropriate for reemployment rights purposes and only lead to confusion and anomalous results in some cases." H.R. Rep. No. 103-65, at 23 (1993).

There is some superficial force, at least, to Somerville's next argument, that McLain's position is unusual. One would expect, Somerville argues, that most full-time members of the Armed Forces are not simultaneously applying for civilian jobs. Perhaps. On the other hand, one might ask whether it is any more disruptive for employers to be required to delay permanent hiring than it is to hold a permanent job open for an existing employee who may leave for military service for several years. The latter is clearly required under section 4312. Membership in the Reserves or National Guard by no means ensures that a person will not be required to serve a year or several-year tour of active duty. Furthermore, given the circumstances of this case -- Somerville's year-long hiring process, its failure to hire additional police officers for the ensuing four years, and the relatively short delay between when Somerville wanted McLain to begin work and when he was available to start --the policy expressed in § 4311(a) seems entirely reasonable.

The case that comes closest to addressing the issue at hand is *Beattie v. Trump Shuttle, Inc.*, 758 F. Supp. 30 (D.D.C. 1991). Beattie, a colonel in the Air Force Reserves, was on a ten -- month leave from his job as an Eastern Airlines pilot to attend military training when Trump Shuttle, Inc. purchased Eastern's shuttle division. *See Beattie*, 758 F. Supp at 31. Trump made employment offers to all of Eastern's employees, contingent on their availability for training at a specified date; Beattie's application was rejected solely because his military training obligation made him unavailable to start work on the date Trump required. *Id*. The court held that Trump's refusal to hire Beattie violated VRRA's provision prohibiting discrimination in hiring on the basis of a Reserve obligation. *Id*. at 36. The court specifically rejected Trump's argument that it denied Beattie a job because he was unavailable and not because of his membership in the Reserves. The court found that Beattie was unavailable due to his obligation to perform military duty, and that VRRA specifically prohibited discrimination based on such an obligation. *Id*. at 34.

While *Beattie* applied VRRA, rather than USERRA, its holding is important to the consideration of the present motion because Congress specifically indicated that it intended USERRA to include the prohibition against discrimination in initial hiring as laid out in *Beattie*. H.R. Rep. No. 103-65, at 23 (1993) ("Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment (see *Beattie v. The Trump Shuttle, Inc.*, 758 F. Supp. 30 (D.D.C. 1991)) . . ."). Somerville argues that *Beattie* only applies to reservists. But it was VRRA itself that limited the anti-discrimination provision to reservists, not any reasoning in the *Beattie* decision. The logic *of Beattie* -- which Congress specifically approved in USERRA --

is that an employer may not discriminate in hiring based on a prospective employee's unavailability due to his obligation to perform military service.

Somerville's next thrust is to read an "undue hardship" limitation into § 4311(a), which Somerville says justifies its failure to hire McLain. The reemployment provision, § 4312(d)(1)(A), contains an exception to the reemployment requirement if "the employer's circumstances have so changed as to make such reemployment impossible or unreasonable." Section 4311, on the other hand, includes no such exception. Once again, familiar canons of statutory construction inform the court that the fact that this exception is expressly included in § 4312, but not in § 4311 weighs against reading the exception into § 4311. *See Trenkler v. United States*, 268 F.3d 16, 23 (1st Cir. 2001) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

Even were an undue hardship exception to apply, Somerville construes it far too broadly. The exception of § 4312(d)(1)(A), which the employer bears the burden of proving, applies only "where reinstatement would require creation of a useless job or where there has been a reduction in the work force that reasonably would have included the veteran." *Wrigglesworth v. Brumbaugh*, 121 F. Supp. 2d 1126, 1136 (W.D. Mich. 2000) (quoting *Davis v. Halifax City Sch. Sys.*, 508 F. Supp. 966, 968 (E.D.N.C. 1981)). Somerville has offered no evidence that this limited exception would apply to it; nor is it plausible on the present record that Somerville has no continuing need for police patrol officers.

Somerville next argues that, as a matter of public safety, it needed to be able to hire the number of police officers it found necessary at the time it deemed necessary. The slowness with which Somerville progressed in filling these eleven vacancies belies this claim. Furthermore, there is nothing to suggest that Somerville was precluded from hiring a temporary officer to be replaced by McLain when McLain became available.[25]

Murphy v. Radnor Township[26]

John J. Murphy was a Major in the USAFR when he applied for the position of Township Manager of Radnor Township, Pennsylvania. He was one of eight candidates invited to appear in person for a first-round interview. The interview was conducted by four township commissioners. It lasted 45 minutes, of which ten minutes was taken up by a commissioner asking him pointed questions about his USAFR obligations, including asking him how many days the township should expect him to be away from work for USAFR service. Murphy testified that when the interview was over a commissioner told him that he would not be invited back for a second-round interview because the Board of Commissioners had “serious reservations about

[25] *McLain,* 424 F. Supp. 2d at 332-36/

[26] 542 Fed. Appx. 173, 197 L.R.R.M. (BNA) 2387 (3rd Cir. 2013).

his ongoing military obligations." Murphy was not invited back for a second interview. None of the other candidates had a military background or military obligations.

The district judge misunderstood the provisions of section 4311(c), which shifts the burden of proof to the defendant employer if the plaintiff service member proves that his or her military service or obligation was "a motivating factor" in the employer's unfavorable personnel decision.[27] The district judge held that the burden of proof was on Murphy to prove that the township's stated reasons for his non-selection were pretextual. In fact, the burden of proof was on the employer to prove that it would not have hired Murphy anyway, even if he had not been a reservist. The district court granted the employer's motion for summary judgment.

Murphy appealed to the United States Court of Appeals for the 3rd Circuit, the federal appellate court that sits in Philadelphia and hears appeals from district courts in Delaware, New Jersey, Pennsylvania, and the United States Virgin Islands. As is always the case in our federal appellate courts, the case was assigned to a panel of three appellate judges. In this case, the panel consisted of Judge Joseph A. Greenaway, Jr., Judge Dolores K. Sloviter, and Judge Maryanne Trump Barry. Judge Greenaway wrote the opinion, and the other two judges joined in a unanimous panel decision overturning the summary judgment for the employer.

I have found no subsequent judicial decision in this case. It is likely that the township and Murphy settled.

Atteberry v. Avantair, Inc.[28]

Alex Atteberry worked for Avantair, Inc. from November 2005 through October 2006, when he resigned. Thirteen months later, in November 2007, he inquired about returning to work for the company. The company originally encouraged him to return, and he and the company agreed that he would return to work on 12/27/2007. But the company kept pressing him with questions about the extent of his military obligations, and on 12/27/2007 (the day that he was to return to work) the company rescinded the job offer.

Atteberry complained to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), asserting that rescinding the job offer violated section 4311 of USERRA—discrimination in hiring based on his military obligations. The company did not acknowledge that the decision to rescind the job offer was motivated by Atteberry's military obligations. Rather, the company asserted three reasons for the decision to rescind:

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[27] In this case, the unfavorable personnel decision was the decision to hire another candidate, not Murphy, for the Township Manager position.

[28] 2009 U.S. Dist. LEXIS 4803 (M.D. Fla. June 9, 2009).

a. There were no current job openings at the time.
b. The company has a policy against hiring former employees.
c. Atteberry had a poor exit interview when he resigned in October 2006.

DOL-VETS investigated Atteberry's claim and concluded that the company's stated reasons for rescinding the job offer were pretextual. DOL-VETS apparently concluded that Atteberry's claim was meritorious, but in this lawsuit Atteberry was represented by private counsel, not by the United States Department of Justice (DOJ). Perhaps Atteberry requested that his case file be referred to DOJ, and DOJ turned down his request for representation. It is also possible that Atteberry chose to retain private counsel instead of requesting referral to DOJ.

After discovery, Avantair, Inc. filed a motion for summary judgment. In a scholarly opinion, Judge Elizabeth A. Kovachevich denied the motion for summary judgment, holding that there was enough evidence from which a reasonable jury could conclude that the decision to rescind the job offer was motivated, at least in part, by Atteberry's military obligations. There is no subsequent published judicial opinion in this case. It is likely that the parties settled.

***Sheehan v. Department of the Navy*[29]**

Patrick J. Sheehan and Ronald J. Fahrenbacher both retired from the Judge Advocate General's Corps of the United States Navy. Shortly after retiring, they sought civilian attorney positions with the Department of the Navy (DON) and were not selected. They brought enforcement actions in the Merit Systems Protection Board (MSPB), contending that the DON decision to select someone else for these vacancies was motivated by animus against them, by the Navy, based on their having served on active duty in the Navy for entire careers. They had no real evidence to support this unlikely theory.

It should be emphasized that Sheehan and Fahrenbacher were not reservists—they were retired regulars. It is of course true that section 4311 of USERRA prohibits discrimination against those who have served as regulars as well as those who are serving or have served as reservists, but when Sheehan and Fahrenbacher applied for these civilian attorney positions their military careers were over. They would not be asking for time off from their civilian jobs for drill weekends, or annual training, or for voluntary or involuntary active duty. It seems most unlikely that DON decision-makers would discriminate against retired Navy officers. It is a mystery why Sheehan and Fahrenbacher chose to bring this case.

[29] 240 F.3d 1008 (Fed. Cir. 2001). This is a 2001 decision of the United States Court of Appeals for the Federal Circuit, the federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board. The citation means that you can find this decision in Volume 240 of *Federal Reporter, Third Series,* and this decision starts on page 1008.

In an important precedential decision,[30] the Federal Circuit set forth the mode of proving a violation of section 4311, as follows:

> Discriminatory motivation under USERRA may be reasonably inferred from a variety of factors, including (1) proximity in time between an employee's military activity and the adverse employment action, (2) inconsistencies between the proffered reasons [the reasons the employer asserts were the reasons for the adverse employment action] and other actions of the employer, (3) an employer's expressed hostility towards members protected by the statute, and (4) disparate treatment of certain employees compared to other employees with similar work records or offenses.[31]

***Diehl v. Lehigh Valley Railroad Co.*[32]**

Mr. Diehl (first name not provided in the opinion) worked for the Lehigh Valley Railroad during the early months of World War II, as a "car man helper." He was drafted, and he served on active duty from 4/15/1943 until 10/20/1945. He made a timely application for reemployment and returned to work for the railroad on 11/11/1945.

At the railroad, car man helpers were promoted to the higher paying position of car man mechanic when they completed a training program. Diehl completed the training program and was promoted to the mechanic position in 1948. He claimed and was able to prove that he would have completed the training program by 6/1/1946, but for his active duty service in World War II. The railroad and the union refused to adjust his seniority date, and he sued.

The Supreme Court held that Diehl was entitled to the seniority adjustment he sought. He could not use his military service time as a substitute for the training program, but once he completed the training program, after returning from service, he was entitled to have his seniority date as a mechanic adjusted to the date that he *would have completed* the training program but for the interruption caused by his call to the colors.

Applying this important precedent to Smith's situation, Smith must be allowed to start the police academy in January 2020, after he returns from active duty. If, as is likely, he successfully completes the police academy and the one-year on-the-job training program, he will become a full-fledged police officer in July 2021. At that point, Smith is entitled to have his seniority date as a full-fledged police officer backdated to July 2020. The other new police officers who started the police academy in January 2019 became full-fledged police officers in July 2020. It is

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[30] For whatever reason, the Federal Circuit chose this case as the opportunity to write the definitive treatise on how to prove a section 4311 case.
[31] *Sheehan,* 240 F.3d at 1014.
[32] 348 U.S. 960 (1955).

reasonable to infer that Smith would have achieved the full-fledged status in July 2020, but for his call to the colors.

Q: The seniority system exists under the collective bargaining agreement (CBA) between the police officers' union and me, as the Sheriff. Backdating Smith's seniority and putting him ahead of other police officers would violate the CBA. I cannot do that.

A: You must do that, because federal law (USERRA) trumps the CBA. In its first case construing the VRRA, the Supreme Court held: "No practice of employers *or agreements between employers and unions* can cut down the service adjustment privileges that Congress has secured the veteran under the Act."[33]

This principle is codified in section 4302 of USERRA, which provides:

> **(a)** Nothing in this chapter [USERRA] shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
>
> **(b)** This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.[34]

The CBA can give service members and veterans greater or additional rights, over and above USERRA, but it cannot take away rights conferred by USERRA.

Q: This is BS, and I will not put up with it. If Smith is in the police academy in January 2020, I will order the instructors to flunk him out.

A: Your disrespect for the rule of law is shocking and unconscionable. As a law enforcement officer, your first responsibility is to *obey the law.* How can you enforce the law against others when you reserve unto yourself the prerogative to flout laws that you find inconvenient or otherwise objectionable?

Q: I do respect the law, but that includes state laws as well as federal laws. What you are telling me that USERRA requires violates our state laws.

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[33] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946) (emphasis supplied).
[34] 38 U.S.C. 4302.

A: As with the CBA, USERRA supersedes and overrides state laws that purport to limit USERRA rights. I also invite your attention to the "Supremacy Clause" of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[35]

The Supremacy Clause means that a federal statute like USERRA trumps conflicting state laws and constitutions.

All too often, state and local officials in your part of the country need to be reminded that General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse.

Q: I strenuously object to this burdensome law.

A: Let us remember that were it not for the sacrifices of military personnel, from the American Revolution to the Global War on Terrorism, none of us would enjoy the blessings of liberty. In a letter to Alexander Hamilton dated May 2, 1783, General George Washington wrote:

> It may be laid down as a primary position, and the basis of our system, that every citizen of a free government owes not only a proportion of his property but even of his personal services to the defence of it, and consequently that the Citizens of America (with a few legal and official exemptions) from 18 to 50 Years of Age should be borne on the Militia Rolls, provided with uniform Arms, and so far accustomed to the use of them that the Total strength of the Country might be called upon at Short Notice on any very interesting Emergency.[36]

Throughout our nation's history, when the survival of liberty has been at issue, our nation has defended itself by calling up state militia forces (known as the National Guard since the early 20th Century) and by drafting young men into military service.[37] A century ago, in the context of World War I, the United States Supreme Court upheld the constitutionality of the draft.[38]

Almost two generations ago, in 1973, Congress abolished the draft and established the All-Volunteer Military (AVM). No one is required to serve in our country's military, but someone

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[35] United States Constitution, Article VI, Clause 2. Yes, it is capitalized just that way, in the style of the late 18th Century.

[36] Published in *The Writings of George Washington* (1938), edited by John C. Fitzpatrick, Volume 26, page 289.

[37] No one has been drafted by our country since 1973, but under current law young men are required to register in the Selective Service System when they reach the age of 18. In Resolution 13-03, ROA has proposed that Congress amend the law to require women as well as men to register. Please see Law Review 15028 (March 2015).

[38] *Arver v. United States,* 245 U.S. 366 (1918). The citation means that you can find this decision in Volume 245 of *United States Reports,* starting on page 366.

must defend this country. When I hear folks complain about the "burdens" imposed by laws like the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), I want to remind those folks that our government is not drafting you, nor is it drafting your children and grandchildren. Yes, these three laws impose burdens on some members of our society, but those burdens are tiny in comparison to the far greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by that tiny sliver of our country's population who volunteer to serve in uniform, in the Active Component (AC) or the Reserve Component (RC).

As we approach the 18th anniversary of the "date which will live in infamy" for our time, when 19 terrorists commandeered four airliners and crashed them into three buildings and a field, killing almost 3,000 Americans, let us all be thankful that in that two-decade period we have avoided another major terrorist attack within our country. Freedom is not free, and it is not a coincidence that we have avoided a repetition of the tragic events of 9/11/2001. The strenuous efforts and heroic sacrifices of American military personnel, AC and RC, have protected us all.

In a Memorial Day speech at Arlington National Cemetery on May 30, 2016, the Chairman of the Joint Chiefs of Staff (General Joseph Dunford, USMC) said:

> Some [of those we honor today] supported the birth of the revolution; more recently, others have answered the call to confront terrorism. Along the way, more than one million Americans have given the last full measure [of devotion]. Over 100,000 in World War I. Over 400,000 in World War II. Almost 40,000 in Korea. Over 58,000 in Vietnam. And over 5,000 have been killed in action since 9/11. Today is a reminder of the real cost of freedom, the real cost of security, and that's the human cost.

In a speech to the House of Commons on 8/21/1940, Prime Minister Winston Churchill said:

> The gratitude of every home in our island, in our Empire, and indeed throughout the world except in the abodes of the guilty goes out to the British airmen who, undaunted by odds, unweakened in their constant challenge and mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the course of human conflict was so much owed by so many to so few.

Churchill's paean to the Royal Air Force in the Battle of Britain applies equally to America's military personnel, AC and RC, who have protected us from a repetition of 9/11/2001, by their prowess and their devotion.

In the last 18 years, most of the American people have made no sacrifices (beyond the payment of taxes) in support of necessary military operations. The entire U.S. military establishment, AC

and RC, amounts to just 0.75% of the U.S. population. This tiny sliver of the population bears almost all the cost of defending our country.

On January 27, 1973, more than 46 years ago, Congress abolished the draft and established the AVM. The AVM has been a great success, and when Representative Charles Rangel of New York introduced a bill to reinstate the draft he could not find a single co-sponsor. Our nation has the best-motivated, best-led, best-equipped, and most effective military in the world, and perhaps in the history of the world. I hope that we never need to return to the draft. Maintaining the AVM requires that we provide incentives and minimize disincentives to serve among the young men and women who are qualified for military service.

I have written:

> Without a law like USERRA, it would not be possible for the services to recruit and retain the necessary quality and quantity of young men and women needed to defend our country. In the All-Volunteer Military, recruiting is a constant challenge. Despite our country's current economic difficulties and the military's recent reductions in force, recruiting remains a challenge for the Army Reserve—the only component that has been unable to meet its recruiting quota for Fiscal Year 2014.
>
> Recruiting difficulties will likely increase in the next few years as the economy improves and the youth unemployment rate drops, meaning that young men and women will have more civilian opportunities competing for their interest. Recent studies show that more than 75% of young men and women in the 17-24 age group are not qualified for military service, because of medical issues (especially obesity and diabetes), the use of illegal drugs or certain prescription medicines (including medicine for conditions like attention deficit hyperactivity disorder), felony convictions, cosmetic issues, or educational deficiencies (no high school diploma).
>
> Less than half of one percent of America's population has participated in military service of any kind since the September 11 attacks. A mere 1% of young men and women between the ages of 17 and 24 are interested in military service and possess the necessary qualifications. The services will need to recruit a very high percentage of that 1%. As a nation, we cannot afford to lose any qualified and interested candidates based on their concerns that military service (especially service in the Reserve or National Guard) will make them unemployable in civilian life. There is a compelling government interest in the enforcement of USERRA.[39]

[39] Law Review 14080 (July 2014) (footnotes omitted). Nathan Richardson was my co-author on Law Review 14080.

Those who benefit from our nation's liberty should be prepared to make sacrifices to defend it. In the AVM era, no one is required to serve our nation in uniform, but our nation needs military personnel, now more than ever. Requiring employers to reemploy those who volunteer to serve is a small sacrifice to ask employers to make. All too many employers complain about the "burdens" imposed on employers by the military service of employees, and all too many employers seek to shuck those burdens through clever artifices.

I have no patience with the carping of employers. Yes, our nation's need to defend itself puts burdens on the employers of those who volunteer to serve, but the burdens borne by employers are tiny as compared to the heavy burdens (sometimes the ultimate sacrifice) borne by those who volunteer to serve, and by their families.

To the nation's employers, especially those who complain, I say the following: Yes, USERRA puts burdens on employers. Congress fully appreciated those burdens in 1940 (when it originally enacted the reemployment statute), in 1994 (when it enacted USERRA as an update of and improvement on the 1940 statute), and at all other relevant times. We as a nation are not drafting you, nor are we drafting your children and grandchildren. You should celebrate those who serve in your place and in the place of your offspring. When you find citizen service members in your workforce or among job applicants, you should support them cheerfully by going above and beyond the requirements of USERRA.

Please join or support ROA

This article is one of 1800-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

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

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Officers Association
1 Constitution Ave. NE
Washington, DC 20002