

LAW REVIEW 198

Asking Questions about Reserve Affiliation in Employment Application Forms

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Q: I am the commanding officer of an Army Reserve unit. A member of my unit has a big problem with her civilian employer, and I have found your “Law Review” articles helpful when trying to advise her.

She recently started a new job with a new employer, and now our unit is being mobilized. At our last drill weekend, I advised all unit members to inform their civilian employers that it is quite likely that we will be called to active duty in the next three or four months, and she followed my advice. Her employer responded, “I did not know that you were in the Reserve. If I had known that, I never would have hired you. I checked the employment application form that you filed with us. The form asks about military affiliation, and you left that line blank. You deceived me, and for that you are fired.” Where does she go from here?

A: Have her call the National Committee for Employer Support of the Guard and Reserve (ESGR), a DoD organization whose mission is “To gain and maintain support from all public and private employers for the men and women of the National Guard and Reserve.” The ESGR toll-free number is 800-336-4590. ESGR will put her in touch with a trained ESGR volunteer in her state, to help her sort this out and to contact the employer on her behalf.

Although I certainly would have advised her to tell the truth about her Army Reserve affiliation, if she had contacted me before completing the job application, I think that the employer is *estopped* (precluded) from relying upon this alleged misrepresentation to justify firing her. *Estoppel* is one of those ancient equitable principles that is exceedingly difficult to explain to non-lawyers. I found the following definition on the Law.com Web site: “A bar or impediment (obstruction) which precludes a person from asserting a fact. Such a hindrance is due to the person’s actions, conduct, statements, admissions, failure to act or judgment against the person in an identical legal case. *Estoppel* includes being barred by false representation or concealment (equitable *estoppel*), failure to take legal action until the other party is prejudiced by the delay (*estoppel by laches*), and a court ruling against the party on the same matter in a different case (*collateral estoppel*).”

Section 4311(a) of the Uniformed Services Employment and Reemployment Rights Act (USERRA) outlaws discrimination in *initial employment* as well as discrimination against those who are already employed, with respect to firing, promotions, and benefits. Section 4311(c) provides that if her military affiliation or performance or obligation to perform uniformed service were a *motivating factor* (not necessarily the only reason) in the employer’s decision, that decision would be unlawful

unless the employer can *prove* (not just say) that the employer would have made the same decision in the absence of the protected factor.

Employers are precluded by Section 4311 from using Reserve Component (RC) affiliation in making employment decisions, including hiring decisions. It would have been unlawful for the employer to deny the Reservist initial employment because of her Army Reserve affiliation. The employer should not have asked about RC affiliation in the application form. Accordingly, I contend that the employer is *estopped* to rely on her failure to disclose her Army Reserve affiliation to justify firing her.

I acknowledge that the *estoppel* argument can cut both ways. A court could hold that she is *estopped* to complain about the firing because she failed to disclose her RC affiliation on the application form. Remember, “Honesty is the best policy.”

Q: Is it unlawful for prospective employers to ask about RC affiliation in employment application forms and in interviews of prospective employees?

A: Asking such a question is not unlawful, but I think that it should be. It is unlawful for an employer to ask a prospective female employee, “Are you pregnant, or do you plan to become pregnant?” I think that RC affiliation should be treated in a like manner. Because it is unlawful for employers to discriminate on this basis, it should be unlawful for a prospective employer to attempt to discern the applicant’s RC status as a part of the hiring process.

Recently, I spoke to an Army National Guard soldier in a medium-sized city. He graduated from college and earned a state license as a surveyor, and then he was mobilized and deployed to Iraq, before he even had a chance to search for work as a surveyor. He has been released from active duty and is seeking employment. There are five surveying firms in his city, and none of them will even give him an interview. Each firm’s employment application form asks about RC affiliation. After he answers truthfully that he is a member of the Army National Guard, the firm will not even give him the courtesy of an interview. He told me that his Army Guard affiliation has made him unemployable in the field for which he has trained.

Q: In Law Review 169, you addressed the proposed Department of Labor (DOL) USERRA regulations. Do those regulations address this question?

A: DOL published proposed USERRA regulations in the *Federal Register* on Sept. 20, 2004. The 60-day notice and comment period expired Nov. 19, 2004. I hope that the final regulations will be promulgated soon. The proposed regulations, as published in the *Federal Register*, do not address permissible and impermissible questions that an employer may ask of a prospective employee.

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