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Voluntary Veterans' Preference in Private Sector Employment May Violate Title VII of the Civil Rights Act of 1964. The States Can Fix this Problem by Enacting Appropriate Legislation.

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

8.0—Veterans' preference

Q: I am a retired Colonel in the Army Reserve and a life member of the Reserve Organization of America (ROA).³ For many years, I have

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "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 Spouses' 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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

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 45 years, I have collaborated 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 38 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 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 <mailto:swright@roa.org>.

³ In 1922, a group of Army Reserve officers who were veterans of "The Great War" (as World War I was then known) met at the historic Willard Hotel in our nation's capital, at the invitation of General of the Armies John J. Pershing, who had commanded American forces in that recent war. General Pershing and all those who attended recognized that calling the recent war "the war to end all wars" was a dangerous conceit and that our nation needed to maintain readiness for future conflicts. The attendees agreed to create the Reserve Officers Association (ROA) to advocate for defense readiness. Captain Harry S. Truman was one of the founders of ROA in 1922. As

read your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially relevant to those who serve our country in uniform. I have found your articles to be most helpful to me in understanding and exercising my legal rights, and I have shared some of your articles with my nephew, who is currently serving in the Army Reserve.

I own and operate a chain of 15 restaurants, with about 500 employees. Like you, I am concerned that the Army and the other services are having difficulty recruiting enough qualified young men and women to support the continuation of the All-Volunteer Military. I want to establish a policy for my restaurants that we will give a hiring preference to applicants who have served our country in uniform or who are currently serving in the Reserve Components. During a recent meeting of our Chamber of Commerce, I was the scheduled speaker, and I proposed that all local employers should sign a voluntary veterans’ preference policy.

One of our Chamber of Commerce members who was present at the meeting strenuously objected to my proposal to give preference in hiring to veterans. She said that most veterans are men, so giving preference to veterans amounts to discrimination against women and that veterans’ preference is unlawful under Title VII of the Civil Rights Act of 1964.

President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the development and implementation of policies that will provide adequate national defense. In 2018, ROA members amended the ROA Constitution, making enlisted service members and veterans, as well as officers, eligible to join ROA. We adopted the “doing business as” name of Reserve Organization of America to emphasize that we represent and seek to recruit as members service members and veterans of all ranks (from E-1 to O-10) and all services.

I have read with great interest your Law Review 24055 (December 2024). In that article, you cited and quoted at length from a 1979 United States Supreme Court decision, *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). You wrote that the Supreme Court held that a state law that provides for veterans' preference in hiring for state and local government employment is not unconstitutional, although 98% of the veterans who were eligible for the preference were men.⁴

After the Chamber of Commerce meeting where I spoke, I sent a letter to my colleague who had objected to veterans' preference in hiring, and I sent her a copy of your Law Review 24055. She wrote back, saying that veterans' preference mandated by statute may be constitutional, but a veterans' preference policy voluntarily adopted by a private sector employer violates Title VII of the Civil Rights Act of 1964. What do you say about that?

Answer, bottom line up front:

In a 1990 policy memorandum, the United States Equal Employment Opportunity Commission (EEOC) took the position that veterans' preference policies voluntarily undertaken by private-sector employers violate Title VII, and that 1990 policy statement still reflects the views of the EEOC. I have placed a link to that 1990 EEOC policy statement at the end of this article.

On its website, the EEOC describes itself as follows:

⁴ Today, the male percentage is not so overwhelming, but it is still true that a clear majority of veterans are men.

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, childbirth, or related conditions, gender identity, and sexual orientation), national origin, age (40 or older), disability, or genetic information.

Most employers with at least 15 employees are covered by EEOC laws (20 employees in age discrimination cases). Most labor unions and employment agencies are also covered. The laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages, and benefits.

Authority & Role

The EEOC has the authority to investigate charges of discrimination against employers who are covered by the law. Our role in an investigation is to fairly and accurately assess the allegations in the charge and then make a finding. If we find that discrimination has occurred, we will try to settle the charge. If we aren't successful, we have the authority to file a lawsuit to protect the rights of individuals and the interests of the public and litigate a small percentage of these cases. When deciding to file a lawsuit, the EEOC considers several factors such as the strength of the evidence, the issues in the case, and the wider impact the lawsuit could have on the EEOC's efforts to combat workplace discrimination.

We also work to prevent discrimination before it occurs through outreach, education, and technical assistance programs.

The EEOC provides leadership and guidance to federal agencies on all aspects of the federal government's equal employment opportunity program. EEOC assures federal agency and department compliance with EEOC regulations, provides technical assistance to federal agencies concerning EEO complaint adjudication, monitors and evaluates federal agencies' affirmative employment programs, develops and distributes federal sector educational materials and conducts training for stakeholders, provides guidance and assistance to our Administrative Judges who conduct hearings on EEO complaints, and adjudicates appeals from administrative decisions made by federal agencies on EEO complaints.⁵

Explanation

One of the most important statutes enacted during the 20th century is the Civil Rights Act of 1964 (CRA-1964), which has been described as follows:

The **Civil Rights Act of 1964** (Pub. L. Tooltip Public Law (United States) 88–352, 78 Stat. 241, enacted July 2, 1964) is a landmark **civil rights** and **labor law** in the United States that outlaws **discrimination** based on **race**, **color**, religion, sex, and national origin. It prohibits unequal application of voter registration requirements, **racial segregation** in schools and **public accommodations**, and employment discrimination. The act

⁵ <https://www.eeoc.gov/overview>,

"remains one of the most significant legislative achievements in American history."

Initially, powers given to enforce the act were weak, but these were supplemented during later years. Congress asserted its authority to legislate under several different parts of the [United States Constitution](#), principally its [enumerated power](#) to regulate interstate commerce under the [Commerce Clause of Article I, Section 8](#), its duty to guarantee all citizens [equal protection](#) of the laws under the [14th Amendment](#), and its duty to protect voting rights under the [15th Amendment](#).

The legislation was proposed by [President John F. Kennedy](#) in June 1963, but it was opposed by [filibuster](#) in the Senate. After [Kennedy was assassinated](#) on November 22, 1963, President [Lyndon B. Johnson](#) pushed the bill forward. The [United States House of Representatives](#) passed the bill on February 10, 1964, and after a 72-day filibuster, it passed the [United States Senate](#) on June 19, 1964. The final vote was 290–130 in the House of Representatives and 73–27 in the Senate. After the House agreed to a subsequent Senate amendment, the Civil Rights Act of 1964 was signed into law by President Johnson at the [White House](#) on July 2, 1964.⁶

In 1971, the Supreme Court held that a test or prerequisite for hiring that has a disparate impact upon members of a protected class is unlawful under Title VII of the Civil Rights Act of 1964 unless the employer can demonstrate a business necessity for the test or

⁶ https://en.wikipedia.org/wiki/Civil_Rights_Act_of_1964.

prerequisite.⁷ It cannot be denied that the great majority of veterans are male, although the male percentage is not nearly as overwhelming as it was 46 years ago, when the Supreme Court decided the *Feeney* case.

Section 712 of the Civil Rights Act of 1964 provides: “Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.”⁸ Thus, the EEOC has acknowledged that Title VII does not make a veterans’ preference statute unlawful, but the EEOC claims that a veterans’ preference policy that was voluntarily adopted by a private-sector employer can be challenged based on its disparate impact on women.

In Law Review 16047 (June 2016), I wrote:

Like many states, Maryland law provides preferences in state employment for veterans and spouses of disabled or deceased veterans. Maryland private sector employers who wish to implement a veterans’ preference system are vulnerable to discrimination suits by non-veterans under Title VII of the Civil Rights Act of 1964.

However, Title VII, section 11 of the Civil Rights Act of 1964 allows states to pass laws authorizing private sector employers to implement an employment preference for honorably discharged veterans. Private sector veterans’ preferences enacted pursuant to Title VII are not subject to Equal Employment Opportunity Commission challenge.

Twenty-nine states have passed laws allowing voluntary private sector veterans’ preferences, thereby protecting private

⁷ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁸ 42 U.S.C. § 2000e-11.

employers from discrimination suits. The Pentagon's USA4MilitaryFamilies website listed private sector veterans' preferences as its second most important state legislative initiative.

The [new Maryland] law adds section 3-714 to the Labor & Employment Article [of the Maryland statutory code], which authorizes an employer to grant a hiring and promotion preference to an eligible veteran, the spouse of an eligible veteran who is disabled, or the surviving spouse of a deceased eligible veteran. An eligible veteran is defined as a veteran of the U.S. Armed Forces who has received an honorable discharge or a certificate of satisfactory completion of military service, including the National Guard and the military reserves. The bill specifies that granting this preference does not violate any State or local Equal Employment Opportunity law.

For example, Kansas law provides as follows:

Permissive preferences in private employment

- (a) As used in this section, "veteran" shall have the meaning ascribed to it in K.S.A. 73-201, and amendments thereto.
- (b) *There is hereby established a permissive preference in private employment for veterans.*
A private employer may adopt an employment policy that gives preference in hiring to a veteran, provided the veteran meets the requirements of the vacant position.
- (c) Such employment policy shall be:
 - (1) In writing; and
 - (2) Applied consistently to all positions regarding initial employment.

(d) The veteran shall submit proof of such veteran's military service and honorable discharge or general discharge under honorable conditions to a private employer with such veterans preference employment policy to establish eligibility for the preference.⁹

I invite the reader's attention to our Law Review Library. In the "State Leave Laws" part of our Law Review Library, you will find 54 articles about the state and territorial laws that provide for veterans' preference in state and territorial and local government employment and in private-sector employment.

Readers: Please determine if your state has a statute authorizing private-sector employers to grant employment preference to veterans. If your state has no such law, please contact your state legislators to ask them to introduce such legislation in your state. Please contact me by e-mail if you have questions. My best e-mail address is SWright@roa.org.

Please join or support ROA.

This article is one of 2,300-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. We add new articles each month.

ROA is the nation's only national military organization that exclusively and solely supports the nation's reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve (32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members),

⁹ Kansas Statutes Annotated, section 73-231 (enacted 2015).

the Army Reserve (176,171 members), and the Army National Guard (329,705 members).¹⁰

ROA is more than a century old. On 10/2/1922 a group of veterans of “The Great War,” as World War I was then known, founded our organization at a meeting in Washington’s historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded “Great War.” 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 adequate national security. For more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, 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.

¹⁰ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

If you are now serving or have ever served in any one of our nation's eight¹¹ uniformed services, you are eligible for membership in ROA,¹² and a one-year membership only costs \$20 or \$450 for a life membership. 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 <https://www.roa.org/page/memberoptions> 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 Organization of America
1 Constitution Ave. NE
Washington, DC 20002¹³

Here is a link to the 1990 EEOC policy statement about veterans' preference as sex discrimination:

<https://www.eeoc.gov/laws/guidance/policy-guidance-veterans-preference-under-title-vii>

¹¹ Congress recently established the United States Space Force as the eighth uniformed service.

¹² Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join.

¹³ You can also contribute on-line at www.roa.org.