

## **Employers Beware: Violating USERRA Through Improper Pre-Employment Inquiries**

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*The Uniformed Services Employment and Reemployment Rights Act (USERRA) provides a wide range of protections for those who serve in our country's military. Constructed as an anti-discrimination statute, USERRA covers a wide variety of employment rights, including ensuring fairness during initial hiring. While courts have held that similar anti-discrimination statutes—such as the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act—prevent employers from asking certain inappropriate questions during pre-employment interviews, the only court that has yet decided whether USERRA gives servicemembers the same protections answered in the negative. This result was puzzling, as USERRA's protections, like those under the ADA and Title VII, begin during initial hiring and are just as extensive when one compares the language and purpose of the three statutes. Because courts have already determined the ability to raise the presumption that an applicant's protected status was a motivating factor in an adverse employment decision through inappropriate interview questions under the ADA and Title VII, this Article argues that the result under USERRA should be the same. Courts should find that it protects military personnel—reservists, in particular—from inappropriate pre-employment inquiries into the extent of their continuing or future military obligations.*

### INTRODUCTION

The familiar and repetitious on-campus interviews for your law firm's summer program are well under way. Drove of law students appear at your office dressed in their new suits, eager for a chance to impress you, one of the hiring partners. You glance down at their resumes to ensure that you have some relevant questions to ask. Suddenly, one resume stands out—the applicant served in the military and was deployed to Iraq. Naturally, you start the interview off with questions about the applicant's military work history; after all, this stressful experience is surely relevant to what type of lawyer this applicant will be. You ask questions such as: "Tell me about your experience in Iraq," and "How has your military service impacted you?" During the conversation, you learn that the law student is still in the Army Reserves. This, of course, spurs a new line of inquiry: "How much longer do you have to serve?" "Are you at risk for another deployment, and if so, when?" "What type of a time obligation

does your reserve duty entail?”

These are all logical questions for a potential employer to ask, but have you violated the Uniformed Services Employment and Reemployment Rights Act (USERRA)<sup>1</sup> by asking them? This Article argues that, just like the Americans with Disabilities Act (ADA)<sup>2</sup> and Title VII of the Civil Rights Act,<sup>3</sup> there are certain questions that will presumptively establish that the applicant's status as a reservist in the United States military was a motivating factor in an adverse employment decision, which is forbidden under USERRA.

One district court, in an unpublished opinion, held that interview questions posed to a servicemember did not amount to discrimination under USERRA.<sup>4</sup> This Article will argue that, contrary to the district court opinion, future courts should find certain interview questions sufficient to establish that an employer used an applicant's status as a reservist as a motivating factor in an adverse employment decision. While largely ignored by the district court, this result is dictated by both USERRA's plain language and numerous judicial decisions interpreting that language broadly in light of USERRA's policy. Further support is gained from USERRA's similarity to other anti-discrimination statutes—specifically the ADA and Title VII—that courts have already determined protect job applicants against improper pre-employment inquiries into their protected status.

Part I of this Article examines USERRA's history, the policy behind it, and the protections it provides. Part II explores the role of the reservist in today's military, which explains why USERRA litigation will likely increase in the future as the military continues to demand more from its reserves. Part III explains how USERRA applies during the hiring process, how one court failed to apply this protection to interview questions, and how courts have found that impermissible interview questions violate similar anti-discrimination laws. Part IV then argues that inappropriate pre-employment inquiries may also run afoul of USERRA, despite the single unpublished opinion holding to the contrary. Finally, Part V provides examples of such pre-employment interview questions with explanations of how they violate the statute. Throughout this analysis, this Article provides information that the legal community has largely overlooked—the potential for interview questions to violate USERRA<sup>5</sup>—raising both employer and applicant awareness of this important topic.

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<sup>1</sup> Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301–4334 (2008).

<sup>2</sup> Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006).

<sup>3</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e17 (2006).

<sup>4</sup> Hart v. Hillside Township, No. 03-5841(JAG), 2006 WL 756000 (D.N.J. Mar. 17, 2006), *aff'd on other grounds sub nom.* Hart v. Township of Hillside, 228 F. App'x. 159, 162 (3d Cir. 2007).

<sup>5</sup> See, e.g., Courtney B. Sapire, *Reducing the Hiring Risk Factor*, 70 TEX. BAR J. 540, 541 (2007) (listing questions employers should not ask during interviews, without mentioning those regarding military status).

I. USERRA SERVES AS THE NEWEST AND STRONGEST PROTECTION PROVIDED BY CONGRESS TO UNITED STATES SERVICEMEMBERS

USERRA is the latest in a series of statutes passed by Congress to protect servicemembers from negative repercussions resulting from their military service. As the most expansive protection yet enacted, USERRA applies to all aspects of employment.<sup>6</sup> An analysis of both its history and its plain language reveals that USERRA should be applied in the pre-employment context to prevent employers from using a reservist's protected status as a motivating factor in an adverse employment decision.

A. Congress Enacted Increasingly Protective Legislation to Prevent Servicemembers from Suffering Disadvantages as a Result of their Military Obligations, Culminating with USERRA

Congress' first effort to provide legislative protections to members of the military came during World War I with the passage of the Soldiers' and Sailors' Civil Relief Act of 1918 (SSCRA).<sup>7</sup> In order to protect members of the military from potential harm due to their service, the SSCRA included a non-binding order that courts use their powers of equity to avoid unjust results for servicemembers in a broad range of civil cases.<sup>8</sup> This statute expired, but was eventually reenacted over twenty years later during World War II.<sup>9</sup> The SSCRA has been modified many times since, most recently in 2008.<sup>10</sup> This updated statute, now called the Servicemembers Civil Relief Act (SCRA), provides wide-ranging protections to deployed servicemembers against evictions, penalties for breach of contract, default judgments, and expiration of statutes of limitations, among others.<sup>11</sup> Some of these protections are mandatory, while others are within the discretion of the court or must be applied for by the servicemember.<sup>12</sup>

Congress first protected servicemembers' reemployment rights by passing the Selective Training and Service Act of 1940 (STSA).<sup>13</sup> The STSA required employers to hold positions open for servicemembers called away for military service under specified circumstances—for example, when the servicemember was still capable of performing job duties and

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<sup>6</sup> Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4311 (2006) (covering "initial employment, reemployment, retention in employment, promotion, or any benefit of employment").

<sup>7</sup> Soldiers' and Sailors' Civil Relief Act, ch. 20, 40 Stat. 440 (1918).

<sup>8</sup> See *id.* at 441. The original SSCRA was drafted in six weeks by Major John Wigmore, Dean of Northwestern University's Law School and author of *Wigmore on Evidence*. See H.R. REP. NO. 108-81, at 33 (2003). He had been called to active duty and attached to the Army Judge Advocate General Corps. *Id.* "The original SSCRA provisions covered default judgments, stays of proceedings, evictions, mortgage foreclosure, insurance, and installment contracts." *Id.*

<sup>9</sup> Soldiers' and Sailors' Civil Relief Act of 1940, ch. 888, 54 Stat. 1178-91.

<sup>10</sup> See Servicemembers' Civil Relief Act, Pub. L. No. 108-189, 117 Stat. 2835 (2008).

<sup>11</sup> Servicemembers' Civil Relief Act, 50 U.S.C. app. §§ 501-91 (2008).

<sup>12</sup> *Id.* § 521.

<sup>13</sup> Selective Training and Service Act of 1940, ch. 720, § 8(b), 54 Stat. 885, 890.

applied for reemployment within forty days of returning from active duty.<sup>14</sup> This statute was modified and renamed several times, eventually becoming the Veterans Reemployment Rights Act (VRRA) during the Vietnam War.<sup>15</sup> Congress modified these statutes to provide increasingly broader protections for servicemembers.<sup>16</sup> Congress' decision to expand these protections was a response to reports that servicemembers, particularly reservists, faced increasing discrimination that had not been alleviated through previous legislation.<sup>17</sup> This discrimination came in the form of employers denying promotions to reservists or even terminating their employment due to their military obligations.<sup>18</sup>

The VRRA remained in effect until 1994, when Congress passed USERRA. USERRA served both to simplify the VRRA and expand its protections.<sup>19</sup> Notable just from the title (the Uniformed Services *Employment and Reemployment Rights Act*),<sup>20</sup> USERRA protects not only reemployment rights, but other employment rights as well, such as rights to pension or health benefits.<sup>21</sup> Congress explained that this strongly written statute was designed to “encourage noncareer service [i.e., reserve service] . . . by eliminating or minimizing the disadvantages to civilian careers and employment . . . [and to] minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, fellow employees, and their communities.”<sup>22</sup>

USERRA's purpose to “encourage noncareer service” should be understood as assisting in both the recruiting and retention of servicemembers by the United States military.<sup>23</sup> As with most decisions in life, a person's choice to volunteer in the armed services is made by weighing the costs against the benefits. Without USERRA's protections, the fear of losing, or being inhibited from gaining civilian employment

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<sup>14</sup> *Id.*

<sup>15</sup> See Judith Bernstein Gaeta, *Kolkhorst v. Tilghman: An Employee's Right to Military Leave Under the Veterans' Reemployment Rights Act*, 41 CATH. U. L. REV. 259, 264–66 (1991).

<sup>16</sup> The 1988 version of the act stated: “Any [employee with reserve obligations] . . . shall not be denied . . . retention in employment, or any . . . other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.” 38 U.S.C. § 2021(b)(3) (1988).

<sup>17</sup> See, e.g., S. REP. NO. 90-1477, at 1–2 (1968), reprinted in 1968 U.S.C.C.A.N. 3421, 3421 (discussing the continued need to further protect reservists).

<sup>18</sup> *Id.*

<sup>19</sup> See H. Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F. L. REV. 55, 59 (1999) (“USERRA also represents a simplification of the original veterans' reemployment legislation that, over the years, had become less comprehensible as various amendments were added.”); Konrad S. Lee, “*When Johnny Comes Marching Home Again*” Will He Be Welcome at Work?, 35 PEPP. L. REV. 247, 256–57 (2008) (noting that USERRA expanded VRRA's protection to reservists that served in active duty voluntarily, instead of just involuntarily).

<sup>20</sup> Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103–353, § 1, 108 Stat. 3149, 3149 (1994) (emphasis added).

<sup>21</sup> See Manson, *supra* note 19, at 77–78.

<sup>22</sup> Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301(a)(1)–(2) (2006).

<sup>23</sup> Lee, *supra* note 19, at 251–52 (“USERRA was intended to provide protections for the purpose of encouraging military recruitment.”).

would cause many individuals to forego service or to quickly end their service. With USERRA's full protections in place, this added cost of military service is mitigated.

B. USERRA Applies Broadly to Protect Servicemembers from Discrimination in All Aspects of Employment, Including Discrimination During Initial Employment Decisions

USERRA is organized into three major sections, with each providing a specific form of protection: (1) non-discrimination in employment; (2) reemployment rights for persons absent for military service; and (3) preservation of employment benefits (e.g., health insurance or pension benefits) for persons absent for military service.<sup>24</sup> The statute explicitly prohibits an employer from denying

[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 services in a uniformed service . . . *initial employment*, reemployment, retention in employment, promotion, or any benefit of employment [because of] that membership, application for membership, performance of service, application for service, or obligation.<sup>25</sup>

An analysis of this language reveals two important features of the statute that illustrate its breadth:

First, USERRA protects a multitude of persons with a variety of connections to military service. Specifically, it covers any person who is a member of the uniformed services.<sup>26</sup> This consequently includes members of the reserves and active components of all branches of the United States military.<sup>27</sup> It also applies to those who contemplate joining either component, regardless of whether they enlist.<sup>28</sup> Finally, it applies to those veterans who have performed military service in the past.<sup>29</sup> To be eligible for protection, a veteran must have received an honorable discharge.<sup>30</sup> The language of the statute therefore covers almost any person who is serving, has served, or potentially will serve in the United States military.

Second, USERRA's protections apply to a wide range of employers. The statute defines "employer" very broadly to include "any person,

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<sup>24</sup> Manson, *supra* note 19, at 59.

<sup>25</sup> 38 U.S.C. § 4311(a) (2006) (emphasis added).

<sup>26</sup> Uniformed services are defined in the statute as "the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency." 38 U.S.C. § 4303(16) (2006).

<sup>27</sup> See *McClain v. City of Somerville*, 424 F. Supp. 2d 329, 334 (D. Mass. 2006) ("Congress intended the benefits of USERRA to apply to both reservists and active duty personnel.").

<sup>28</sup> 38 U.S.C. § 4311(a) (2006) (applying USERRA's protections to "[a] person who . . . applies to be a member of . . . a uniformed service").

<sup>29</sup> *Id.* (applying USERRA's protections to "[a] person who . . . has performed . . . service in a uniformed service").

<sup>30</sup> *Id.* § 4304 (2006).

institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities.<sup>31</sup> Notably, unlike other federal anti-discrimination statutes, such as Title VII,<sup>32</sup> USERRA offers no exception for employers with only a small number of employees.<sup>33</sup> However, specific types of employers are exempted from USERRA, such as religious institutions, Native American tribes, foreign governments, and international organizations.<sup>34</sup>

When a plaintiff claims that an employer violated USERRA's discriminatory prohibitions, courts apply a burden-shifting analysis to decide whether the employer used the plaintiff's military service as a basis for its adverse employment decision.<sup>35</sup> When conducting this evaluation, courts construe the statute liberally in favor of the plaintiff.<sup>36</sup> This liberal interpretation has led courts to go as far as reading a cause of action for a hostile work environment into USERRA's protection of the "benefit of employment."<sup>37</sup>

The burden-shifting analysis begins when the plaintiff establishes a prima facie case of discrimination.<sup>38</sup> This is done by showing by a preponderance of the evidence that the servicemember's military status was a motivating factor in the employer's adverse employment decision.<sup>39</sup> A motivating factor does not need to be the sole cause for the decision.<sup>40</sup> Instead, as one court explained, a motivating factor "is one of the factors that a truthful employer would list if asked for the reasons for its decision."<sup>41</sup>

Once the servicemember establishes a prima facie case under USERRA, the burden shifts to the employer to demonstrate that the servicemember's protected status was not a motivating factor in the adverse employment decision.<sup>42</sup> This can be done by establishing another legitimate reason for its decision and showing that the decision would have been the same regardless of the plaintiff's protected status.<sup>43</sup> Unlike a Title

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<sup>31</sup> *Id.* § 4303(4)(a).

<sup>32</sup> 42 U.S.C. § 2000e(b) (2006) (defining employer as a person with at least fifteen employees for purposes of the statute).

<sup>33</sup> See David A. Lowe & Andrew P. Lee, *Military Leave and the Workplace at War: USERRA Overview and Update*, in 763 PRACTICING LAW INST., LITIG. & ADMIN. PRACTICE SERIES COURSE HANDBOOK NO. H-763 929, 932 (2007), available at 763 PLI/LIT 929 (Westlaw) (citing *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992)).

<sup>34</sup> Lowe & Lee, *supra* note 33, at 932.

<sup>35</sup> See *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001) (describing USERRA's burden-shifting analysis).

<sup>36</sup> *McGuire v. United Parcel Serv.*, 152 F.3d 673, 676 (7th Cir. 1998).

<sup>37</sup> *Vickers v. City of Memphis*, 368 F. Supp. 2d 842, 845 (W.D. Tenn. 2005).

<sup>38</sup> *Sheehan*, 240 F.3d at 1013 n.3.

<sup>39</sup> *Id.* at 1013.

<sup>40</sup> *Sanguinetti v. United Parcel Serv.*, 114 F. Supp. 2d 1313, 1318 (S.D. Fla. 2000), *aff'd*, 254 F.3d 75 (11th Cir. 2001).

<sup>41</sup> *Id.* (quoting *Brandsasse v. City of Suffolk*, 72 F. Supp. 2d 608, 617 (E.D. Va. 1999)) (internal quotations omitted).

<sup>42</sup> *Brandsasse*, 72 F. Supp. 2d at 617.

<sup>43</sup> See *id.*

VII action, the USERRA employer bears not only the burden of producing evidence for this affirmative defense, but also the burden of persuading the court.<sup>44</sup> An employer's failure to carry the burden of persuasion on its affirmative defense results in a verdict for the plaintiff.

II. RECENT INCREASES IN THE BURDEN PLACED ON THE ARMED FORCES RESERVES INCREASES USERRA'S RELEVANCE AS MORE RESERVISTS NEED ITS PROTECTIONS

In the initial employment context, one must know more than just how courts analyze cases arising under USERRA. One must also understand the individuals protected by the statute, specifically reservists, who are the most likely to need USERRA's protection. The unique situation facing reservists today—post-9/11—increases the magnitude of the imposition they place on their respective employers. This increases the likelihood that an employer will factor an applicant's reservist status into its hiring decision. Further, a court is more likely to recognize the increased relevance of USERRA's protections in light of the increased burden on today's reservist.

A. Congress Created the Military Reserves to Augment Active Forces During Times of War

Congress created the reserves through its power granted by Article I of the United States Constitution:

The Congress shall have the Power . . . To raise and support Armies . . . To provide and maintain a Navy . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States.<sup>45</sup>

Historically, militias have existed since the very beginning of the United States.<sup>46</sup> However, these militias belonged to the various states and were governed by state statutes.<sup>47</sup> Congress began bringing these state militias under the control of the federal government in the early 1900s.<sup>48</sup> In 1912, Congress established the Army Reserves by passing the Army Appropriations Act.<sup>49</sup> In 1915, Congress formally created the Naval Reserve Force.<sup>50</sup> Congress followed this by bringing the states' National Guard forces under the control of the federal government in 1916 to

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<sup>44</sup> *Sheehan*, 240 F.3d at 1014 (comparing the burden shifting scheme of USERRA to that of Title VII).

<sup>45</sup> U.S. CONST. art. I, § 8, cl. 1, 12, 13, 15, 16.

<sup>46</sup> See TIMOTHY J. LOWENBERG, NAT'L GUARD ASSOC., THE ROLE OF THE NATIONAL GUARD IN NATIONAL DEFENSE AND HOMELAND SECURITY 1 (2005), available at <http://www.ngaus.org/ngaus/files/ccLibraryFiles/Filename/00000000457/primer%20fin.pdf>.

<sup>47</sup> *Id.*

<sup>48</sup> See Act of June 3, 1916, ch. 134, 39 Stat. 166 (1916).

<sup>49</sup> See Act of August 24, 1912, ch. 391, 37 Stat. 569, 590 (1912).

<sup>50</sup> See Naval Appropriations Act for Fiscal Year 1916, ch. 83, 38 Stat. 928, 940 (1915).

support World War I.<sup>51</sup> The next major restructuring of the reserves occurred following World War II. This restructuring came in the form of the National Security Act of 1947, which created the Air Force and Air Force Reserve, and placed each reserve force under its active counterpart's command.<sup>52</sup>

The modern reserves were created when Congress passed the Reserve Forces Act of 1955, which established that reserve participation requires forty-eight scheduled training periods (a full day equals two training periods) and no more than seventeen days of continuous training annually, or up to thirty days of active duty without a training period requirement.<sup>53</sup> These requirements have changed only slightly since the Act's passage, when the maximum of seventeen days was changed to a minimum of fourteen days.<sup>54</sup> During the next fifty years, this "one weekend a month and two weeks a year" requirement placed relatively little burden on employers, who were accustomed to giving employees weekends off and losing employees for several weeks each year for vacation, illness, or other reasons. However, as explained *infra* in Part II.B., the actual demands on individual reservists—with the correlative effects on their employers—have increased since the 1950s, and dramatically so since September 11, 2001.

#### B. The Modern Impact of Reserve Service Places Increased Strain on both Reservists and their Employers

Perhaps the largest catalyst for the evolution of the "one weekend a month and two weeks a year" service requirement to the more demanding, current norm was Congress's 1976 amendment to Title 10 of the United States Code. This amendment gave the President the authority to use reservists for operational missions without declaring a national emergency.<sup>55</sup> This change corresponded with Congress's adoption, following the draft in 1973, of a "Total Force" policy that allowed for increased use of reserve forces.<sup>56</sup>

Modern reserve forces since the 1970s have been divided formally into seven components: (1) The Army National Guard of the United States, (2) The Army Reserve, (3) The Navy Reserve, (4) The Air National Guard of the United States, (5) The Air Force Reserve, (6) The Marine Corps

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51 See Act of June 3, 1916, ch. 134, 39 Stat. 166 (1916).

52 National Security Act of 1947, ch. 343, § 207–08, 61 Stat. 495, 502–03.

53 Reserve Forces Act of 1955, ch. 665 § 2, 69 Stat. 598.

54 National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 110147(a)(1), 108 Stat. 2972, 2973–74 (1994).

55 See H.R. REP. NO. 94-1069, at 1 (1976), reprinted in 1976 U.S.C.C.A.N. 1034 (codified as amended at 10 U.S.C. § 673(b) and renumbered to 10 U.S.C. § 12304).

56 See generally Ryan Wedlund, *Citizen Soldiers Fighting Terrorism: Reservists' Reemployment Rights*, 30 WM. MITCHELL L. REV. 797, 802–04 (2004) (describing the concept behind and development of the "Total Force" policy).

Reserve, and (7) The Coast Guard Reserve.<sup>57</sup> They serve the purpose of providing “trained units and qualified persons . . . in time of war or national emergency, and at such other times as the national security may require, to fill the needs of the armed forces whenever more units and persons are needed than are in the regular components.”<sup>58</sup> The Army and Air National Guard components have the additional purpose of serving their respective states’ needs according to the applicable state laws and constitutions.<sup>59</sup>

The demand placed on the military since September 11, 2001, has proven to be beyond the ability of the active component to fulfill; consequently, the demand on the reserves has increased dramatically. While the minimum reserve obligation has not substantially deviated in the last fifty years from the standard “one weekend a month and two weeks a year,”<sup>60</sup> most reservists now find it to be anything but the norm. The current, more extensive, obligations of reservists consist of unit training, individual training, and deployments.

Unit training is the time individual reservists must spend with their respective units, which traditionally consisted of one weekend a month and two weeks a year.<sup>61</sup> This standard serves as a minimum;<sup>62</sup> therefore, it can be increased when needed. During recent increases in the operational tempo of reserve units, the federal government allocated funds to increase the length of most, or sometimes all, weekends to what is called a Military Unit Training Assembly Five (MUTA 5).<sup>63</sup> This entails servicemembers coming in on Friday evenings, instead of Saturday mornings, for their one weekend a month. Further, the two weeks of annual training is being extended for many units to three or even four weeks.<sup>64</sup>

Besides the training each reservist engages in with his or her assigned unit, each reservist must also fulfill individual training obligations that consist of initial entry training, professional development training, and attending skill development schools. Initial entry training must be

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<sup>57</sup> 10 U.S.C. § 10101 (2006)

<sup>58</sup> *Id.* § 10102.

<sup>59</sup> See Lowenberg, *supra* note 46, at 1–2.

<sup>60</sup> 10 U.S.C. § 10147 (2006). See also *Joining the Military – Military.com*, [http://www.military.com/Recruiting/Content/0,13898,rec\\_step04\\_questions\\_guardreserve,,00.html](http://www.military.com/Recruiting/Content/0,13898,rec_step04_questions_guardreserve,,00.html) (describing how Select Reserve Units are referred to as “weekend warriors” and serve “one weekend a month, two weeks a year”).

<sup>61</sup> 10 U.S.C. § 10147 (2006).

<sup>62</sup> *Id.* (requiring reservists to “serve on active duty for training of *not less than* 14 days”) (emphasis added).

<sup>63</sup> See *Military Reserve Component Retirement Overview – Military Benefits – Military.com*, <http://www.military.com/benefits/military-pay/retired-pay/military-reserve-component-retirement-overview>. Reservists are paid based on participation in a unit training assembly (UTA). UTAs typically range from four to twelve hours. Multiple UTAs (MUTAs) typically are either a MUTA-4 (all day Saturday and Sunday) or MUTA-5 (Friday afternoon through Sunday).

<sup>64</sup> Sydney J. Freedberg, Jr., *As Military Begins to Draw Down, National Guard Ramps Up*, NAT’L J., Dec. 26, 2007, <http://www.govexec.com/dailyfed/1207/122607nj1.htm> (“The federal government is funding states’ efforts to give Guard soldiers additional weekend drills and extended annual training periods . . . probably two to three weeks of additional annual training.”) (internal quotations omitted).

completed by everyone entering the reserves,<sup>65</sup> unless it has already been completed during prior active service; it provides a reservist with the initial skills required to perform his or her Military Occupational Specialty (specifically assigned area of expertise). The length of training varies by job, but it can last up to eighty-one weeks.<sup>66</sup> Professional development training is required for most reservists to be promoted to the next rank. The length of this training is generally more reasonable, but in some cases it can take several months.<sup>67</sup> Finally, reservists wishing to expand their military skill set can volunteer for a variety of skill development schools—such as Airborne<sup>68</sup> or Ranger<sup>69</sup> schools—that can last from a few weeks to several months.<sup>70</sup>

In addition to training, reservists face the significant and increasing time obligation of deployments. While the number of active duty forces have shrunk, deployment obligations incurred by the United States have not. Initially, during the late 1990s, deployments for reservists began as six-month rotations in Bosnia, Kosovo, or Egypt as part of peacekeeping forces.<sup>71</sup> Later, the heaviest call-up of the reserves since World War II began in support of the Global War on Terrorism.<sup>72</sup> Now, the reserve forces find themselves facing multiple, long-duration call-ups in support of combat operations.<sup>73</sup> Almost half a million reservists have been deployed overseas since September 11, 2001.<sup>74</sup> Most current deployments are to either Iraq or Afghanistan, and they may last from three months to over a year.<sup>75</sup> In addition to the actual time spent overseas, reservists are usually

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<sup>65</sup> 10 U.S.C. § 510(c)(1) (2006).

<sup>66</sup> See GoArmy.com > Careers & Jobs > Cryptologic Linguist (35P), <http://www.goarmy.com/JobDetail.do?id=97> (stating that a Cryptologic linguist's initial training takes up to eighty-one weeks).

<sup>67</sup> See Navy Times, Professional Military Education: Guard and Reserve Members, [http://www.navytimes.com/benefits/education/Online\\_hbgr06\\_education\\_militaryedprofessional4/](http://www.navytimes.com/benefits/education/Online_hbgr06_education_militaryedprofessional4/) (last visited Aug. 21, 2008). The Fleet Seminar Program can take up to three year to complete. *Id.*

<sup>68</sup> U.S. Army Infantry Homepage, 1st Battalion, 507th Parachute Infantry Regiment, Basic Airborne Course, <https://www.infantry.army.mil/airborne/airborne/> (last visited Aug. 21, 2008) (providing instruction on parachuting).

<sup>69</sup> U.S. Army Ranger School, <https://www.benning.army.mil/rtb/main.asp> (last visited Jan. 13, 2009) (infantry-based leadership school).

<sup>70</sup> Ranger schools takes sixty one days if each phase is passed the first time, but some individuals take more than twice that time to complete it. See ATRRS Homepage, <https://www.atrrs.army.mil/atrrsec/courseInfo.aspx?fy=2008&sch=071&crs=2E-SI5S-5R%2f011-SQIV-G&crstitle=RANGER&phase=> (listing the Ranger School course length as "8 weeks 5.0 days").

<sup>71</sup> After the brief Persian Gulf War, 4,500 Guard troops were deployed as peacekeepers in Bosnia, Kosovo, and the Sinai. See Sydney J. Freedberg Jr., *The Guard's Turn to Surge*, NATIONAL JOURNAL, Dec. 15, 2007, at 24 ("Even there, the assumption was that it was going to be six months [per deployment] and it wasn't going to be repeated . . .").

<sup>72</sup> U.S. Gen. Accounting Office, *Reserve Forces: Observations on Recent National Guard Use in Overseas and Homeland Mission and Future Challenges: Testimony Before the H. Comm. on Government Reform*, GAO-04-670T, at 1 (2004), available at <http://www.gao.gov/new.items/d04670t.pdf> (statement of Janet A. St. Laurent, Director, Defense Capabilities and Management).

<sup>73</sup> Freedberg, *supra* note 64.

<sup>74</sup> *Id.* ("Since September 11, 2001, the military has relied heavily on reservists to conduct overseas operations.").

<sup>75</sup> Ann Scott Tyson, *Possible Iraq Deployments Would Stretch Reserve Force: Leaders Express Concern Over Troop Rotation Plans*, WASH. POST, Nov. 5, 2006, at A1 (describing the length of

brought into active service to be trained for a period of time before being deployed for the operation—up to six months in some cases.<sup>76</sup>

The reserves, particularly the National Guard, are subject to other missions in addition to these overseas deployments. Notably, National Guard forces have been deployed to provide security for airports,<sup>77</sup> to augment federal law enforcement agencies conducting border security operations, and to aid in relief after natural disasters, such as the massive deployment in response to Hurricane Katrina in 2005.<sup>78</sup> The length of these deployments vary, depending both on the nature of the operation and, at times, the choice of the individual reservist.<sup>79</sup>

These extensive obligations make the term “reserve” seem ironic. As of September 30, 2007, just fewer than 600,000 reservists had been called into active duty for Operations Noble Eagle, Enduring Freedom, and Iraqi Freedom.<sup>80</sup> At one point in 2004, approximately one-third of all soldiers serving in Iraq came from National Guard forces.<sup>81</sup> While this number has since decreased due to the reorganization of the active Army, it will likely increase once again as active forces find themselves exhausted due to the recent “surge” operations in Iraq.<sup>82</sup> Thus, the extent of reservists’ obligations is not likely to decline in the near future.<sup>83</sup> As a retired Marine Major General put it, “Let’s face it: There are no national security missions that we can carry out now or in the future that will not have the Guard and Reserve involved.”<sup>84</sup>

### III. CASE LAW FIRMLY ESTABLISHES USERRA’S PROTECTION DURING INITIAL HIRING

To protect these citizen-soldiers, who wear the dual hat of civilian employee and servicemember, Congress passed USERRA. In addition to holding reservists’ civilian jobs open while they serve in the above-mentioned capacities,<sup>85</sup> case law firmly establishes that USERRA’s

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reserve mobilizations).

<sup>76</sup> Lowenberg, *supra* note 46, at 5 (noting that it usually requires eighteen months of activation to produce a deployment of “12 months or less”).

<sup>77</sup> *Id.* at 2.

<sup>78</sup> About 41,000 Guard members were used across Alabama, Mississippi and Louisiana. *See National Guard Stretched Thin*, CBS NEWS, Sep. 10, 2005, <http://www.cbsnews.com/stories/2005/09/10/katrina/main832586.shtml>.

<sup>79</sup> For example, National Guard soldiers were initially sent to the Southwest border for one month, but given the opportunity to extend for a longer duration. *See* Sgt. Jim Greenhill, *Operation Jumpstart a Success, Officials Say*, NAT’L GUARD BUREAU, Dec. 11, 2006, [http://www.ngb.army.mil/news/archives/2006/12/121106-OJS\\_success.aspx](http://www.ngb.army.mil/news/archives/2006/12/121106-OJS_success.aspx) (noting the voluntary nature of service at the border).

<sup>80</sup> COMM’N ON THE NAT’L GUARD AND RESERVES, TRANSFORMING THE NATIONAL GUARD AND RESERVES INTO A 21ST-CENTURY OPERATIONAL FORCE 236 (2008).

<sup>81</sup> *Id.* at 6.

<sup>82</sup> *See* Freedberg *supra* note 64.

<sup>83</sup> *Id.*

<sup>84</sup> Judy Woodruff, *National Guard Underfunded, Not Prepared for Crises*, PBS, Mar. 1, 2007, [http://www.pbs.org/newshour/bb/military/jan-june07/military\\_03-01.html](http://www.pbs.org/newshour/bb/military/jan-june07/military_03-01.html).

<sup>85</sup> 38 U.S.C. § 4311 (2006).

protections apply during the hiring process.

A. Current Case Law Illustrates the Breadth of USERRA's Pre-Employment Protections

Beginning with the VRRRA, Congress has sought to protect reservists from discrimination during the hiring process.<sup>86</sup> Congress intended to reinstate this protection when it enacted USERRA.<sup>87</sup> In two cases brought under the VRRRA and USERRA respectively, courts made it clear that employers may not decide against hiring a servicemember because of the extent of his or her future military obligation.

In *Beattie v. Trump Shuttle, Inc.*,<sup>88</sup> an Air Force Reserve Colonel brought an action against a potential employer for refusing to offer him employment due to his unavailability for the employer's training program.<sup>89</sup> The Colonel volunteered for career progression training as a part of his military service, and this caused the initial temporary absence from his civilian job.<sup>90</sup> Despite the optional, rather than mandatory nature of this training, the United States District Court for the District of Columbia held that the plain language of the VRRRA protected the Colonel from discrimination during the initial hiring process.<sup>91</sup> The court made clear that his prospective employer could not rely on his military service-related absence as a reason for failing to offer him employment.<sup>92</sup>

A second case involving initial hiring discrimination against a reservist arose under USERRA.<sup>93</sup> In *McClain v. City of Somerville*, a servicemember was unavailable to participate in initial police department training due to his military service, and was denied employment.<sup>94</sup> The servicemember successfully brought a suit under USERRA against the city for failing to hire him.<sup>95</sup> The United States District Court for the District of Massachusetts held that the employer discriminated based on the servicemember's obligation to perform service, which is explicitly

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<sup>86</sup> Veteran's Reemployment Rights Act, 38 U.S.C. § 2021(b)(3) (1990) (protecting against discrimination against any reservist "who seeks or holds" an employment position) (current version at 38 U.S.C. § 4301 (2000)).

<sup>87</sup> Congress specifically indicated that it intended USERRA to include the prohibition against discrimination in initial hiring. 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") (citing *Beattie v. The Trump Shuttle, Inc.*, 758 F. Supp. 30 (D.D.C. 1991)).

<sup>88</sup> 758 F. Supp. 30 (D.D.C. 1991). Although *Beattie* was brought under the VRRRA, its relevance is established through House Reports for § 4311(a)—USERRA's prohibition on initial hiring discrimination—which expresses a desire to reenact the protection discussed in *Beattie*. See H.R. REP. NO. 103-65, at 23.

<sup>89</sup> *Id.* at 31.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 33.

<sup>92</sup> *Id.*

<sup>93</sup> *McClain v. City of Somerville*, 424 F. Supp. 2d 329 (D. Mass. 2006).

<sup>94</sup> *Id.* at 331.

<sup>95</sup> *Id.* at 330, 337.

prohibited by the statutory language of USERRA.<sup>96</sup>

In both of these cases the courts relied on the statute's plain language applying to initial hiring decisions.<sup>97</sup> Neither case analyzed whether the employers' decisions not to hire the servicemembers were based on the applicants' military service, but instead focused on the defendants' arguments that the respective scenarios fell outside the scope of the statutes' protections.<sup>98</sup> Thus, neither case mentioned whether an employer runs afoul of USERRA's prohibition against discrimination during initial hiring if it asks questions designed to elicit information about the potential impacts of an applicant's military service.

B. The Only Case to Consider the Issue Decided that USERRA Did Not Protect a Reservist from Pre-Employment Inquiries into the Burden of his Military Service

In *Hart v. Hillside Township*,<sup>99</sup> a prospective employer asked a New Jersey National Guard soldier applying for a fire-fighter position several questions regarding the potential burdens his service might impose.<sup>100</sup> Specifically, the employer asked the following questions:

- (1) Are you still in the National Guard?
- (2) Do you have to do [sic] certain amount of training each year?
- (3) How much time does that involve, say annually, that you have to put in with the National Guard?
- (4) Now, how flexible are they—I'm trying to get—ascertain, you have to be there certain weekends or—or [sic] is there a flexibility in scheduling, or . . .
- (5) What does that usually entail, so much per month is it or . . .
- (6) When is that—when is that two weeks, in the summer?
- (7) In other words, if you work—you know, the schedule here, it's 24 hours and 72 off. Could it—could you choose a weekend when you're not working here possibly or . . .
- (10) How long is your tour in the National Guard? As long as you want? Or . . .<sup>101</sup>

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<sup>96</sup> *Id.* at 333 (“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.”).

<sup>97</sup> *Id.*; *Beattie*, 758 F. Supp. at 33.

<sup>98</sup> *Beattie*, 758 F. Supp. at 32 (discussing the defendant’s argument that the applicant’s service was not an “obligation” within the meaning of the statute, that the statute only applied to reemployment, and that the applicant had to be available for work at the time of the discrimination); *McClain*, 424 F. Supp. 2d at 334 (addressing the defendant’s argument that the statute does not apply to active duty personnel).

<sup>99</sup> *Hart v. Hillside Township*, No. Civ.A. 03-5841(JAG), 2006 U.S. Dist. LEXIS 16577 (D.N.J. Mar. 17, 2006), *aff’d on other grounds sub nom. Hart v. Township of Hillside*, 228 F. App’x. 159, 164 (3d Cir. 2007).

<sup>100</sup> *Hart*, 2006 U.S. Dist. LEXIS 16577 at \*2–4.

<sup>101</sup> *Id.* at \*4.

This line of questioning expressly inquires into the burden that the applicant's National Guard service—his protected status—would impose on the employer. The United States District Court for the District of New Jersey, however, found the inquiries to be “merely logistical questions that are not discriminatory on their face.”<sup>102</sup> Thus, the court granted the employer's motion for summary judgment.<sup>103</sup>

On appeal, in an unpublished opinion, the United States Court of Appeals for the Third Circuit “assume[d] without deciding that Hart met his *prima facie* burden of showing that his membership in the National Guard was a substantial or motivating factor.”<sup>104</sup> The Court of Appeals went on to affirm the case based on the employer's ability to carry its burden by showing other factors, unrelated to the applicant's military service, which supported the district court's decision.<sup>105</sup> By not deciding whether these inquiries satisfied a plaintiff's *prima facie* case under USERRA, the Third Circuit failed to address the soundness of the reasoning of the district court.

### C. Cases Interpreting Other Anti-Discrimination Statutes have Prohibited the Use of Certain Pre-Employment Inquiries

Several cases under similar federal anti-discrimination statutes have looked at the legality of inappropriate pre-employment inquiries. They have unanimously held that such questions are sufficient to establish a plaintiff's *prima facie* case. Two anti-discrimination statutes—the ADA and Title VII—prove particularly useful due to the availability of substantial case law. The ADA, Title VII, and USERRA all share similar purposes and language.<sup>106</sup> Therefore, cases interpreting these statutes would logically serve as persuasive authority for reaching a similar result under USERRA—that improper pre-employment inquiries raise the presumption that an employer took an applicant's protected status into account when making an adverse employment decision.<sup>107</sup>

Under anti-discrimination statutes, courts generally prohibit the use of all pre-employment inquiries that screen out members of a protected class, unless those classifications are valid predictors of job performance or can be justified as a “business necessity.”<sup>108</sup> Over time, courts have consistently held that certain questions violate specific anti-discrimination

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<sup>102</sup> *Id.* at \*28.

<sup>103</sup> *Id.* at \*43.

<sup>104</sup> Hart v. Township of Hillside, 228 F. App'x. 159, 162 (3rd Cir. 2007) (internal quotations omitted).

<sup>105</sup> *Id.* at 162–63.

<sup>106</sup> See *infra* Part IV.

<sup>107</sup> See, e.g., Garrett v. Circuit City Stores, 449 F.3d 672, 680–81 (5th Cir. 2006) (using Title VII as precedent in determining whether USERRA claims may be arbitrated).

<sup>108</sup> See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (“If an employment practice which operates to exclude . . . cannot be shown to be related to job performance, the practice is prohibited.”).

statutes. For instance, in *Barbano v. Madison County*,<sup>109</sup> the United States Court of Appeals for the Second Circuit decided that certain interview questions—specifically whether a female job applicant would become pregnant and quit in the future, or whether her husband would mind if she had to “run around the country with men”—were discriminatory under Title VII because neither related to a bona fide occupational qualification.<sup>110</sup> Another case involving Title VII held that questions that would tend to have the effect of denying one race an equal opportunity for employment are likewise discriminatory.<sup>111</sup> Courts deciding discrimination cases under the ADA have looked with disfavor at questions that would reveal a potential disability, such as “[w]hat current or past medical problems might limit your ability to do a job?”<sup>112</sup> All of these interview questions raised the presumption that an employer improperly took an applicant’s protected status into account when making an adverse employment decision.<sup>113</sup>

Countless publications providing human resource advice offer summaries of questions that violate anti-discrimination laws.<sup>114</sup> Most of these offer a wide array of questions that would violate various federal employment statutes, such as “Do you have any disabilities?” or “How old are you?”<sup>115</sup> While a few publications mention discrimination based on *past* military service, presumably under USERRA—suggesting that it is illegal to ask the characterization of a veteran’s discharge—they are notably silent when it comes to questions that may invoke the protected status of a reservist.<sup>116</sup> More frequently, discriminatory questions regarding military service are overlooked altogether.<sup>117</sup> Thus, there is a strong possibility that employers will violate USERRA by asking certain interview questions.

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<sup>109</sup> *Barbano v. Madison County*, 922 F.2d 139, 143 (2d Cir. 1990).

<sup>110</sup> *Id.*

<sup>111</sup> *Gregory v. Litton Sys.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (referring to application questions about arrests that did not lead to convictions, which, according to the court, singles out certain minority groups that are often arrested without evidence of a crime).

<sup>112</sup> *EEOC v. Wal-Mart Stores*, 11 F. Supp. 2d 1313, 1317 (D.N.M. 1998).

<sup>113</sup> See Merrick T. Rossein, *Title VII: Race, Color, Sex and National Origin*, in 1 EMP. L. DESKBOOK HUM. RES. PROF. § 9:13 (2007):

Employers should avoid any question on employment applications and during job interviews that request information that should not be used in the decision-making process. This would include questions about an applicant's race, national origin, marital status, and childbearing or child-care plans. These questions might later be used as evidence of employer bias.

<sup>114</sup> See, e.g., *Illegal Interview Questions*, USA TODAY, Jan. 29, 2001, <http://www.usatoday.com/careers/resources/interviewillegal.htm> (providing examples of prohibited questions); MATTHEW J. DELUCA & NANETTE F. DELUCA, MORE BEST ANSWERS TO THE 201 MOST FREQUENTLY ASKED INTERVIEW QUESTIONS 137–38 (2001).

<sup>115</sup> See *Illegal Interview Questions*, *supra* note 114.

<sup>116</sup> *Id.*

<sup>117</sup> See, e.g., Courtney B. Sapire, *Reducing the Hiring Risk Factor*, 70 TEX. B.J. 540, 541 (2007) (listing subjects of questions to avoid, but not discussing current military service).

IV. DESPITE ONE UNPUBLISHED OPINION HOLDING THE  
OPPOSITE, USERRA DOES PROTECT APPLICANTS FROM  
INAPPROPRIATE INTERVIEW QUESTIONS

While the district court in *Hart* held that questions about how an applicant's National Guard service would impact his ability to perform a civilian job were "merely logistical" and "not discriminatory on their face,"<sup>118</sup> this reasoning ignores the plain language and policy behind USERRA. Additionally, the court failed to note USERRA's similarity to analogous anti-discrimination statutes, as well as case law holding that the protections of these statutes can be invoked through "merely logistical" interview questions.

A. USERRA's Plain Language and Policy Justify the Protection of  
Reservist's from Inappropriate Pre-Employment Inquiries

The plain language of USERRA states: "A person who is a member of . . . a uniformed service shall not be denied initial employment . . . by an employer on the basis of that . . . obligation."<sup>119</sup> The USERRA plaintiff need only establish that his or her service obligation was a motivating factor in the employer's adverse employment decision.<sup>120</sup> It does not need to be the sole cause, but just one of the factors that "a truthful employer would list if asked for the reasons for its decision."<sup>121</sup> While the district court in *Hart* relied on the explanation of the interviewers during litigation that they did not consider the plaintiff's military obligation to be negative,<sup>122</sup> this ignores the fact that litigants' memories are often favorable to their desired outcome. It is illogical to assume that questions about the extent of a reservist's obligation and his ability to work his military duties around his civilian employer's schedule do not imply that the employer might use that information as a motivating factor in making an adverse employment decision. Therefore, in taking the employer at its word, the court ignored the rationale behind the rule that a motivating factor is one that a "truthful employer" would give for its decision.<sup>123</sup>

The policy justifications behind USERRA further support the view that an employer violates USERRA by asking questions about the future obligations of a reservist. This policy is reflected in USERRA's broad language, which extends protection to a person who merely "*applies* to be a

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<sup>118</sup> *Hart v. Hillside Township*, No. Civ.A. 03-5841(JAG), 2006 WL 756000 at \*9 (D.N.J. Mar. 17, 2006), *aff'd on other grounds sub nom.*, *Hart v. Township of Hillside*, 228 F. App'x. 159, 164 (3d Cir. 2007).

<sup>119</sup> 38 U.S.C.A § 4311(a) (2006).

<sup>120</sup> *See Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001).

<sup>121</sup> *Sanguinetti v. United Parcel Serv.*, 114 F. Supp. 2d 1313, 1318 (S.D. Fla. 2000), *aff'd*, 254 F.3d 75 (11th Cir. 2001).

<sup>122</sup> *Hart*, 2006 WL 756000, at \*8.

<sup>123</sup> *Sanguinetti*, 114 F. Supp. 2d at 1318 (emphasis added).

member of” the military.<sup>124</sup> No other anti-discrimination statute applies to individuals that are inchoate members of the protected class. Further, the statute’s legislative intent is notably friendly to reservists, as it seeks “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.”<sup>125</sup> This policy has led courts to construe USERRA liberally “in favor of those who served their country.”<sup>126</sup> Therefore, the *Hart* court’s offhand dismissal of suspect interview questions as “merely logistical” runs counter to the broad protection Congress sought to provide to those serving in the armed forces reserves.<sup>127</sup>

B. USERRA’s Similarities to Other Anti-Discrimination Statutes Justifies a Similar Result for Questions Regarding the Potential Burden of an Applicant’s Protected Status on an Employer

A comparison of USERRA to other anti-discrimination statutes strengthens the conclusion that USERRA provides similar protections during the hiring process. USERRA’s text and context closely parallel both the ADA and Title VII. All three broadly cover qualified individuals,<sup>128</sup> protect against harms related to multiple aspects of employment, including hiring,<sup>129</sup> and require a nexus between what qualifies the individual for the statutes’ protections and the alleged employment-related harm.<sup>130</sup> Additionally, the ADA’s statement of purpose closely parallels that of USERRA.<sup>131</sup> Both the ADA and USERRA also require an employer, at times, to treat covered individuals differently than other employees in order to ensure they receive the same benefits as their non-protected coworkers.<sup>132</sup>

Noting the similarities between these three statutes, it is enlightening to return to the “logistical” questions that courts have held to be discriminatory under the ADA and Title VII. First, under Title VII, a

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<sup>124</sup> 38 U.S.C.A. § 4311 (2006) (emphasis added).

<sup>125</sup> H.R. REP. 103–65, at 2 (1993).

<sup>126</sup> See *McGuire v. United Parcel Serv.*, 152 F.3d 673, 676 (7th Cir. 1998) (internal citation omitted).

<sup>127</sup> *Hart v. Hillside Township*, No. Civ.A. 03-5841(JAG), 2006 U.S. Dist. LEXIS 1657 at \*28 (D.N.J. Mar. 17, 2006).

<sup>128</sup> 38 U.S.C. § 4311(a) (2006) (“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 services in a uniformed service . . . .”); 42 U.S.C.A. § 2000e-2 (West 2006) (“any individual”); 42 U.S.C.A. § 12112(a) (West 2006) (“a qualified individual”).

<sup>129</sup> 38 U.S.C. § 4311(a) (2006) (“denied initial employment”); 42 U.S.C.A. § 2000e-2 (a)(1) (West 2006) (“fail or refuse to hire”); 42 U.S.C.A. § 12112(a) (West 2006) (“the hiring”).

<sup>130</sup> 38 U.S.C. § 4311(a) (2006) (“on the basis of”); 42 U.S.C.A. § 2000e-2 (West 2006) (“because of”); 42 U.S.C.A. § 12112 (West 2006) (“because of”).

<sup>131</sup> Andy P. Fernandez, *The Need for the Expansion of Military Reservists’ Rights in Furtherance of the Total Force Policy: A Comparison of the USERRA and ADA*, 14 ST. THOMAS L. REV. 859, 881 (2002) (discussing the similarities in the two statutes’ purpose statements).

<sup>132</sup> *Fink v. City of New York*, 129 F. Supp. 2d 511, 519 (E.D.N.Y. 2001) (noting that, like the ADA, USERRA requires that “the employer must sometimes treat veterans differently from other employees in order to assure that they receive the same benefits as their co-workers”).

question about whether a woman intends to get pregnant has been held to be discriminatory.<sup>133</sup> The question involved the applicant's protected status (her gender) and sought to uncover whether that status would logistically infringe on her ability to comply with her employment obligations—presumably, if pregnant she would take maternity leave or leave her employment altogether. Next, under the ADA, a court held that questioning a man's ability to fully utilize his prosthetic arm was discriminatory.<sup>134</sup> Again, the employer sought to determine whether the applicant's protected status (his disability) could logistically burden the employer in the future by hindering the applicant's ability to perform certain tasks.

The similarities between these anti-discrimination statutes, their purposes, and the nature of questions that courts find discriminatory, support a conclusion that an employer violates USERRA by asking “merely logistical” questions. Reservists today find themselves subject to an increasingly burdensome “obligation” that is protected under USERRA.<sup>135</sup> This raises the presumption that employers, by asking logistical questions, are really seeking to uncover the probability that a reservist's service obligations will impinge on his or her availability for civilian employment. While an employer may still utilize the affirmative defense that the servicemember's protected status was not a motivating factor in its employment decision, a court should find that a reservist has established a *prima facie* case through evidence of questions regarding the extent of future reserve obligations.

#### V. FOUR CATEGORIES OF QUESTIONS WOULD VIOLATE USERRA

Similar to other federal anti-discrimination statutes, there are some types of interview questions that are permissible, and other categories of questions that could run afoul of USERRA. As noted by one human resource manual, employers may ask certain benign questions about an applicant's past military work experience, such as “whether or not the applicant has served in the military, period of service, rank at time of discharge, and type of training and work experience received while in the service.”<sup>136</sup> Presumably, each of these questions would be relevant enough to a business necessity to support the inquiry, because these questions truly help the employer evaluate the applicant's experience and qualifications for the job. However, other questions about an applicant's future military service are likely to raise a presumption of discriminatory intent under USERRA.

<sup>133</sup> *Barbano v. Madison County*, 922 F.2d 139, 143 (2d Cir. 1990) (citing *King v. Trans World Airlines*, 738 F.2d 255, 258 (8th Cir. 1984)).

<sup>134</sup> *EEOC v. Wal-Mart Stores*, 11 F. Supp. 2d 1313, 1320–21 (D.N.M. 1998).

<sup>135</sup> 38 U.S.C.A. § 4311(a) (2006).

<sup>136</sup> See Questions #7, PAC. UNIV. HUMAN RES. HR TRAINING & DEV., INTERVIEW QUESTIONS: LEGAL OR ILLEGAL? (2003), available at <http://www.pacificu.edu/hr/training/interview/pdfs/LegalOrIllegalInterviewQuestions.pdf>.

The first category of impermissible questions can be referred to as *current obligation questions*. These questions relate to how much time an applicant expects to dedicate to the reserves. Examples would be: “How often do you train with the reserves?” or “How long is your annual training?” As mentioned earlier, the typical “one weekend a month and two weeks a year” obligation is no longer the norm for most reservists.<sup>137</sup> Once hired, an applicant must be given time off to attend any training, both required and voluntary.<sup>138</sup> It is natural for an employer to be concerned about employing a person who may be unavailable for the job for several weeks and numerous weekends each year. However, Congress has clearly provided through the plain language of USERRA that this burden cannot be used as the basis for making an adverse employment decision; if these questions were asked, it would be hard to avoid the conclusion that an employer has discriminated against an applicant because of his or her military status.

The second category of impermissible interview questions is *future deployment questions*. These are probably the most common types of pre-employment questions faced by reservists today. This category includes questions such as: “Is your unit scheduled for an upcoming deployment?” or “How likely is it that you will be deployed?” As the United States depends more on its reserve forces to sustain deployments, both internally and abroad, more and more employers will experience the pain of losing employees for military service. As a result, employers will become increasingly cognizant of the likelihood of losing reservist-employees to future deployments. Almost every employment lawyer is aware of the strong protection provided by USERRA for reemployment rights.<sup>139</sup> As these lawyers educate their clients about USERRA’s protections and employers either experience or imagine the difficulty of holding open an employee’s position for a year or more, employers will undoubtedly hesitate to make a job offer to someone who is likely to be deployed. Again, this would constitute an impermissible motivating factor in the employer’s decision of whether to hire the applicant.

The third category of impermissible questions consists of *duration of service questions*. This category is the most straightforward. It encompasses questions such as: “How much longer do you have to serve?” Like the previous two categories, this type of question seeks information about how long an employer could expect to be subjected to the conflicting and superior requirements of the United States military.

Finally, the fourth category covers *service-related disability questions*; these types of questions are prohibited by USERRA as well as by the ADA.<sup>140</sup> The media has paid much attention lately to the number of

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<sup>137</sup> See *supra* note 60 and accompanying text.

<sup>138</sup> See *Beattie v. Trump Shuttle, Inc.*, 758 F. Supp. 30, 33 (D.D.C. 1991).

<sup>139</sup> See *Lowe & Lee*, *supra* note 33, at 931–32.

<sup>140</sup> See *supra* Part III.B.

servicemembers returning with physical and mental injuries.<sup>141</sup> The most prolific disability in the headlines is Post-Traumatic Stress Disorder (PTSD).<sup>142</sup> An unwary interviewer may be tempted to slip in a question about whether an applicant suffers from PTSD because its effects and frequency are becoming well-known, and its symptoms are not obvious during a quick encounter like an interview. While many might think this category is irrelevant due to the heightened sensitivity regarding disability related questions under the ADA,<sup>143</sup> it is worth mentioning here for two reasons. First, USERRA claims can be easier to bring than ADA claims, which requires plaintiffs to show that they are otherwise qualified for the job.<sup>144</sup> Second, USERRA applies to more employers, as it is not limited to employers with a certain number of employees like the ADA.<sup>145</sup>

If no servicemember may be “denied initial employment . . . by an employer on the basis of . . . [his or her] obligation,”<sup>146</sup> then questions that would fall into one of these four categories cannot be asked. Or, if such questions are asked, courts should hold that the questions serve as prima facie evidence that an applicant’s protected military status served as a motivating factor in the employer’s adverse employment decision. An employer would thus be required to plead and prove an affirmative defense under USERRA—a requirement no employer wants to face.

#### CONCLUSION

“Employers should expect to face more claims under the Uniformed Services Employment and Reemployment Rights Act . . . .”<sup>147</sup> This observation, made by a Justice Department lawyer at an American Bar Association Conference in March of 2007, seems rather foreboding, but nonetheless accurate. In light of the current international commitments of the United States and the current military force structure, it is unlikely that the strain on the reserves will lighten anytime soon. Likewise, it is unlikely that Congress will eliminate USERRA’s broad protections in the near future. On the contrary, the trend seems to be a gradual increase in protections for servicemembers.<sup>148</sup> As USERRA’s protections transfer some of the inconveniences of military service from the backs of reservists to employers, one can expect interviewers to have further incentives to

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<sup>141</sup> See, e.g., Jeff Donn & Kimberly Hefling, *War injuries strain vets’ system, observers say*, USATODAY, Sep. 29, 2007, [http://www.usatoday.com/news/health/2007-09-29-warinjured\\_n.htm](http://www.usatoday.com/news/health/2007-09-29-warinjured_n.htm) (discussing the high costs of caring for wounded veterans).

<sup>142</sup> *Id.*

<sup>143</sup> See *supra* Part III.B.

<sup>144</sup> See Kevin P. McGowan, *Military Leave: ABA Panelists Explore Interplay of Laws on Military Leave, Family Leave, Disabilities*, 58 Daily Lab. Rep. (BNA) C-1 (Mar. 27, 2007).

<sup>145</sup> See 42 U.S.C.A. § 2000e(b) (2006) (limiting application of the ADA to employers with at least fifteen employees).

<sup>146</sup> 38 U.S.C.A. § 4311(a) (2006).

<sup>147</sup> See McGowan, *supra* note 144, at C-1.

<sup>148</sup> Each statute passed by Congress to protect servicemembers has provided either identical or heightened protections. See *supra* Part I.A.

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inquire into the extent of a reservist's future commitments. Despite one unpublished opinion holding to the contrary, the language and policy behind USERRA, and USERRA's similarity to other anti-discrimination statutes which already provide such protections, suggest that a future case involving questions into the extent of a reservist's future service commitments will likely result in a verdict for the plaintiff. This possibility can be mitigated by having employment attorneys educate both themselves and their clients about the types of employment inquiries that are acceptable to ask applicants in the military reserves.