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Best Practices in Veteran Hiring: Balancing Employer Risks and Goals With Applicant Rights

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Military veterans comprise a significant component of the civilian workforce in the United States, and are likely to increase in coming years with the military drawdown occasioned by the demise of the wars in Iraq and Afghanistan. Incentives to hire veterans abound, and multiple public and private sector entities have made veteran hiring a priority. But seeking out veterans specifically as candidates for employment—however patriotically or altruistically motivated—carries its own risks. Favoring candidates with military experience over others is subject to challenge under federal anti-discrimination law, notwithstanding the widespread existence of state laws that purport to authorize such preferences. Hiring veterans also raises the question of what type of veteran an employer is looking for and the extent to which an employer may properly inquire into a candidate's military experience and service record, particularly with respect to the candidate's type of military discharge. This article explores these issues in the hope of providing guidance to both public-and private-sector employers.

In the United States as in other countries, military service is widely seen as a feather in one's cap, and thus those who have served honorably

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in the U.S. Armed Forces often highlight their military service on the resumes that they submit to potential employers. Indeed, in the public sector, veterans are given a statutory preference in hiring for civil service jobs at both the federal and state levels. Unless specifically authorized by statute, however, a hiring preference for veterans may conflict with federal or state anti-discrimination laws because of its potential disparate impact on women in the workforce. And an employer's consideration of the specific type of military discharge that a veteran received – i.e., honorable, general, or otherwise – can potentially disadvantage protected groups in ways that conflict with equal opportunity laws and regulations. Thus, notwithstanding the many government initiatives that encourage employers to hire veterans, consideration of a job applicant's military record is not risk-free, either to private companies or government entities. In this article, we discuss what some of those risks are and the steps that employers can take to minimize them.

MILITARY VETERANS IN THE CIVILIAN JOB MARKET: BASIC FACTS AND PROGRAMS

According to statistics provided by the Department of Veterans' Affairs and the Bureau of Labor Statistics, as of 2018 there were approximately 19.2 million living military veterans in the United States.[1] Although veterans overall have favorable rates of employment when compared to the national average, veterans in the youngest cohort – i.e., those most likely to have experience in the recent wars in Iraq and Afghanistan – are unemployed at a rate substantially higher than that of their counterparts without military service.[2] If this pattern holds, the number of young and unemployed military veterans can be expected to increase in coming years, as more servicemembers are expected to transition from active duty and enter the civilian work force because of the drawdown in Afghanistan and other factors.[3]

Since the Vietnam era, private companies doing business with the federal government have been required to take affirmative steps to recruit veterans,[4] but recent years have witnessed an explosion of government initiatives to address the problem of veteran unemployment and encourage veteran hiring in the private sector, irrespective of whether companies are involved in federal government contracting. In August 2011, for example, President Obama challenged employers to commit to hiring 100,000 veterans by the end of 2013, a goal accompanied by multiple federal programs offering financial incentives. Under the VOW to Hire Heroes Act of 2011,[5] employers could receive "Returning Heroes and Wounded Warrior Tax Credits" worth up to $5,600 for hiring an out-of-work veteran, with a potential bump to $9,600 if the veteran had service-connected disabilities.[6] In addition, through the VA's Special Employer Incentives program, employers who create job-training programs for hard-to-employ veterans could receive reimbursement of up

to 50 percent of a veteran's salary during training.[7] States, too, have gotten into the act, with multiple programs offering tax credits or grants to defray training costs.[8]

These private sector measures have long been preceded by even more robust programs in the public sector, including statutorily mandated hiring preferences for government jobs at both the federal and state levels. Since the Civil War, the federal government has officially supported a veterans' preference in federal hiring. During the war, President Lincoln expected there would soon be an unemployment crisis, and urged the creation of a hiring preference for Union veterans.[9]

In 1865, President Johnson followed through on Lincoln's suggestion, ordering the Treasury Department to fire employees to make room for veterans, later issuing a formal circular directing several departments to institute an official preference in hiring.[10]

During the Second World War, Congress expanded and codified these initiatives through the Veterans' Preference Act of 1944, which required federal government entities to give preferential treatment for openings in civil service occupations to applicants with military experience.[11]

Presently, all 50 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have similar laws respecting state- and municipal-level government employment.[12]

As a general matter, these are not controversial. As the U.S. Supreme Court has observed, as "veterans' preference laws have traditionally been justified as measures designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations."[13]

THE LEGAL FRAMEWORK: VETERAN PREFERENCES AND THE LEGAL LIMITS THEREOF

The statutory preferences for veterans apply to government hiring only. With the very limited exception of a veteran's right to re-claim his old job upon returning to civilian life, no federal or state law requires private employers to give a preference to veterans. Indeed, despite the many above-noted official encouragements for private companies to hire veterans – including an appeal directly from President Obama – pro-veteran preferences in the private sector (as well as non-mandatory ones in the public sector) have been successfully challenged under federal anti-discrimination law for their disparate impact on female applicants and employees.

USERRA: Limited Preferences and Protections

The starting point for any legal analysis of veterans' private-sector employment rights is the Uniformed Services Employment and

Reemployment Rights Act of 1994, commonly known as USERRA.[14] Under USERRA, it is illegal to discriminate in employment based on a person's existing military obligations (e.g., duties in the reserves or National Guard) or previous military service.[15] Like other federally-created anti-discrimination employment rights, the rights created by USERRA are enforceable by private action in federal court, except against State employers, in which case suits by private parties (e.g., individual job applicants) must either be brought in state court or pursued through the Department of Labor and then referred to the Department of Justice, which may choose to file suit in the name of the United States.[16]

USERRA also grants veterans returning to civilian employment after less than five years of military service the right to demand that their former employers re-hire them for their old jobs,[17] as well as grant them, under the "escalator principle," any advancement they would have received had they remained in civilian employment over the same period.[18] Other than in this limited respect, however, the rights created by USERRA are not preferences but merely anti-discrimination protections. USERRA does not grant a veteran an advantage over other applicants in the private-sector job market in general.[19]

Disparate Impact Challenges to Veterans' Preferences

A veterans' preference may seem entirely benign – or even laudatory, as a reward given for veterans' service to the nation – until one recognizes that, like all forms of preference in hiring, it may also be discriminatory. Although persons without military experience are not a protected class under Title VII or other anti-discrimination law, veterans historically have been overwhelmingly male, meaning that women – who *are* a protected class – have been, and are, disadvantaged by veterans' preferences in hiring.[20] On this basis, voluntary veterans' preferences have been challenged successfully under Title VII,[21] as it is well established that an employment practice with a disparate impact on a protected group can violate anti-discrimination laws even if the impact is unintentional.[22]

To enable the statutory veterans' preferences to exist in spite of their discriminatory effect, Title VII's prohibition on discrimination in employment contains a carve-out for veterans' preferences mandated by state or federal law:

> 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.[23]

An express statutory authorization, of course, does not rule out a constitutional challenge under the Equal Protection Clause, but such

challenges have failed.[24] Importantly, however, the above carve-out is expressly limited to preferences created by law, and thus it has no bearing on a purely self-initiated policy of preferring veterans to other applicants. On that point, moreover, the Equal Employment Opportunity Commission ("EEOC") has stated that for such "voluntarily adopted" veterans' preferences, it "will presume the existence of adverse impact" on women.[25]

Given the importance of a statutory basis to the Title VII carve-out, many states have enacted laws authorizing (but not mandating) private-sector employers to use a veterans' preference in hiring.[26] These statutes are of relatively recent vintage, however, and thus few if any have yet been tested against disparate-impact challenges. Thus, it is very much an open question whether a voluntary veterans' preference adopted in reliance on such a statute will come within the above-mentioned exemption for preferences "creat[ed]" by law. If it does not, then voluntary veterans' preferences are still subject to disparate impact challenges under federal law even where they are expressly permitted by state law.

Two additional caveats are in order. First, because a voluntary veterans' preference is subject to challenge only on grounds of disparate impact – i.e., that it *un*intentionally creates a disadvantage to a protected group[27] – it is subject to the employer defense of business necessity. That is, an employer whose veterans' preference is challenged can defend its policy by showing a legitimate business rationale for preferring applicants with military experience.[28] On that point, however, most civilian jobs do not require military skills, and "military skills" are hard to define given that the armed forces train servicemembers in a wide variety of fields. Thus, courts and the EEOC have been skeptical of proffered business necessity rationales in veterans' preference cases, even where the position at issue was directly related to other veterans.[29] The availability of direct financial incentives for hiring veterans may be a different matter. But whether a veteran-hiring tax credit (for example) supplies the business purpose sufficient to defeat a disparate impact challenge has not yet been decided by courts.

Second, because veterans' preferences are problematic solely because of their potential impact on job applicants from certain protected categories, individuals outside of those protected categories are not able to challenge them even if they are negatively impacted by them. For example, although men without military experience are disadvantaged by a veterans' preference, they are not disadvantaged in a way that the civil rights laws are concerned about – most veterans are male, and thus veterans' preferences do not negatively impact men as a group – and thus they are unable to challenge a preference under Title VII or other federal anti-discrimination law.[30]

THE LEGAL FRAMEWORK: DISCHARGE STATUS AND EMPLOYMENT DISCRIMINATION

Thus far in this article, when discussing "veterans" and the employment laws applying to them, we have been referring to honorably-discharged veterans. This is intentional. Most veterans are honorably discharged, and thus the above-referenced preferences and protections apply in the majority of cases. For the minority of veterans with "bad paper" discharges, however, the situation is different.

The Different Types of Military Discharge

To understanding the employment consequences of military discharge status, one should be familiar with the various types of military discharge. Upon any servicemember's final separation,[31] the military will either "discharge" or "dismiss" the servicemember, and under current law and regulations, will characterize the discharge in one of five ways:

(i) Honorable;

(ii) General (under honorable conditions);

(iii) Other than honorable;

(iv) Bad conduct; or

(v) Dishonorable.[32]

According to the Department of Defense, the services should grant an *honorable* discharge when the quality of the member's military service "generally has met the standards of acceptable conduct and performance of duty for military personnel, or is otherwise so meritorious that any other characterization would be clearly inappropriate."[33] This is a flexible and highly discretionary standard, allowing for honorable characterizations under a variety of non-obvious circumstances, including where the servicemember separates before completing his enlistment contract because of unsatisfactory performance, alcohol-abuse rehabilitation failure, or failure to meet body weight standards.[34] Accordingly, the military has characterized the majority of U.S. veterans' discharges as honorable. Although the precise percentages have varied over the decades and various periods of war and conflict, Swords to Plowshares reports that 77 percent of veterans have received honorable discharges.[35]

The military may also release a servicemember with a *general (under honorable conditions) discharge*. According to the Department of Defense, this discharge is appropriate when a member's service "has

been honest and faithful," and, for enlisted personnel, "when the positive aspects . . . outweigh negative aspects."[36] It is not as favorable as an honorable discharge: Although a veteran with a general discharge is still entitled to USERRA's reemployment rights, she is not entitled to the statutory veterans' preferences for federal or state civil service jobs and may also be precluded from receiving GI Bill education benefits.[37]

The harshest discharge that the military can give without a court-martial is a discharge *under other than honorable conditions* ("OTH"). An OTH discharge may be issued when the separation "is based on a pattern of behavior that constitutes a significant departure from the conduct expected of [] Service members."[38] Examples of such behavior include "the use of force or violence to produce serious bodily injury or death; abuse of a special position of trust; disregard by a superior of customary superior-subordinate relationships; . . . and deliberate acts or omissions that seriously endanger the health and safety of other persons."[39] Although classified as "administrative" rather than "punitive," an OTH discharge entails a host of negative consequences, including the loss of most veterans' benefits.[40] Indeed, the negative consequences are sufficiently profound that some have called into question whether the formal distinction between administrative discharges (which do not result from court-martial proceedings) and punitive ones (which do) is anything more than nominal in the case of the OTH.[41]

Still more severe than an OTH discharge are the "punitive" discharges, which can only result from conviction by court-martial of an offense under the Uniform Code of Military Justice.[42] There are two types: the *bad conduct discharge* and the *dishonorable discharge*.[43] The latter is reserved for the most serious offenses, such as desertion, rape, and murder.[44] As with the OTH discharge, either type of punitive discharge results in the forfeiture of virtually all veterans' benefits.[45] In addition, veterans with dishonorable discharges are subject to other collateral consequences separate and apart from the loss of benefits: they cannot own or purchase firearms,[46] and may lose their right to vote, receive governmental assistance, or work in the public sector, depending on the state in which they reside.[47] Indeed, the U.S. Code omits persons with a dishonorable discharge from its definition of "veteran."[48]

How Fair and Reliable Is a Discharge Characterization?

Although a job applicant's military discharge is one of several indicia of her performance while on active duty, it is important for potential employers to understand a few nuances of the military discharge system that may bear upon the reliability of discharge status as a qualification for employment.

First, research has shown that persons in certain marginalized groups are at an increased risk of unfavorable outcomes in the military discharge system. Persons of color, victims of sexual assault or harassment,

gay and lesbian servicemembers, and persons with post-traumatic stress disorder ("PTSD") and traumatic brain injury have received unfavorable discharges at above-average rates.[49] In certain cases, their discharges may reflect now-abandoned policies or failures of the discharge system rather than a flaw in the individual who received them.[50] Moreover, the individual services have broad discretion when deciding what category of discharge to apply,[51] meaning that discharge types are applied inconsistently across the military services and even across different commands within the same service.[52] Misconduct that might result in an OTH discharge in one unit, for example, might very well result in a general discharge in a different unit – or even be overlooked altogether for in yet another unit, allowing the servicemember to separate with a fully honorable discharge.[53]

Further, the military justice system punishes behaviors that are not addressed criminally, if at all, in civilian employment. Under military law, servicemembers may be (and sometimes are) prosecuted for being late to work,[54] missing work without permission,[55] disrespecting superiors,[56] or committing adultery.[57] Moreover, the military places a high emphasis on physical fitness standards (including body weight) and will separate servicemembers for failing to adhere to them. Because military rules govern many aspects of life that are seen as private in the civilian world, transgressions that would have little or no bearing to civilian employment can, in the armed forces, become the impetus for discipline and, potentially, an unfavorable discharge.

Finally, employers are well served to recall that servicemembers often enlist early in life – in many cases, directly out of high school – and are therefore forced to adapt at a young age to working full-time away from home in an unfamiliar environment. As with their civilian counterparts, some servicemembers struggle with the transition. In the military, however, growing pains and failures to adapt can carry consequences unknown in the civilian world, resulting in forms of discharge – handed down near the outset of a servicemember's working life – that may not accurately represent the servicemember's potential to succeed in a civilian career at a later stage in life.

What Review and Appeal Processes Are Available to Veterans with Unfair Discharge Characterizations?

There are processes available to veterans to try to correct errors or injustices in their military records and discharge characterizations. To upgrade a discharge or amend the reasons given in the discharge paperwork, a veteran can look to either of two administrative review boards within his branch of service: (i) the Discharge Review Board, or (ii) the Board for Correction of Military Records.[58] Usually, a veteran applies first to the former (which is staffed by military officers) and then, if unsuccessful, to the latter (which is comprised entirely of civilians), but

there is no bar to applying directly to the Board for Correction. Indeed, a veteran can apply only to the Board for Correction if her discharge was the product of a general court martial or occurred more than 15 years earlier.[59]

Both Boards have notoriously low grant rates for discharge upgrades and have been roundly criticized for failing to function as intended.[60] Most veterans apply pro se, and the majority of those pro se applications are denied.[61] In addition, a veteran has no right to an in-person hearing with the Board for Correction of Military Records, and the Board rarely grants requests for hearings as a matter of discretion. Although there have been some improvements in the grant rates as a result of advocacy by veteran organizations, they are by no means a catch-all for correcting improper discharge characterizations. Therefore, employers should be alert to the fact that a veteran's failure to obtain an upgraded discharge may be more a reflection of failings in the review process than the accuracy of the initial categorization.

What Are the Employment Consequences of an Unfavorable Military Discharge?

Wholly separate and apart from the formal benefits that it entails, an honorable discharge invokes the notion that the veteran's service to the country was meritorious and deserving of respect. Unsurprisingly, therefore, it is generally viewed favorably by employers in both the public and private sectors, whether or not the employer employs a veterans' preference or formal program of veteran recruitment. In sharp contrast, an unfavorable military discharge invokes essentially the opposite idea, and accordingly it can have profound consequences on a veteran's prospects for post-service civilian employment.

As noted above, in the public sector, the statutory hiring preferences for federal and state government jobs are not available; they apply only to veterans who have been honorably discharged.[62] Persons with an actual *dis*honorable discharge, moreover, do not merely lose the preference, but become ineligible for government employment altogether, at the federal level and in most states as well.[63] Other public-sector employment barriers arise without such formal restrictions, such as through difficulties in obtaining a security clearance,[64] a permit to carry firearms,[65] or other prerequisites that entail looking into the veteran's background. In addition, in the case of the punitive discharges, some employment restrictions may flow simply from the fact of a court-martial conviction, setting aside the form of discharge itself.[66]

Although there are no official restrictions on employment in the private sector, veterans with bad paper discharges frequently find potential employers unwelcoming.[67] Veterans have few legal protections from these biases. USERRA does not apply to veterans with OTH or punitive discharges.[68] Nor does Title VII establish veteran status or type of discharge

as a protected characteristic.[69] At the state level, meanwhile, only Illinois and Wisconsin have made "unfavorable discharge" a prohibited basis for hiring decisions, and even in those states, the protections are qualified, with no application at all in cases of dishonorable discharge.[70]

That said, employers do not have carte blanche to adopt policies categorically excluding veterans with bad paper discharges from consideration. In April 2018, the Connecticut Commission on Human Rights and Opportunities issued policy guidance observing (as noted *supra*) that persons of color and LGBT veterans have received unfavorable discharges at higher-than-average rates, and thus that employers who refuse to hire unfavorably discharged veterans – like those who apply a veterans' preference – could be liable on a disparate impact theory.[71] Although the Connecticut Commission's policy guidance is not law, its analysis is supported by federal case law and EEOC decisions from the 1970s,[72] and thus its potential implications go well beyond Connecticut.[73]

On this point, the same above-noted caveats applicable to veterans' preferences also apply to discrimination based on unfavorable discharge status. Because such discrimination is problematic only because of its unintended impact on certain marginalized groups (i.e., racial minorities and LGBT veterans), non-minority veterans with unfavorable discharges are not disadvantaged by it in an actionable way and thus are unable to challenge it.[74] And, because disparate impact is necessarily premised upon *un*intentional discrimination, a lawsuit based on discharge-status discrimination will always be subject to the employer defense of legitimate business purpose. As with a veterans' preference, however, an employer may find it difficult to show a legitimate reason to categorically exclude any veteran with bad paper, given that a bad paper discharge can result from many different types of conduct,[75] most of which are in all likelihood irrelevant to the job under consideration.

POTENTIAL RISKS TO EMPLOYERS AND BEST PRACTICES

Based on the above discussion, employers may have concerns about both hiring veterans and declining to hire them. Such concerns are not unfounded: Making an employment decision based on an applicant's military experience or discharge status *is* a potential source of liability, despite multiple government-backed incentives to increase veteran hiring. Making matters worse, the risks to employers come from both directions. Although making some inquiries of an applicant's military experience is a practical necessity, an employer can get into trouble by asking either too many questions or too few. Nevertheless, some general principles and guidelines are discernable.

First, there is nothing *per se* unlawful about asking an applicant whether she has military experience and, if so, what type of discharge

she received. That is, there is no law analogous to the recently-enacted "Ban the Box" statutes which preclude employer inquiry into job applicants' criminal records.[76] Even the above-noted Connecticut Commission on Human Rights and Opportunities, which has questioned the legality of discharge-status discrimination, has acknowledged that the mere act of inquiring about discharge status is a routine employment practice.[77] There are good reasons for this, as an applicant's prior job performance – whether in military service or civilian employment – is a highly relevant index of ability, reliability, and character. Inquiries into former employment, therefore, can be a critical safeguard against liability, as derelict employees can subject their employers to costly lawsuits premised on both vicarious liability (i.e., respondeat superior)[78] and direct liability (e.g., for negligent hiring or entrustment).[79]

Moreover, as least with respect to government employers – or private employers who are required to keep track of veteran hiring (such as government contractors)[80] – it is effectively impossible *not* to make such inquiries. There is no way to implement a veterans' preference – or, conversely, a prohibition on employing persons dishonorably discharged – without knowing to whom it applies. The same is true with respect to any job, private or public, with legal restrictions on the persons eligible to hold it. Applicants cannot be expected to know the legal restrictions surrounding particular positions, and accordingly there is no way for employers to ensure compliance with the law without making the appropriate inquiries.

That said, an employer must be thoughtful about how it structures its inquiries into an applicant's military service. An applicant needs to clear only a very low bar to show that her military service record – or lack thereof – was an improper motivating factor in an employment decision.[81] To reduce the possibility of a claim, therefore, an employer should postpone its inquiries about military experience until late in the hiring process, preferably not until the point of an actual offer. The inference that veteran status was important to the employer is greatly diminished if it is not used as a threshold screening tool, and no causal link can be established if the employer makes its hiring decision before it even knows the applicant's status. Staging the inquiry in this fashion is not inconsistent with an employer's goal of hiring more veterans. VEVRAA, for instance, encourages veteran hiring not through a hiring preference for veterans, but simply by requiring that veterans be informed of potential job openings and encouraged to apply for them.[82]

In the same vein, an employer's inquiry into an applicant's military experience should not seek more information than necessary to ensure compliance with the law and suitability for the position in question.[83] If an employer requires official confirmation of military experience, it may request a copy of the applicant's Department of Defense Form 214, a form that is issued to every servicemember upon release from active duty and which serves as a summary of his or her service record ("DD214").[84]

The DD214 comes in edited ("short") and unedited ("long") versions, the former of which will omit the discharge characterization and other information of a personal nature, such as psychological, medical, or disability condition.[85] For this reason, the Connecticut Commission advises that if an employer needs to request the DD214, it should request only the short form.[86] Limiting the inquiry in this fashion allows the employer to assess the candidate's background for relevant experiences and training – as well as verify the applicant's claims of military service, just as one might do for any other reference – but avoids learning information unimportant to the hiring decision that could give rise to an inference of bias. For the same reason, for applicants who are members of the National Guard or other drilling reserve unit, employers should not inquire about the applicant's drill or deployment schedule, as such information is unrelated to his or her qualifications and invokes a prohibited basis for hiring decisions under USERRA.

Supplemental guidelines should be observed for employers who wish to adopt a voluntary veterans' preference. As noted above, employers should be aware that adopting such a preference may give rise to disparate impact claims by female or LGBT applicants. An employer willing to bear that risk should first check whether the states in which it operates have enacted statutes permitting voluntary veterans' preferences.[87] Next, to establish a business purpose for the preference – and, thus, a defense to disparate impact claims – it should investigate the availability of tax credits or other financial incentives tied to veteran hiring.[88] Third, to avoid claims that the preference is a pretext for intentional discrimination, it should ensure that its preference is applied uniformly across applicants, without regard to gender, race, religion, or any other prohibited characteristic.[89] An employer should also ensure that its preference includes those with unfavorable discharges, or at least that it can articulate job-related reasons why a particular discharge classification may make a veteran unsuited to a particular position.

Employers who wish to adopt a voluntary veterans' preference should be similarly thoughtful about how they structure inquiries into applicants' military service. Instead of simply asking all applicants whether they have military experience, an employer should consider informing all applicants of its policy and then inquiring, on an individualized basis, whether an applicant elects to invoke the preference. In this way, an applicant who may be wary of disclosing some aspect of her military service – perhaps due to the nature of a discharge or existing military obligations – could elect not to disclose the information at the outset of the hiring process.

Finally, whether or not an employer elects to adopt a veterans' preference, it should give all applicants individualized consideration. Thus far, reported cases in which employers have been found liable for discriminating based on applicants' military status – either positively (e.g., in

favor of veterans generally) or negatively (e.g., against veterans with bad paper) – have involved policies of categorical treatment.[90] Employers who make case-by-case decisions about the relevance of military experience to specific job openings are often able to show that their decisions were rooted in legitimate business reasons rather than mere bias. Moreover, in the private sector, it will likely be the relatively rare case in which the mere fact of favorable or unfavorable military discharge – as opposed to the conduct giving rise to the discharge – will bear a direct relationship to an applicant's suitability for a particular job. Consistent with this, and to avoid even the suggestion of a categorical policy, the Connecticut Commission advises employers to make an affirmative statement that all veterans are welcome to apply for any job opening, "regardless of [] discharge status."[91] In the same vein, an employer who is specifically seeking veteran applicants for a particular job opening should similarly make clear that applicants without military experience are welcome to apply as well.

CONCLUSION

For many employers, the armed forces represent a vast reservoir of potential employee talent waiting to be tapped. To succeed in the military mission, servicemembers must learn valuable lessons like teamwork, initiative, and personal discipline, lessons that translate well to the civilian workplace and bode well for a veterans' chance of success later in life. When coupled with sentiments of patriotism and the many government initiatives to reward veteran hiring, these attributes and incentives leave little reason to wonder why employers aggressively recruit veterans as potential hires. Employers must be careful, however, to ensure that efforts to recruit veterans do not run afoul of the many federal and state anti-discrimination laws which seek to ensure fair employment practices for both veterans and non-veterans alike.

NOTES

1. News Release, U.S. Department of Labor Bureau of Labor Statistics, *Employment Situation of Veterans – 2018* at 2 (March 21, 2019), *https://www.bls.gov/news.release/pdf/vet.pdf*; U.S. Department of Veterans Affairs National Center for Veterans Analysis and Statistics, *Veteran Population* (May 2019), *https://www.va.gov/vetdata/docs/Demographics/VetPop_Infographic_2019.pdf*.

2. *Employment Situation of Veterans*, *supra* note 1, at 2 (reporting that veterans with experience serving in Iraq and/or Afghanistan had an unemployment rate of 5.7 percent).

3. U.S. Department of Veterans Affairs National Center for Veterans Analysis and Statistics, *Veterans Employment 2000-2013*, *https://www.va.gov/data/VAOpenDataMigration2019/Employment_Rates_FINAL.pdf*; Off. of the Chairman of the Joint Chiefs of Staff, Enabling

Collaborative Support to Reintegrate the Military Family 4 (Nov. 2014) (estimating 250,000 separations annually).

4. Vietnam Era Veterans Readjustment Assistance Act of 1974 ("VEVRAA"), 38 U.S.C. § 4212. Although VEVRAA does not establish a hiring preference for veterans, its administering agency, the Office of Federal Contract Compliance Programs (OFCCP), sets "benchmarks" of veteran hiring goals and monitors contractors compliance with those goals. *See* 38 U.S.C. § 4212 (requiring federal contracts in amounts greater than $100,000 to contain provisions requiring the contractor to take affirmative actions to employ and advance covered veterans).

5. Pub. L. No. 112-56 § 251, 125 Stat. 711, 729 (codified as amended at 38 U.S.C. § 4303(2)).

6. Smaller financial rewards were also available, including a $2400 credit for veterans who were unemployed for more than four weeks but less than six months. *See* The White House, Office of the Press Secretary, Fact Sheet: Returning Heroes and Wounded Warrior Tax Credits (Nov. 21, 2011), *https://obamawhitehouse.archives.gov/the-press-office/2011/11 /21/fact-sheet-returning-heroes-and-wounded-warrior-tax-credits*. Other examples of Congressional encouragement to private-sector veteran hiring include the Congressional Veterans Jobs Caucus, *see https://www.manchin.senate.gov/download/congressional-veterans-jobs-caucus-*; Senator Baucus's "I Hire Vets" Initiative, *see https://www.ibirevets.com/*; the Hire More Heroes Act of 2015, and the Veteran Employment Transition Act.

7. AMENDMENT – INTERNAL REVENUE CODE, Pub. L. No. 112-56, 125 Stat. 711 (Nov. 21, 2011); U.S. Department of Veterans Affairs, Veterans Benefits Administration, *Special Employer Incentive (SEI) Program* (Oct. 2018), *https://www.benefits.va.gov/VOCREHAB/docs/SpecialEmployerIncentive.pdf*. In addition, although not a financial incentive, the Office of Federal Contract Compliance Programs ("OFCCP") issued new regulations in 2015 expanding the definition of "Protected Veteran" to include "recently separated veterans" for purposes veteran-hiring benchmarks in federal government contracting.

8. For example, Connecticut's "Hire Vets First" initiative allows businesses hiring veterans to defray costs, and Minnesota's "Show Me Heroes" program reimburses employers for half of a veteran's wages during training.

9. James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 Veterans L. Rev. 135, 153 (2011).

10. *Id.* at 155.

11. Pub. L. No. 78-359, ch. 287, 58 Stat. 390, as amended and codified in various sections of Title 5 of the U.S. Code. *See also Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 261 & nn.6-7 (1979) (discussing the federal veterans' preference statute and system); *Lazaro v. Dep't of Veterans Affairs*, 666 F.3d 1316, 1318 (Fed. Cir. 2012) (discussing statutes and regulations that provide veterans preference).

12. *See* Colo. Const. art. XII, § 15; Ala. Code § 36-26-15; Alaska Stat. Ann. § 39.25.159; Ariz. Rev. Stat. Ann. § 38-492; Ark. Code Ann. § 21-3-302; Cal. Gov't Code § 18973.1; Conn. Gen. Stat. Ann. § 5-224; Del. Code Ann. Tit. 29, § 5935; Fla. Stat. Ann. § 295.08; Ga. Code Ann. § 43-1-9; Haw. Rev. Stat. § 76-103; Idaho Code Ann. § 65-503; 15 Ill. Comp. Stat. Ann. 310/10b.7; Ind. Code Ann. § 5-9-3-2; Iowa Code Ann. § 35c.1; Kan. Stat. Ann. § 75-2955; Ky. Rev. Stat. Ann. § 18a.150; La. Rev. Stat. Ann. § 33:2416(B); Me. Rev. Stat. Tit. 5, § 7054-B; Md. Code Ann., State Pers. & Pens. § 7-207; Mass. Gen. Laws Ann. Ch. 31, § 3; Mich. Comp.

Laws Ann. § 38.413; Minn. Stat. Ann. § 43a.11; Miss. Code Ann. § 71-5-121; Mo. Ann. Stat. § 36.220; Mont. Code Ann. § 39-29-102; Neb. Rev. Stat. Ann. § 48-227; Nev. Rev. Stat. Ann. § 284.260; N.H. Rev. Stat. Ann. § 283:4; N.J. Stat. Ann. §§ 11a:5-4, 11a:5-5; N.M. Stat. Ann. § 10-9-13.2; N.Y. Civ. Serv. Law § 85; N.C. Gen. Stat. Ann. § 128-15; N.D. Cent. Code Ann. § 37-19.1-02; Ohio Rev. Code Ann. § 124.23; Okla. Stat. Ann. Tit. 74, § 840-4.14; Or. Rev. Stat. Ann. § 408.230; 51 Pa. Cons. Stat. Ann. § 7103; R.I. Gen. Laws Ann. § 36-4-19; S.C. Code Ann. § 1-1-550; S.D. Codified Laws § 3-3-1; Tenn. Code Ann. § 8-30-307; Tex. Gov't Code Ann. § 657.003(c); Utah Code Ann. § 71-10-2; Vt. Stat. Ann. Tit. 20, § 1543; Va. Code Ann. § 2.2-2903; Wash. Rev. Code Ann. § 41.04.010; W. Va. Code Ann. § 6-13-1; Wis. Stat. Ann. § 66.0509; Wyo. Stat. Ann. § 19-14-102; D.C. Code Ann. § 1-607.03; P.R. Laws Ann. Tit. 29 § 737(f); 4 Guam Code Ann. § 4104; V.I. Code Ann. Tit. 3, § 525.

13. *Personnel Admin'r of Mass. v. Feeney*, 442 U.S. 256, 265 (1979), *cited in* EEOC Notice No. 915.056, Policy Guidance on Veterans Preference under Title VII (August 1990); *see also id.* 265 n.12 ("Veterans' preference laws have been challenged so often that the rationale in their support has become essentially standardized.").

14. *See* 38 U.S.C. §§ 4301-4335. Although presently the most important federal law concerning the private-sector employment rights of servicemembers and veterans, USERRA is not the first. It was preceded by VEVRAA in 1974, *see supra* note 4, as well as by the Veterans' Reemployment Rights Act in 1968, which protected reservists from losing their jobs when activated for regular duty. *See*, *e.g.*, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 216-17 (1991). VEVRAA's effect on veteran hiring in the private sector was always intentionally limited, as it applied exclusively to federal government contractors. Moreover, VEVRAA has never applied to *all* veterans, but only Vietnam-era veterans and qualified disabled veterans, although recent years have seen OFCCP regulations expand to include veterans discharged within the previous three years.

15. 38 U.S.C. § 4311(a) ("A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."); *see also Coffman v. Chugach Support Servs.*, 411 F.3d 1231, 1234 (11th Cir. 2005) ("Congress enacted USERRA to prohibit employment discrimination on the basis of military service as well as to provide prompt reemployment to those individuals who engage in non-career service in the military.").

16. 38 U.S.C. § 4323(b) ("(1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action. (2) In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State. (3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action."). Unlike a private litigant, the federal government may sue a State employer in federal court to enforce private rights under USERRA. *McIntosh v. Partridge*, 540 F.3d 315, 320-21 (5th Cir. 2008); *Wood v. Fla. Atl. Univ. Bd. of Trs.*, 432 F. App'x 812, 815 (11th Cir. 2011) (*per curiam*) ("[T]he permissive language of USERRA regarding private actions against state employers vests exclusive jurisdiction in state courts.").

17. *See* 38 U.S.C. § 4312(a). USERRA is not the first piece of federal legislation on this issue. Congress created reemployment rights for persons compelled into military service

with the United States' first peacetime draft in 1940, *see* Selective Training and Service Act of 1940, *see* Pub. L. No. 76-783, § 8, 54 Stat. 885, 890, and a year later expanded those same rights to cover military volunteers as well, *see* Service Extension Act of 1941, Pub. L. No. 77-213, § 7, 55 Stat. 626, 627; H.R. Rep. No. 77-1117, at 6. *See also Leib v. Georgia-Pacific Corp.*, 925 F.2d 240, 242 (8th Cir. 1991) (veteran reemployment statutes "date from the nation's first peacetime draft law, enacted in 1940"); Andrew P. Sparks, *From the Desert to the Courtroom: The Uniformed Services Employment and Reemployment Rights Act,* 61 Hastings L.J. 773, 776 (2010); Stephen D. Tandle, *Military Service and Private Pension Plan Benefits: An Analysis of Veterans' Reemployment Rights,* 58 Chi.-Kent. L. Rev. 167 (1981).

18. *See* 38 U.S.C. § 4313; 20 C.F.R. §§ 1002.196, 1002.197; *see also Oakley v. Louisville & Nashville R. Co.*, 338 U.S. 278 (1949) ("the right to be restored 'to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment"); *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946) (escalator position is "the precise point [the veteran] would have occupied had he kept his position continuously during the war"); Thomas R. Haggard, *Veterans' Reemployment Rights and the "Escalator Principle,"* 51 B.U. L. Rev. 539 (1971).

19. Nor does a veteran possess any advantage – or even any protection – based solely on veteran status under other well-known anti-discrimination laws. Prior military service and veteran status are not protected categories under, for example, Title VII. *Wood v. Fla. Atl. Univ. Bd. of Trs.*, 432 F. App'x 812, 816 (11th Cir. 2011) ("[V]eterans, as a group, are not protected under Title VII . . .."). The Veterans and Servicemembers Employment Rights and Housing Act of 2013 would have made military service such a protected class and afforded veterans the same remedies as under Title VII (as well as prohibited discrimination on the basis of military service in housing), but it was not enacted. *See* H.R. 2654, 113th Cong. (2013).

20. Importantly, most of the data on which gender-based disparate-impact challenges have been based are from the 1970s and 1980s, when far fewer military career fields were open to women. As of 2017, women's participation in military was at its highest level in history, with women comprising 16 percent of active-duty enlisted personnel and 18 percent of commissioned officers. U.S. Department of Defense, *Population Representation in the Military Services: Fiscal Year 2017 Summary Report* 6 (2017), *https://prhome.defense.gov/Portals/52/Documents/MRA_Docs/ MPP/AP/poprep/2017/Executive%20Summary.pdf*. In the same vein, as of 2017, women comprised 8.9% of the nation's 18.2 million living veterans. *See* National Conference of State Legislatures, *A Path to Employment for Veterans with Disabilities* 3 (2019), *http://www.ncsl.org/Portals/1/Documents/Military_Veterans/Veteran-Employment_v04.pdf* (citing U.S. Census Bureau, 2017 American Community Survey). By comparison, the Supreme Court noted in *Feeney* that when that litigation commenced in 1975, women comprised just 1.8% of veterans in Massachusetts. 442 U.S. at 270. It will be interesting to see whether disparate impact will remain viable as a theory to challenge veterans' preferences if the current trend of expanding opportunities for women in the military continues, as courts considering analogous claims have been reluctant to infer present effects from old data. *See, e.g.,* Elizabeth Westrope, *Employment Discrimination on the Basis of Criminal History: Why an Anti-Discrimination Statute is a Necessary Remedy*, 108 Journal of Criminal Law and Criminology 367, 385 (2018) ("[C]ourts today usually require plaintiffs to present very detailed statistical evidence rather than the broad general data that plaintiffs often used in the 1970s and 1980s.").

21. *See, e.g.*, *Bailey v. S.E. Area Jt. Apprenticeship Comm.*, 561 F.Supp. 895, 912 (N.D.W.Va. 1983) ("Title VII, unlike various other statutes and government regulations which have been enacted since World War II, does not accord veterans any employment preferences. Rather, Title VII seeks to secure equality of employment opportunities for members of certain protected classes. Inasmuch as veterans are not a protected class under Title VII, the statute leaves no room for a veteran preference which has a disparate impact on a protected class, e.g., women.").

22. *See*, *e.g., Griggs v. Duke Power Co.,* 401 U.S. 424 (1971).

23. Section 712 of the Civil Rights Act of 1964, or 42 U.S.C. 2000e-11 (1982). Both the EEOC and the courts have found no Title VII violation for the public-sector veterans' preferences that are authorized by statute. *Bannerman v. Dep't of Youth Auth.*, 436 F. Supp. 1273, 1281 (N.D. Cal. 1977), *aff'd per curiam*, 615 F.2d 847 (9th Cir. 1980).

24. *Feeney*, 442 U.S. 256 (upholding Massachusetts veterans preference statute against equal protection challenge, notwithstanding adverse impact on employment opportunities for women).

25. EEOC, Policy Guidance on Veterans' Preference under Title VII, Notice No. N-915.06 (Aug. 10, 1990), *https://www.eeoc.gov/policy/docs/veterans_preference.html.*

26. *See* Ala. Code 1975 §§ 25-1-50 – 25-1-52; Alaska Stat. Ann. § 23.88.010 (West); Ariz. Rev. Stat. § 23-495.01; Ark. Code Ann. § 11-15-103; Fla. Stat. § 295.188; Ga. Code Ann. § 34-1-8; Idaho Code § 65-513; 330 Ill. Comp. Stat. 56/10 (2016); Ind. Code §10-17-15-5 (2015); Iowa Code Ann. § 35.3; Kan. Stat. Ann. § 73-231; Ky. Rev. Stat. Ann. § 40.345 (West); La. Stat. Ann. § 23:1001; Me. Rev. Stat. Tit. 26, § 878; Md. Code Ann., Lab. & Empl. § 3-714 (West); Mass. Gen. Laws Ann. Ch. 149, § 44 3/4 (West); Mich. Comp. Laws Ann. § 35.1202 (West); Minn. Stat. Ann. § 197.4551 (West); Mo. Ann. Stat. § 285.250 (West); Mont. Code Ann. § 39-29-203; Neb. Rev. Stat. §48-238; Nev. Rev. Stat. Ann. § 613.385 (West); N.H. Rev. Stat. Ann. § 275-G:2; N.J. Stat. Ann. § 38A:3-12 (West); N.C. Gen. Stat. § 95-28.4; N.D. Cent. Code Ann. § 37-19.1-05 (West); Ohio Rev. Code Ann. § 5903.15 (West); Okla. Stat. Ann. Tit. 40, § 801; Or. Rev. Stat. Ann. § 408.497 (West); 51 Pa. Cons. Stat. § 7203 (2016); 30 R.I. Gen. Laws Ann. § 30-21-14 (West); S.C. Code Ann. § 1-13-80; Tenn. Code Ann. § 50-1-107 (West); Tex. Labor Code Ann. § 23.002 (West); Utah Code Ann. § 34-50-103 (West); Va. Code Ann. § 40.1-27.2 (West); Wash. Rev. Code Ann. § 73.16.110 (West); Wyo. Stat. Ann. § 19-14-111 (West).

27. This assumes, of course, that an employer's use of veterans' preference is genuine and not merely a pretext for intentional discrimination against, for example, women. *See* EEOC, policy guidance, *supra* note 25 (discussing the pretextual use of veterans' preference in *Woody v. City of West Miami*, 477 F. Supp. 1073, 1080 (S.D. Fla. 1979)).

28. The defense has its origins in *Griggs v. Duke Power Co.,* 401 U.S. at 431, which expanded the scope of possible Title VII liability by recognizing disparate impact claims, but suggested that policies with an unintentionally discriminatory effect could justified by "business necessity." *See also New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1979); *Blake v. City of Los Angeles*, 595 F.2d 1367, 1377 (9th Cir. 1979); *Green v. Mo. Pac. R.R.*, 523 F.2d 1290, 1298 (8th Cir. 1975); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 451 (5th Cir. 1971).

29. *See, e.g.*, *Krenzer v. Ford*, 429 F. Supp. 499, 503 (D.D.C. 1977) (concluding that the VA policy of appointing only veterans to the Board of Veterans Appeals violated Title VII as it was not sufficiently job-related: "They have not shown that the character of the work or the constituency served necessitates that each and every person appointed to the Board

be a veteran."); *see also Bailey*, 561 F. Supp. at 912 n. 20 (finding no business necessity for questions in an interview for a boilermaker apprenticeship related to military service, but recognizing "that some occupational qualifications or specializations, which are similar to those required of a boilermaker, can be acquired during military service," and that "questions concerning prior military service may have some tangential relevance in that an applicant's successful completion of military service is conceivably indicative of his or her general ability to work in a group.").

30. Of note, multiple U.S. Courts of Appeals have, within the past few years, held that Title VII's protections against discrimination on the basis of sex include protections against discrimination on the basis of sexual orientation, *see Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 107 (2d Cir. 2018), *cert. granted* 139 S. Ct. 1599 (2019) and *Hively v. Ivy Tech Cmty. Coll. of In.*, 853 F.3d 339, 340 (7th Cir. 2017), as well as transgender status, *see EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 584 (6th Cir. 2018), *cert. granted in part* 139 S. Ct. 1599 (2019). The Supreme Court has granted certiorari in three related cases and heard arguments on these questions in October 2019. Given the military's previous ban on gay and lesbian persons and its current ban on transgendered persons, it may be the case that veterans' preferences have a disparate impact on individuals who identify as LGBT. Therefore, although we have not seen any cases as of yet, it may be the case that LGBT persons, regardless of gender, will also be able challenge voluntary veterans' preferences just as women can at present.

31. Contrary to common parlance, the vast majority of those leaving the service after completing an initial period of enlistment are "separated" rather than "discharged." The key difference is that a "discharge" entails no additional service obligation, whereas "separation" may leave an additional military service obligation to be fulfilled in the reserves. U.S. Dep't of Defense, Instruction 1332.14, *Enlisted Administrative Separations* (Change 3, Mar. 22, 2018) at 54.

32. In addition, if the servicemember's period of service did not exceed 180 days, the military ordinarily will give him or her an "entry-level separation" (also referred to as "ELS") or "uncharacterized" discharge. U.S. Dep't of Defense, Instruction 1332.14, Enclosure 4.3.b; *see also* Donna P. Price, *Getting Fired by the Military (And What You Can Do About It)*, N.J. Law. Mag., June 2007, at 21, 22, and 23.

33. U.S. Dep't of Defense, Instruction 1332.14, Enclosure 4.3.b; *see also* U.S. Dep't of Defense, Instruction 1332.30, *Commissioned Officer Administrative Separations* (May 11, 2018), at 23.

34. U.S. Dep't of Defense, Instruction 1332.14, Enclosure 3, at 9-24. Many of these separation reasons may also warrant a general (under honorable conditions) discharge. *Id.*

35. Swords to Plowshares, *Veterans and Bad Paper: The Facts* 1 (2015), *https://www.swords-to-plowshares.org/wp-content/uploads/Bad-Paper-Fact-Sheet-June-2015.pdf*.

36. U.S. Dep't of Defense, Instruction 1332.14, at 30. For officers, a General (Under Honorable Conditions) discharge characterization is appropriate where the negative aspects outweigh the positive. U.S. Dep't of Defense, Instruction 1332.30, at 23.

37. For a helpful chart displaying the types of benefits available to veterans with differing types of discharge, *see* Cong. Research Serv., *Veterans' Benefits: The Impact of Military Discharges on Basic Eligibility* 6-7 (Mar. 2015), *https://crsreports.congress.gov/product/pdf/R/R43928*.

38. U.S. Dep't of Defense, Instruction 1332.14 at 30-31; *see also* U.S. Dep't of Defense, Instruction 1332.30, at 24 ("when separation is based upon one or more acts or

omissions that constitute a significant departure from the conduct expected of Service members").

39. U.S. Dep't of Defense, Instruction 1332.14, at 30-31; U.S. Dep't of Defense, Instruction 1332.30, at 24. As Professor Marcy Karin observes, however, each of the military services has its own regulations regarding OTH discharges, and thus the type of conduct that will result in an OTH discharge varies considerably across the services and even within the same service. *See* Marcy L. Karin, "*Other than Honorable" Discrimination*, 67 Case W. Res. L. Rev. 135, 156-60 (2016) ("[T]here is no clear, uniform definition of what misconduct will result in an OTH discharge, and each military branch has separate guidance. . . . [T]he reality is that it generally remains at the discretion of command on a case-by-case basis."); *see also infra* notes 53-55 and accompanying text.

40. *See, e.g.*, 38 U.S.C. § 5303 (denying certain benefits based on OTH separation); *see also supra* note 37, *Veterans' Benefits: The Impact of Military Discharges on Basic Eligibility* 6-7 (Mar. 2015), *https://crsreports.congress.gov/product/pdf/R/R43928*; *see also* John W. Brooker, Evan R. Seamone & Leslie C. Rogall, *Beyond "T.B.D.": Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces,* 214 Mil. L. Rev. 1, 18 (2012).

41. Cong. Research Serv., *Administrative Separations for Misconduct: An Alternative or Companion to Military Courts-Martial* (May 26, 2004), at CRS-2 n.5 ("Some may argue that administrative separations are 'punitive' since some courts have found that a discharge under other than honorable conditions, which may be awarded as a result of an administrative separation, stigmatizes the servicemember's reputation, impedes his ability to gain employment, and serves as prima facie evidence against the servicemember's character, patriotism and loyalty.") (quoting *Stapp v. Resor*, 314 F. Supp. 475, 478 (S.D.N.Y. 1970); *see also Kauffman v. Sec'y of the Air Force*, 415 F.2d 991, 995 (D.C. Cir. 1969); *Van Bourg v. Nitze*, 388 F.2d 557, 559 n.1 (D.C. Cir. 1967).

42. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003(b)(8) (2012). A court martial is a military court or trial in which charges are brought against military members for offenses under military law. There are two types, general and special. A conviction by court-martial is equivalent to a felony conviction in a civilian court. Matthew S. Freedus & Eugene R. Fidell, *Conviction by Special Courts-Martial: A Felony Conviction?*, 15 Fed. Sent. Rep. 220 (UC Press, 2003). The Uniform Code of Military Justice ("UCMJ") is the criminal code governing all U.S. servicemembers. It is codified at 10 U.S.C. §§ 801-946.

43. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003(b)(8) (2012). Formally speaking, these apply to enlisted personnel only. Commissioned officers are not immune from punitive separation following conviction by court-martial, but they are subject to "dismissal." An officer convicted at court martial but not sentenced to dismissal may be administratively dropped from the rolls by the service secretary, but that is not considered a punitive separation. *See Goldsmith v. Clinton*, 48 M.J. 84 (C.A.A.F. 1998), *rev'd Clinton v. Goldsmith*, 526 U.S. 529 (1999).

44. In recent memory, the most prominent example is probably U.S. Army Sergeant Beaudry Robert "Bowe" Bergdahl, who was dishonorably discharged in November 2017 after pleading guilty to desertion in court-martial proceedings. *See* Jamie Ducharme, *Bowe Bergdahl Was Dishonestly Discharged. What's That?*, Time, Nov. 3, 2017, *http://time.com/5009192/what-is-dishonorable-discharge-bowe-bergdahl/*. In addition, a dishonorable discharge can only be handed down by a *general* court martial, whereas a bad conduct discharge may also be imposed by a *special* court martial, a smaller proceeding that is used for less serious offenses.

45. *See Veterans' Benefits: The Impact of Military Discharges*, *supra* note 37, at 5.

46. 18 U.S.C. § 922.

47. Charles E. Lance, *A Criminal Punitive Discharge–An Effective Punishment?*, 79 Mil. L. Rec. 1, 20–21 (1978) (cataloguing federal benefits denied to servicemembers dishonorably discharged).

48. *See* 38 U.S.C. § 101(2) ("The term 'veteran' means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.").

49. Michael J. Wishnie, *"A Boy Gets Into Trouble": Service Members, Civil Rights, and Veterans' Law Exceptionalism*, 97 B.U. L. Rev. 1709, 1725 (Oct. 2017); Marcy L. Karin, *"Other Than Honorable" Discrimination*, 67 Case W. Res. L. Rev. 135, 162-69 (2016).

50. For example, until the repeal of the Department of Defense's "Don't Ask, Don't Tell" policy in 2010, same-sex sexual relationships could result in disciplinary action. Marcy L. Karin, *"Other Than Honorable" Discrimination*, 67 Case W. Res. L. Rev. 135, 162-69 n.135 (2016) ("[C]oncealing one's homosexuality, lying about prior acts, or committing same-sex acts during service could have led to a mandatory OTH."); *see also generally* Karen Moulding, 1 SEXUAL ORIENTATION AND THE LAW § 8:19 (2016) (discussing some historic military policies on homosexuality); U.S. DEP'T OF THE ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (2011) (revising regulations).

51. This is particularly the case for the administrative separations, i.e., the honorable, general-under-honorable, and OTH discharges. Although no category of discharge is unreviewable, the administrative discharges do not require trial by court-martial, and thus the due-process protections that attend to military justice proceedings do not apply to the administration of a general or an OTH discharge.

52. To illustrate, each branch of the military (with the authorization of the Department of Defense) has promulgated its own standards for OTH separations. *See* U.S. DEP'T OF THE AIR FORCE, AIR FORCE INSTRUCTION 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN (2015); U.S. DEP'T OF THE ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (2011); U.S. MARINE CORPS, MCO P1900.16F, SEPARATION AND RETIREMENT MANUAL (2013); U.S. DEP'T OF THE NAVY, NAVAL MILITARY PERSONNEL MANUAL, art. 1900-1999 (2002); *see also* 20 C.F.R. § 1002.136 (2019) ("The branch of service in which the employee performs the tour of duty determines the characterization of service.").

53. For a thorough discussion of the problem of inconsistency in application of OTH discharges, see Marcy L. Karin, "*Other than Honorable" Discrimination*, 67 Case W. Res. L. Rev. 135, 156-60 (2016). *See also* John W. Brooker, Evan R. Seamone & Leslie C. Rogall, *Beyond "T.B.D.": Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces,* 214 Mil. L. Rev. 1, 18 (2012) ("Historically and modernly, the military's reliance on and deference to command discretion has produced inconsistent punishments.").

54. 10 U.S.C. § 886.

55. *Id.*

56. 10 U.S.C. § 889.

57. 10 U.S.C. § 934.

58. 10 U.S.C. §§ 1552, 1553. Because the Marine Corps is part of the Department of the Navy, upgrade requests for Marine veterans are heard by the Navy's Discharge Review Board and Board for Correction of Naval Records.

59. 10 U.S.C. § 1553 (review of discharge or dismissal must be made within 15 years); *see also* DEP'T OF DEFENSE, INSTRUCTION 1332.28, DISCHARGE REVIEW BOARD (DRB) PROCEDURES AND STANDARDS (2004) (restating this requirement); DEP'T OF DEFENSE FORM 293, APPLICATION FOR THE REVIEW OF DISCHARGE FROM THE ARMED FORCES OF THE UNITED STATES (2015) (same). By contrast, review by the Board for Correction of Military Records must be sought within three years, but this limitations period may be waived "in the interest of justice." 10 U.S.C. § 1552(b). For a helpful overview of the upgrade process, see Connecticut Veterans Legal Center, Veterans Discharge Upgrade Manual (2011).

60. *See, e.g.*, Sundiata Sidibe and Francisco Unger, Veterans Legal Services Clinic at Yale Law School, *Unfinished Business, Correcting Bad Paper for Veterans with PTSD* 1, *https://law.yale.edu/sites/default/files/documents/pdf/unfinishedbusiness.pdf*:

> [F]or decades, these record correction boards have failed to function as intended by Congress. They refused to permit veterans to appear before them personally, failed to disclose information about the boards' work, and most importantly, engaged in a near-categorical refusal to correct the discharge status of veterans suffering from post-traumatic stress disorder (PTSD), denying more than 95% of such applications from Vietnam veterans in the last 15 years.

61. *See* Wishnie, *A Boy Gets into Trouble*, *supra* note 49 at 1727-28; *see also* Eugene R. Fidell, *The Boards for Correction of Military and Naval Records: An Administrative Law Perspective*, 65 Admin. L. Rev. 499, 501-03 (2013) (discussing high denial of application and denial of personal hearing rates by the corrections boards); MICHAEL ETTLINGER & DAVID F. ADDLESTONE, MILITARY DISCHARGE UPGRADING AND INTRODUCTION TO VETERANS ADMINISTRATION LAW: A PRACTICE MANUAL 26.3.4.1 (2d ed. 1990) ("The VA favorably adjudicates only about ten percent of these cases.").

62. *See supra* notes 12-13.

63. *See supra* note 47.

64. *See* 5 C.F.R. § 732.102(a)(1)–(2); Exec. Order No. 12,968, § 3.1(b), 3 C.F.R. § 391 (1995).

65. *See* 18 U.S.C. § 922.

66. For example, federal law prohibits an individual convicted of certain crimes in the previous ten years from working as a security screener or otherwise having unescorted access to the secure areas of an airport. *See* 49 U.S.C. §§ 44935(e)(2)(B), 44936(a)(1), (b)(1).

67. For an excellent profile on the difficulties faced by job-seeking veterans with unfavorable military discharges, see the online article by the Christian Science Monitor from May 2018. Jennifer McDermott, *Discharged veterans work to end employment discrimination*, Christian Science Monitor, May 25, 2018, *https://www.csmonitor.com/USA/Justice/2018/0525/Discharged-veterans-work-to-end-employment-discrimination*. These biases are hardly new, and similar commentary can be found in publications from decades ago. *See, e.g.*, Peter Slavin, *The Cruelest Discrimination: Vets with Bad Paper Discharges*, 14 Bus. & Soc. Rev. 25, 27–28 (1975).

68. 38 U.S.C. 4304 (noting, under "Character of Service," that the "benefits of this chapter" terminate upon, among other events, an other-than-honorable or punitive discharge); *Tootle v. Merit Sys. Prot. Bd.*, 559 F. App'x 998, 1001 (Fed. Cir. 2014) (*per curiam*) ("[E]ven if [plaintiff-appellant] had made the required discrimination allegation, he still could not pursue a claim under USERRA. . . . [H]is one dishonorable discharge takes away any standing he would otherwise have had to bring his USERRA claim."); *Adams v. Penn Line Servs., Inc.*, 620 F. Supp. 2d 835, 839 & n.1 (N.D. Ohio 2009) ("A threshold requirement for armed services personnel seeking USERRA protection includes an honorable discharge from the armed forces."). Professor Marcy Karin disagrees, asserting that the "character of service" requirements in § 4304 apply only to the reemployment protections of USERRA § 4312, not the anti-discrimination and anti-retaliation protections of § 4311. *See* Marcy L. Karin, *"Other than Honorable" Discrimination*, 67 Case W. Res. L. Rev. 135, 154, 157 (2016). This reading of the statute seems at odds with cases like *Tootle*, which observed that a dishonorably-discharged veteran would *not* be able to bring a discrimination claim under USERRA. 559 F. App'x at 1001. Moreover, given private employers' well-documented aversion to hiring veterans with "bad paper," *see supra* note 67, one would expect to see far more employment discrimination claims by bad-paper veterans if, in fact, they were legally empowered to bring such claims.

69. *See, e.g.*, *Wood v. Fla. Atl. Univ. Bd. of Trs.*, 432 F. App'x 812 (11th Cir. 2011); *Bailey v. S.E. Area Jt. Apprenticeship Comm.*, 561 F. Supp. 895, 912 (N.D.W.Va. 1983).

70. Illinois law prohibits discrimination because of "unfavorable discharge from military service," which it defines to exclude discharge characterized as dishonorable, in connection with employment. 775 Ill. Comp. Stat. Ann. 5/1-102. Wisconsin law bans discriminatory employment action from being taken based on less than honorable discharges or criminal punishment imposed by the military, Wis. Stat. Ann. §§ 111.32(3), 111.322, unless "the circumstances of the discharge or separation substantially relate to the circumstances of the [employer's] particular job," *id.* § 111.335.

71. Connecticut Commission on Human Rights and Opportunities, *Guide to Nondiscrimination in Hiring and Employing Connecticut Veterans*, *http://www.ct.gov/chro/lib/chro/Veteran_Employer_QA_Guidance.pdf*. *See also* Alyssa Peterson, *Discriminating against Veterans with Less-than-Honorable Discharges in Hiring or Employment Could Subject Employers to Liability Under Civil Rights Laws*, CHRO (Dec. 6, 2017), *https://ctchro.wordpress.com/ 2017/12/06/discriminating-against-veterans-with-less-than-honorable-discharges-in-hiring-or-employment-could-subject-employers-to-liability-under-civil-rights-laws/*.

72. *Dozier v. Chupka*, 395 F. Supp. 836 (S.D. Ohio 1975); EEOC Decision 74-25 (1973); EEOC Decision 76-13 (1975). The principal difference between these older decisions and the Connecticut Commission's position is that the latter holds that discharge-status discrimination implicates *two* protected categories under Title VII – race and sexual orientation – whereas prior decisions were premised exclusively on race. This is likely because the case law in the Second Circuit has evolved to recognize sexual orientation as a protected characteristic, *see Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 107 (2d Cir. 2018), *cert. granted* 139 S. Ct. 1599 (2019), which it did not in the 1970s when the early analyses of discharge-status discrimination were performed.

73. The Connecticut Commission's position is supported by the same logic underlying the EEOC's longstanding position that an employer who discriminates based on a job applicant's criminal record may be liable under Title VII – given the higher prevalence of criminal convictions and arrests among certain minority groups – even though criminal history is not itself a protected characteristic under federal anti-discrimination

law. *See* EEOC Enforcement Guidance (April 25, 2012) ("An employer's use of an individual's criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title 5 VII of the Civil Rights Act of 1964," because of its disparate impact on African-American and other minority employees and applicants.); *see also Gillum v. Nassau Downs Reg'l Off Track Betting Corp.*, 357 F. Supp. 2d 564, 569 (E.D.N.Y. 2005); *Quick v. Runyon*, No. 96 CV 0474, 1997 WL 177858, at *1 (E.D.N.Y. Mar. 25, 1997); Westrope, *supra* note 20.

74. *Cf.* Westrope, *supra* note 20 at 380 (disparate impact theory "only applies to minorities . . . rather than all individuals with criminal records").

75. To illustrate, the Connecticut Commission observes that "prior to 2011, thousands of gay service members were discharged from the military solely because of their sexual orientation." LGBT status, of course, is now a protected class in many states and municipalities.

76. The name "Ban the Box" refers to the portion of a job application asking for a yes-or-no (or "check the box") representation as to whether the applicant has a criminal record. According to secondary sources, thirty-one states have banned such questions in government hiring, while eleven states have gone further and imposed the same restriction on private employers as well. *See* Beth Avery, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Housing Policies*, NELP, *https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/*. As a general matter, such statutes do not disallow criminal history questions entirely, but require that employers postpone them until a certain stage of the hiring process. For a thorough survey of state and local laws on this issue, *see* Denise Lewis, *Ban the Box Laws By State: A Guide for* Employers, Alliance Worldwide Investigative Group, Inc., Dec. 8, 2017, *https://www.allianceinvestigative.com/ban-the-box-laws-by-state-a-guide-for-employers/*.

77. *See* Connecticut Commission on Human Rights and Opportunities, *Guide to Nondiscrimination in Hiring and Employing Connecticut Veterans*, *supra* note 71. Analogously, the EEOC has recognized that there is no federal prohibition on an employer merely asking about an applicant's criminal history, despite the organization's position that exclusion of applicants on the basis of criminal history is discriminatory due to its impact on minority applicants. *See* EEOC, *Pre-Employment Inquiries and Arrest & Conviction*, *https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm* ("Federal law does not prohibit employers from asking about your criminal history.").

78. *See, e.g., Kephart v. Genuity, Inc.*, 38 Cal. Rptr. 3d 845, 852–53 (Ct. App. 2006) ("[L]osses caused by the torts of employees, which as a practical matter are certain to occur in the conduct of the employer's enterprise, should be placed on the enterprise as a cost of doing business."); *N.X. v. Cabrini Med. Ctr.*, 765 N.E.2d 844 (N.Y. 2002); *McHaffie ex rel. McHaffie v. Bunch*, 891 S.W.2d 822, 825 (Mo. 1995) (en banc).

79. *See, e.g.*, *Rockwell v. Sun Harbor Budget Suites*, 925 P.2d 1175, 1183 (Nev. 1996) (reversing grant of summary judgment and allowing plaintiff's claims for both *respondent superior* and negligent hiring to proceed to trial); *but see City of Kingsland v. Grantham*, 805 S.E.2d 116, 119 (Ga. Ct. App. 2017) (holding direct liability claims based on negligent hiring and entrustment duplicative of, and therefore precluded by, *respondeat superior* claim). For a detailed analysis of the elements of negligent hiring under the laws of various states, *see* Nesheba M. Kittling, *Negligent Hiring and Negligent Retention: A State by State Analysis* (A.B.A. Nov. 6, 2010), *https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/annualconference/087.authcheckdam.pdf*.

80. 41 C.F.R. § 60-300.44(k).

81. *See*, *e.g.*, *Coffman v. Chugach Support Servs.*, 411 F.3d 1231, 1238 (11th Cir. 2005) ("[M]ilitary service is a motivating factor if the defendant relied on, took into account, considered, or conditioned its decision on that consideration.") (internal quotation marks omitted).

82. Indeed, the governing OFCCP regulations expressly state that compliance with veteran-recruitment goals – goals set forth in those very same regulations – is *not* a legitimate business purpose sufficient to justify a veterans' preference with a negative disparate impact on female job applicants. 71 Fed. Reg. 58,639 (Oct 4, 2006).

83. In the analogous situation of requesting information on an applicant's criminal history, the EEOC similarly recommends that employers limit their inquiries to true business necessities, i.e., matters which are "job related for the position in question." EEOC, Enforcement Guidance, No. 915.002, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (April, 25, 2012) at 8-10.

84. *DD Form 214, Discharge Papers and Separation Documents*, NATIONAL ARCHIVES, *https://www.archives.gov/st-louis/military-personnel/dd-214.html* [*https://perma.cc/9PW6-EY84*] (last received Apr. 26, 2018). Although FOIA makes some military service records publicly available, DD214s are generally not available through the FOIA route because of the Privacy Act of 1974. *See* National Personnel Records, *Freedom of Information Act (FOIA) and The Privacy Act*, *https://www.archives.gov/personnel-records-center/foia-info* (last visited Sept. 25, 2019) (explaining the types of military records available through FOIA).

85. Connecticut Commission on Human Rights and Opportunities, Guide to Nondiscrimination in Hiring and Employing Connecticut Veterans, *supra* note 71.

86. *Id.*

87. *See, e.g.*, *supra* note 26.

88. *See supra* note 8.

89. *See supra* note 27 and accompanying text.

90. For example, awarding veterans an automatic five bonus points in an applicant scoring matrix, or refusing outright to hire veterans with bad paper.

91. Connecticut Commission on Human Rights and Opportunities, Guide to Nondiscrimination in Hiring and Employing Connecticut Veterans, *supra* note 71.