



USERRA Protects Returning Veterans' Employment Rights

The [Uniformed Services Employment and Reemployment Rights Act \(USERRA\)](#) protects those returning from service in the uniformed services, including those called up from the Reserves or National Guard, and prohibits employer discrimination based on time in the military.

Federal courts have consistently held that USERRA, like other statutory means of protecting service members, is to be liberally construed in favor of those who drop their personal affairs and leave their jobs to answer their nation's call. No longer are the National Guard and the Reserves a strategic reserve. Rather, the current defense doctrine calls for them to remain a part of the operational forces. In a time of continued heavy reliance on the National Guard and the Reserve, USERRA is more relevant and critical to service members and the nation's defense structure than ever before.

What is USERRA's purpose?

Congress, in passing USERRA in 1994, stated it was intended to:

- Encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers that can result from such service
- Minimize disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt re-employment of such persons upon their completion of such service
- Prohibit discrimination against persons because of their service in the uniformed services

What does USERRA require of employers?

To accomplish its purpose, USERRA:

- Prohibits discrimination and retaliation based on military service
- Allows the use of paid time off held by the employee
- Guarantees continued health insurance coverage while a service member is on leave and re-employment upon his or her return
- Requires that seniority and pension benefits be preserved when a service member is re-employed
- Prohibits discharge without cause for specific periods of time after a service member's return from service

Which employers are covered?

USERRA applies to all employers incorporated or otherwise organized in the United States and all employers controlled by entities organized in the United States, including foreign employers (unless a foreign employer's compliance with USERRA would violate the laws applicable in its foreign workplace). It also applies to U.S. operations of foreign employers. It applies regardless of the size of the employer's workforce.

Who is protected?

USERRA applies to all U.S. citizens, nationals, or permanent resident aliens who are employed in the United States or in a foreign country by a U.S. employer. It applies regardless of how long an employee has been working with an employer. The act protects covered employees on leave in the "uniformed services," which include the Army, Navy, Marine Corps, Air Force, and Coast Guard and their reserve components, the Army and Air National Guards, and the commissioned corps of the Public Health Service.

Protection is afforded to employees who report for active duty, active duty training, initial active duty for training, inactive duty training, full-time National Guard duty, and/or absence to determine fitness to perform service. The employee's service must be "honorable" to enjoy protection under USERRA.

When is a claim timely?

USERRA, enacted in 1994, was not provided a separate statute of limitations. Until the 2008 amendment, 28 U.S.C. §1658(a)'s four-year statute of limitations applied. USERRA was amended in 2008 by the Veterans' Benefits Improvement Act (VBIA), which determined there shall be no limit on the period for filing a complaint or claim. This amendment does not apply retroactively.

How do employees assert USERRA's protections?

In order to take advantage of USERRA's protections, employees must give prior notice of military service to their civilian employer. Written notice is not required, but it is strongly recommended. Additionally, in order to be protected by USERRA, the employee's period of military service cannot exceed five cumulative years. Military service during wartime, a period of national emergency declared by the President, or periodic and special Reserve/National Guard training do not count toward the five-year calculation. The five-year clock restarts when a service member changes civilian employers.

How is USERRA enforced?

The U.S. Department of Labor, Veterans' Employment and Training Service, (DOL-VETS) is responsible for the implementation, administration, and enforcement of USERRA. Individuals who believe their USERRA rights have been violated may file a complaint with DOL-VETS. As part of the complaint process, a DOL-VETS investigator will collect and

review evidence and conduct witness interviews necessary to resolve the complaint. If the claimant is dissatisfied with the outcome of the claim, he or she may request referral of the matter to the U.S. Department of Justice (DOJ) for further review and possible representation. It is important to note, however, that DOJ may decline referral and representation if the individual has retained private counsel or received assistance from an attorney in attempting to resolve his or her USERRA claim.

What are some recent judicial and administrative decisions involving USERRA rights?

Inferences of hostility to military service: The U.S. Supreme Court, in an 8-0 opinion, denied judgment for the employer where there was evidence that the human resources vice president relied on accusations of immediate supervisors to discharge the employee and there was evidence the supervisors were motivated by hostility toward the employee's military obligations, thereby upholding a "cat's paw" discrimination claim.

Staub v. Proctor Hospital, 131 S. Ct. 1186 (2011). Visit the [U.S. Supreme Court](#) website to view the entire opinion.

Promotion and seniority issues: Police Officer Brian Benvie, an Army Reservist who served on deployments to Kosovo, Iraq, and Kuwait, missed taking promotion exams for sergeant and lieutenant due to active military duty. When he eventually took the exam, he found others were promoted ahead of him even though he scored better. His matter was referred to the Justice Department, which secured a settlement that included \$32,000 in back pay, a promotion, and retroactive seniority.

Seniority and retaliation: After returning from deployment, Army Reservist Theresa Slater returned to her job as a security officer in Missouri. Upon her return, however, she discovered that her employer had changed her status to that of a new employee, which cost her 13 years of seniority and required her to retake company training courses. After Slater filed a USERRA complaint to regain her lost seniority, she was terminated for a minor infraction of company policy. She amended her complaint to include retaliation. In arbitration, Slater received her original job back with her seniority restored and more than \$20,000 in back pay.

Re-employment, promotional, and retirement issues: While a claimant was deployed in Iraq, the Highland Park (Mich.) Fire Department promoted three firefighters with less seniority and refused to promote the claimant upon his return. In a settlement, the claimant's wages and benefits were adjusted from the time of the promotion to the date of his return to work.

In another case, the Justice Department settled with United Airlines, which had made pension contributions at a minimum level during a claimant's deployment instead of, as USERRA requires, "in the same manner and to the same extent the allocation occurs for other employees during the period of service." Under the terms of the settlement, the claimant was fully compensated for all deficient pension payments, plus any associated earnings.

Introducing the *Civil Rights Reporter*

Welcome to the first issue of the *Civil Rights Reporter*, an Ohio Attorney General's Office newsletter aimed at raising awareness of Ohio's laws against discrimination as well as important civil rights issues and cases.

The newsletter will be sent twice a year, and we encourage you to forward it to others who may find the information valuable. (For best results, please use the forward button at the bottom of the *Civil Rights Reporter* e-mail you received.)

Appropriately, this first issue coincides with National Fair Housing Month, an observance that has occurred annually since April 1969, the first anniversary of Congress' passage of the Fair Housing Act. The act prohibits discrimination in the sale, rental, and financing of housing based on race, religion, national origin, and (as amended) sex, handicap, and family status. In fact, as you will read in a Q&A with Attorney General Mike DeWine in this issue, the attorney general led efforts to add family status to the act when he served in the U.S. House of Representatives.

The Civil Rights Reporter's audience includes attorneys who practice civil rights law; staff of fair housing organizations, urban leagues, and similar organizations that advocate for civil rights; law school students; and others interested in this subject.

The Ohio Attorney General's Civil Rights Section, by law, represents the Ohio Civil Rights Commission. The staff includes a section chief and 10 assistant attorneys general who work throughout the state. They handle about 400 cases annually in the administrative forum, common pleas courts, and courts of appeals.

Most cases come to the Attorney General's Office through the commission's administrative process, governed by Ohio Revised Code Section 4112. It serves individuals who believe they have been discriminated against in the areas of housing, employment, public accommodation, higher education disability issues, or credit. The commission has jurisdiction over allegations of discrimination based on military status, disability, sex, religion, race, ancestry, color, age, national origin, and familial status (the presence of children younger than 18 in housing cases only).

The Ohio Civil Rights Commission's services and processes are spelled out on its website at www.crc.ohio.gov/. Matters not resolved through the commission's conciliation process are referred to the Ohio Attorney General's Office, where the first step is to try to resolve the situation informally. If that is unsuccessful, the section prepares the case for trial or administrative hearing and continues to represent the commission through any subsequent appeals. The office also defends the commission's decisions not to proceed with cases in which it finds no probable cause.

The Civil Rights Section also works to educate the public about Ohio's anti-discrimination laws. Staff members train groups of all sizes, tailoring the subject matter to each

audience. Many landlords and employers want to comply with the law, but don't know how and sometimes don't have the resources to determine how to handle a situation. By educating the public on Ohio's laws against discrimination, the Attorney General's Office hopes to encourage voluntary compliance, consistency, and fair access for all Ohioans.

More information and resources, including answers to frequently asked questions, appear at www.OhioAttorneyGeneral.gov/CivilRights. To schedule a training session in your area, contact Civil Rights Section Chief Lori Anthony at Lori.Anthony@OhioAttorneyGeneral.gov or 614-466-7900.

A conversation with the Attorney General

As the launch of the *Civil Rights Reporter* approached, Ohio Attorney General Mike DeWine discussed civil rights issues in a conversation with Marilyn Tobocman, a principal assistant attorney general in the office's Civil Rights Section. Attorney General DeWine has been involved in civil rights issues throughout his career, primarily during his years in Congress. Tobocman, a civil rights attorney for three decades, has been with the Attorney General's Office for 19 years and was in private practice for 11 years.

Marilyn Tobocman: Can you talk about the educational role our office plays in civil rights law?

Mike DeWine: Our Civil Rights Section is proactive, and of course, our goal is to have no problems. The way we do that — or at least the way we try to lessen the problems — is to be proactive and educate people. As I tell a lot of different groups, we are here to be of assistance to you. Whether you have a small business or any other enterprise, we want to brief you on all the things you need to be aware of and watch out for.

Marilyn Tobocman: Have you had opportunities to do that in past positions?

Mike DeWine: Throughout my career, I've dealt with civil rights issues primarily from a legislative point of view. In addition to voting on all the major civil rights legislation during my 20 years in Congress, I served on a working group that Bob Dole put together when he was Majority Leader of the Senate and Bill Clinton was President. There was a big push to totally do away with affirmative action, and we came back and recommended keeping it. We wanted to see whatever problems existed fixed, but we were in favor of the public policies of this country that reach out to be inclusive, which is really all affirmative action is. I'm very proud of having played a major role in preserving policies that try to compensate for and include people who would have been excluded from the pool — whether it's hiring or going to school or whatever it is. I'm also very proud of having taken the lead in advocating for including family status as a protected class under the fair housing law when I was on the House of Representatives' Judiciary Committee. As a father of eight children, I was somewhat informed and obviously concerned about someone being denied housing because they have a bunch of kids.

Marilyn Tobocman: Can you talk about your expectations of the office's Civil Rights Section?

Mike DeWine: Well, you know, I think it's pretty easy to describe. It is to do justice and rectify problems and to serve, therefore, as a deterrent. The law is a teacher, and by writing legislation and passing laws, we set that as a standard. And although we are not writing laws, we are enforcing them. The publicity from a case serves as an example. I think our Civil Rights Section accomplishes what it accomplishes by example. We — or the Civil Rights Commission or anybody else — can never catch all forms of discrimination. But we follow the law, we do justice, we set examples, we deter, we prevent, we inform, and we educate.

Marilyn Tobocman: How does your office protect Ohio families from a civil rights perspective?

Mike DeWine: We should constantly be looking for ways to teach more, to inform more. It's not enough for us to sit back and wait until stuff comes to us (not that we do that). We've got to be proactive. So I've challenged our staff to come to me with ideas about how — in the case of the Civil Rights Section, for instance — we can seek justice, prevent discrimination, do the right thing. How can we better inform? How can we reach the average person out there? And so it's a work in progress. We are not where we need to be, but I think we are doing a good job. There's always room to go higher and do better.

Marilyn Tobocman: As a father and grandfather, how do you convey these ideals to your children and grandchildren?

Mike DeWine: Well, in every area, it's not what you tell kids, it's what you do. They observe you. I was fortunate to grow up in a fascinating community, Yellow Springs, Ohio. When I was growing up, Yellow Springs was a very diverse community, much more diverse actually than it is today. The African-American population was probably 30 percent, and many families had been there for 50, 60, 70, 100 years. There was a continuity, which I think was just kind of a neat thing. My grandfather was in the seed business, an entrepreneur. He had a story about one of his partners, a guy by the name of Edwards, who was African-American. And they were partners: They owned some piece of equipment — I can't remember exactly what it was — and they would rent this piece of equipment out. They bought it together, they worked together. It was a partnership. No one thought anything about it, and that was in the 1930s. But at the same time, in many communities, including Yellow Springs, the movie theater was segregated. There were restaurants that African-Americans could not go into, even in this so-called progressive town of Yellow Springs. One controversy that hit the national news, as it should have, was in the early '60s. A guy had a barber shop, and he wouldn't cut African-Americans' hair. It went on and on, and there was picketing and all the things you would expect to happen. Finally, he left town. So, I think growing up in a very diverse community was very beneficial. It shaped how I look at a lot of things.

Significant Cases

Bobo v. United Parcel Service, U.S. Court of Appeals for the Sixth Circuit, 2012 U.S. App. LEXIS 394 (Jan. 9, 2012)

Issue: Does a defendant have the ability to limit a plaintiff's discovery into company records to locate similarly situated individuals in an employment discrimination case based on disparate treatment?

Summary: Walleon Bobo is an African-American man who worked as a supervisor at United Parcel Service. He was a military reservist who spent two weeks each year undergoing military training. When Bobo turned in his training orders, his supervisor commented that he would have to choose between the military and UPS.

Bobo trained new drivers and conducted annual daylong safety rides with each employee he supervised. The number of drivers reporting to Bobo is in dispute, with Bobo claiming he supervised 83 drivers to the other supervisors' 40 to 46 drivers. UPS claims the number of people Bobo supervised was less and that the figure of 83 was a clerical error. Bobo also claims his supervisor told him not to approve a female driver candidate.

Bobo's department fell behind in its safety evaluation rides and, in response, reduced the safety rides to half a day but still required the same paperwork. Bobo falsified some of his reports and did not complete the full training sessions with some employees. A complaint led him to admit to violating the UPS Integrity Policy. A group of senior managers reviewed the situation, and Bobo was given the option of resigning or being fired. He chose termination.

Outcome: Bobo filed a discrimination suit alleging disparate treatment based on race and military status. The court granted summary judgment in favor of UPS, stating that Bobo had not demonstrated there were any similarly situated individuals who were treated differently. UPS named one individual who resigned after being threatened with termination by the same managers who terminated Bobo for violating the UPS Integrity Policy. The court denied Bobo the opportunity to conduct additional interviews and review UPS files in an attempt to locate other similarly situated employees.

The appeals court reversed the summary judgment, finding there were sufficient factors to raise the possibility of discrimination against Bobo. The court stated that the requirement that all similarly situated employees have the same supervisor was not absolute and defendants could not limit discovery only to the employees it claimed were similarly situated. The plaintiff and the court must be allowed to have input on determining who they think is similarly situated for purposes of a disparate treatment claim. The court also stated that this may be an instance of "cat's paw discrimination" in that even though the managers who terminated Bobo never expressed any discriminatory actions or language toward him, they relied on the statements of Bobo's supervisor in regard to Bobo's violation of the UPS policy. The possibility that the

supervisor hid his actual reasons for advocating for Bobo's termination opens UPS to the possibility of liability for discrimination. The supervisor may have turned his negative opinion of Bobo's military service into an attempt to have management discharge him for reasons that were not valid.

Legal significance: The selection of similarly situated employees for purposes of demonstrating disparate treatment should be determined on a case-by-case basis. In determining whether other employees' positions are similarly situated, they need only be comparable in the *factors relevant* to the discrimination claim.

Visit the [United States Court of Appeals for the Sixth Circuit](#) website to view the entire opinion.

Trujillo v. Henniges Automotive Sealing Systems North America, U.S. Court of Appeals for the Sixth Circuit, 2012 U.S. App. LEXIS 17793 (Aug. 20, 2012)

Issue: When does an employee's informal statement to a human relations vice president make the employee's subsequent termination unlawful retaliatory conduct?

Summary: Scott Trujillo was the director of global finance for Henniges Automotive Sealing Systems. After a July conference call with senior management of the Henniges plant in Guadalajara, Mexico, Larry Rollins, the vice president of operations, referred to the Mexican plant employees as "those f***ing wetbacks." Trujillo confronted Rollins in a lighthearted way, and he appeared very embarrassed and apologetic. The following September, during a dinner with other Henniges' executives, Trujillo suggested that the intimidating style of a Henniges employee was unnerving to the Latin American employees of the Mexican plant. Rollins interrupted Trujillo, saying, "F*** that cultural bulls**t" and characterized the Mexican plant employees as "f***in' worthless." Trujillo spoke to Henniges' vice president of human relations, Geri Gasperut, who was present for Rollins' statement, suggesting that such comments had been made more than once and were "inappropriate or derogatory things about other races." Gasperut was present a week later when Trujillo was fired because he was not "a good fit."

Outcome: The appellate court in reversing the lower court's grant of summary judgment held that to establish a case of retaliation under Title VII, several factors are required: A terminated employee must show he engaged in protected activity; the employer knew of the exercise of the protected right; an adverse employment action was subsequently taken against the employee; and there was a causal connection between the protected activity and the adverse employment action. The court noted that advocating for members of a protected class as opposed to oneself is protected activity for purposes of unlawful retaliation. The court, however, determined that Trujillo's confrontation of Rollins regarding the first comment was not such a complaint because he did not communicate to Rollins that he was offended by the "wetback" comment. Therefore, it did not constitute an act of "opposition" to discrimination and would not be considered

protected activity under the court's previous decisions interpreting Title VII of the Civil Rights Act.

The court, however, did find that Trujillo's second communication to Gasperut was "opposition" to the alleged racial character of Rollins' comments because the comments themselves were unlawful employment practices to the extent that they created a hostile work environment.

Legal significance: For purposes of unlawful retaliation, it is irrelevant whether the discriminatory statements are directed toward the race or national origin of the person complaining or are directed toward others. Conduct producing a hostile environment based on a protected class is an unlawful employment practice and those who complain about it are protected from an adverse employment action that can be traced to any such complaint.

Visit the [United States Court of Appeals for the Sixth Circuit](#) website to view the entire opinion.

Warden v. Ohio Department of Natural Resources, Ohio Court of Claims, 2012 Ohio Misc. LEXIS 109 (April 9, 2012)

Issues: Does a policy that prohibits a retired former employee from being rehired into the same or similar position have a disparate impact based on age where the employer is unable to demonstrate that its actions were based upon a reasonable factor other than age?

Summary: Richard Warden is an engineer who worked for the Ohio Department of Natural Resources (ODNR) for 29.5 years as an Engineer 4 in the Mineral Resources Management Division. In 2006, Warden accepted a two-year buyout and retired with 31.5 years of service. At the time of his retirement he was making \$79,000. Following his retirement, legislation was passed requiring ODNR to prepare cost estimates for reclaiming coal mining sites. ODNR asked Warden if he would do the estimates on a 1000-hour yearly contract. Warden successfully did the estimates and was granted three additional contracts. In 2009, ODNR decided to create a full-time Natural Resources 3 position to do the estimates and asked Warden to apply. He submitted his application, was interviewed, and was determined to be the most qualified.

Unbeknownst to Warden, ODNR established a policy prohibiting a retired former employee from being rehired in the same or similar position. This policy was based on the director's belief that "double-dipping" creates "distrust with the public." According to the director, when a public servant retires, the public expects that person to leave the position. Previously, ODNR allowed one of its recently retired employees to become a deputy chief despite his having retired from a similar position. There, ODNR explained that exceptional circumstances necessitated the hiring because newly enacted

legislation required additional inspectors and a new regulatory structure in the oil and gas industry, and he had the expertise to oversee the development of the new regulatory structure and to ensure that it met public safety requirements.

Pursuant to the policy, Warden, 54, was not given the position and Jared Knerr, 39, was hired. Everyone acknowledged that Warden scored highest on the interview, and that Knerr scored third. Everyone also acknowledged that it would require six to twelve months of training for an individual to reach the same level of proficiency as Warden and that not hiring him made the division less productive. Finally, everyone agreed that Warden would only be receiving \$58,000 in the Natural Resources 3 position whereas previously he was making \$79,000 so in this situation Warden's "double-dipping" saved the department money.

Outcome: Warden sued ODNR for age discrimination based upon disparate treatment and disparate impact. The court found ODNR's desire to avoid "double-dipping" was a legitimate non-discriminatory reason for not awarding him the position under his disparate treatment claim. But it held that this policy, which was obviously based on age because people under 40 cannot retire, had a disparate impact on individuals over 40. Under the disparate impact claim, an employer can overcome a claim of age discrimination by showing it had a reasonable factor other than age for its decision. In this case, the "double-dipping" would have allowed the most qualified applicant to get the job and saved the department money. This, coupled with the fact that ODNR had already violated its own policy with no adverse effect, led the court to conclude that it failed to provide proof that the policy promotes public trust and thus failed to demonstrate that its actions were based upon a reasonable factor other than age.

Legal significance: The court held where a policy is obviously based on age the employer must produce concrete evidence that its actions were based upon a reasonable factor other than age.

Visit the [Ohio Court of Claims](#) website to view the entire opinion.

Kroll v. White Lake Ambulance Authority, U.S. Court of Appeals for the Sixth Circuit, 2012 U.S. App. LEXIS 17727 (Aug. 22, 2012)

Issue: Is employer ordered counseling a medical appointment and therefore restricted by the Americans with Disabilities Act (42 USC 12112(d)(4)(A)) which does not allow employers to compel employees to submit to medical examination except in specific circumstances?

Summary: Emily Kroll was employed as an emergency medical technician by the White Lake Ambulance Authority. She was well-regarded by her co-workers until she became romantically involved with a fellow employee at which time complaints were lodged against her with her supervisor and the office manager. The office manager requested

she seek counseling. There is some question as to whether the possibility of financial assistance from the Red Cross to pay for the counseling was mentioned and to whom Kroll was referred. After a subsequent dispute between Kroll and another employee, the counseling request was changed to a requirement of her continued employment. Kroll informed her supervisor that she would not attend counseling and left the company. Later, Kroll claimed it was the cost that prevented her from undergoing counseling.

Outcome: Kroll filed a complaint with the U.S. Equal Employment Opportunity Commission alleging ADA violations, was issued a right to sue letter, and filed suit. Summary judgment was awarded to her employer because the court concluded it did not intend the counseling to be considered medical. The appeals court directed that the employer's intent alone did not determine whether counseling, tests, or appointments are medical in nature. An EEOC Enforcement Guidance, while not binding law, is considered by the courts to be a persuasive authority. The guidance offers a seven-part test to determine whether an appointment is medical. The appeals court reviewed the counseling requirement in light of the seven-part test and found it to be medical in nature. Based on this finding, the case was remanded to the lower court to resolve whether it fell into one of the ADA exceptions that allowed employers to require medical treatment.

Legal significance: Counseling is a medical appointment and the determination as to whether it can be required for employment is dependent on whether it is "job related" and consistent with a "business necessity" as described in the ADA.

Visit the [United States Court of Appeals for the Sixth Circuit](#) website to view the entire opinion.

Hidden Village v. City of Lakewood, Ohio, U.S. District Court for the Northern District of Ohio, 2012 U.S. Dist. LEXIS 46589 (Mar. 30, 2012)

Issue: Do the provisions of the Fair Housing Act *only* provide legal protection against acts that have made housing unavailable or resulted in the denial of housing to a protected class?

Summary: Hidden Village is the owner and manager of apartments located on the eastern border of Lakewood, adjoining Cleveland. Two buildings of the complex's four buildings are occupied by the Lutheran Metropolitan Ministries' Youth Re-Entry Program (YRP). YRP seeks to prepare young adults ages 16 to 21 for independent living after they leave foster care or are released from the juvenile correction system. The two buildings provided supervised and cluster-site living arrangements while offering instruction on topics such as anger management, banking, and navigating the apartment rental market. On average, 80 percent of the clientele are African-Americans.

YRP's relocation to Lakewood was preceded by a meeting with city officials, whose initial response was that the YRP occupancy constituted an institutional use prohibited by code. YRP's legal counsel disagreed. The relocation occurred in April 2006, and by May, the Building Commission gave Hidden Village a month to remove the "unpermitted use." YRP's appeal to the Planning Commission resulted in a unanimous decision overruling the Building Commission's determination.

Subsequently, the Lakewood Police Department ordered its officers to document any contacts with the 27 YRP residents and recommended that citations be issued or arrests made for any on or off-site violations. In February 2007, Lakewood's mayor sent a letter expressing concern about the YRP move, noting that police intervention had more than doubled since its relocation. The letter warned of the mayor's intent to seek the program's removal from Lakewood. In May 2007, during a meeting with YRP, a police department representative asked if YRP would leave the Hidden Village Apartments. Six days later, members of the Lakewood fire, police, and health departments attempted an impromptu inspection of Hidden Village to verify that all health and safety issues were properly addressed. In response, Hidden Village's counsel informed the city that future warrantless searches would not be tolerated. A subsequent inspection by the state and city fire inspectors, again without a warrant, was attempted and when asked to leave, they promised to return with a warrant. In July, Hidden Village owners were cited for failing to maintain a hedge at a three-foot height even though the hedge had been at a four-foot height for a decade.

Outcome: The court ruled that the Fair Housing Act was *not* limited to discriminatory conduct at the time of the acquisition of housing and applies with equal force to subsequent conduct that interferes with the occupants' use and enjoyment of the housing opportunities.

Legal significance: The court declared that a post-acquisition claim of harassment is actionable under the Fair Housing Act, even where no actual or constructive eviction has occurred, thereby rejecting the Fifth and Seventh Circuits' decisions.

Visit [Hidden Village v. City of Lakewood summary on Google Scholar](#) to view the entire opinion.

Crider v. University of Tennessee, Knoxville, U.S. Court of Appeals for the Sixth Circuit, 2012 U.S. App. LEXIS 15444 (July 23, 2012)

Issues: Can an individual with a sincerely held religious belief ask for her Sabbath off every week as a reasonable accommodation when her co-workers are claiming that this creates an undue hardship on them?

Summary: Kimberly Crider is a Seventh Day Adventist who worked for the University of Tennessee as a Programs Abroad Coordinator. Crider's job duties included attending

conferences, traveling internationally, and monitoring an emergency cell phone on a rotating basis, including on weekends, with several other coordinators. The emergency phone was activated so students studying abroad could reach a coordinator in an emergency. Because a student's file might need to be accessed during an emergency, the coordinator with monitoring duties was required to stay in Knoxville while in possession of the phone. During her employment, there were three coordinators who shared responsibility for carrying the emergency cell phone on a rotating basis at all times, including off-hours and weekends.

Shortly after beginning her employment, Crider told her employer that her religion prohibited her from working from sundown on Friday until sundown on Saturday. She asked that she be given the accommodation of not having to work during her Sabbath and in particular that she not be required to have the emergency cell phone during this period of time. When the university failed to offer her any accommodation, she suggested a schedule shift with her co-workers: They would carry the cell phone during her Sabbath, and she would carry it more during the rest of the week. Her co-workers rejected the idea, saying that having to carry the cell phone every other weekend would be too burdensome since they could not travel or "disengage" from work. One of her co-workers threatened to quit. The university rejected the accommodation, claiming it created an undue hardship. Crider proposed several other accommodations, including having her supervisor or some other departmental staff carry the cell phone from sundown on Friday to sundown on Saturday or having any emergency calls forwarded to the campus police. These accommodations were rejected, and the university terminated Crider after determining that she was unable to fulfill her job duties.

The lower court granted summary judgment after determining Crider's request that her co-workers carry the cell phone during her Sabbath while she carried it for additional hours during the week would have created an undue hardship for her co-workers.

Outcome: The Court of Appeals, in reversing the decision, found that the mere grumblings of co-workers was not enough to show an undue hardship on the employer's part. The court noted, "Title VII does not exempt accommodation which creates undue hardship on the *employees*; it requires reasonable accommodation 'without undue hardship on the conduct of *the employer's business*.' The court further noted 'objections and complaints of fellow employees, in and of themselves, do not constitute undue hardship in the conduct of an employer's business,' noting that 'undue hardship is something greater than hardship, and an employer does not sustain his burden of proof merely by showing that an accommodation would be bothersome to administer or disruptive of the operating routine.'"

Legal significance: The Sixth Circuit held that an employer must show objective evidence that granting a religious accommodation will cause its business to suffer an undue hardship and a co-worker's threat of quitting if forced to be on call every other week instead of once every three weeks was not sufficient to meet its burden.

Visit the [United States Court of Appeals for the Sixth Circuit](#) website to view the entire opinion.

Did you know?

Ohio's laws against discrimination, spelled out in Ohio Revised Code 4112.02(J), prohibit people from aiding or abetting unlawful discriminatory practices. In *Fair Housing Justice Center v. Broadway Crescent Realty*, a fair housing organization sued Broadway Crescent Realty after the wife of an apartment manager aided and abetted a discriminatory practice. If an applicant was African-American, she was absolutely certain no units were available and was unable to find her husband. But when an applicant was white, she wasn't sure whether units were available and was always able to find her husband. The woman was not an employee of the apartment complex or an agent of the owners, but she was liable as one who aided and abetted unlawful discriminatory conduct. **2011 U.S. Dist. LEXIS 24515 (S.D. N.Y. 2011.)**