LAW REVIEW[1] 19063
July 2019

Excellent New Appellate Case on USERRA

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
Update on Sam Wright

1.2—USERRA forbids discrimination
1.3.2.7—Adequate rest before and after service
1.8—Relationship between USERRA and other laws/policies

***Hickle v. American Multi-Cinema, Inc.,* 296 F. Supp. 3d 879 (S.D. Ohio 2017), *reversed, Hickle v. American Multi-Cinema, Inc.,* 2019 U.S. App. LEXIS 18501 (6th Cir. June 20, 2019).**

This is a very recent appellate court decision about the application of the Uniformed Services Employment and Reemployment Rights Act (USERRA) to the relationship between National Guard and Reserve personnel and their civilian employers. Because Guard and Reserve personnel are only paid for the days that they serve (including training), their cost to the country is a small fraction of the cost of a full-time Active Component service member, these

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1800 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1600 of the articles.

[2] BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

part-time service members need full-time civilian jobs to support themselves and their families. USERRA's first enumerated purpose is to encourage service in the uniformed services, including the National Guard and Reserve components of the Army, Air Force, Navy, Marine Corps, and Coast Guard.

Jared Hickle, the plaintiff and appellant in this case, began working for American Multi-Cinema (AMC), a major chain of movie theaters, in 2004, when he was still in high school. In 2008, he joined the Ohio Army National Guard (ARNG).[3] Like all young men and women joining the National Guard with no prior military experience, he was required to go on full-time military training duty for about six months, to attend military basic training ("boot camp").

After he had joined the ARNG, but before he was scheduled to leave for basic training, Hickle applied for and was interviewed for a promotion to a management position at the movie theater. He was interviewed by Tim Kalman, the General Manager of the Easton Theater where he worked. During the interview, Hickle mentioned that he would be leaving soon for six months of full-time National Guard training. Kalman ended the interview immediately and hired another candidate for the promotion opportunity. The person who got the promotion later told Hickle: "Thanks for joining the military. I got the promotion."

After Hickle successfully completed his ARNG basic training, he became a traditional National Guard member, performing military "drills" one or more times per month, usually on weekends. He was also called to active duty and served in Afghanistan for more than a year.

A continuing problem for Hickle was that his ARNG training was generally held on weekends, and the weekend is the busiest time for a movie theater. A problem arose when Hickle's National Guard weekend coincided with the opening weekend of the very popular "Avengers" movie, and the theater management strenuously objected to Hickle's absence during the theater's busiest weekend of the year.

Another problem was that Hickle's Thursday night shift at the theater often ran until well past midnight, and his "drill weekend" began early Friday morning. It was impossible for Hickle to work past midnight at the theater and then travel to the drill site and get a reasonable night of sleep in order to be "fit for duty" when the drill started early Friday morning, so Hickle exercised his right under the Uniformed Services Employment and Reemployment Rights Act (USERRA) to miss the Thursday night shift.[4]

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[3] The facts set forth in this article come directly from the 6th Circuit decision. I have no personal knowledge of the facts. The appellate court's decision notes at the outset that the depositions and other evidence contain directly contrary versions of the facts on many key points and that the appellate court's opinion set forth the facts in the version most favorable to the plaintiff (Hickle), because the district court had granted the defendant's summary judgment motion.

[4] Please see Law Review 19001 (January 2019).

One AMC supervisor, Senior Manager Jacqueline Adler, continually expressed irritation at Hickle when he missed work for National Guard duties and threatened to fire him. When Hickle informed Adler that firing him for missing work for National Guard duties would violate USERRA, she said, "We will just fire you for something else." Adler tried to recruit other employees to lie about Hickle, to build a case for firing him.[5]

AMC fired Hickle in April 2015, accusing him of "unprofessional conduct." Hickle claimed that the firing was motivated by his ARNG service and that the firing violated section 4311 of USERRA, which provides:

> **(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.
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> **(b)** An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.
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> **(c)** An employer shall be considered to have engaged in actions prohibited—
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> **(1)** under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is *a motivating factor* in the employer's action, *unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or*
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> **(2)** under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action

[5] Adler's actions and attitudes are reminiscent of those of Korenchuk and Mullaly, the supervisors in *Staub v. Proctor Hospital,* 562 U.S. 411 (2011). Please see Law Review 11022 (March 2011) and Law Review 17016 (March 2017) for a detailed discussion of *Staub,* the first and so far, the only Supreme Court decision about USERRA, the 1994 version of the reemployment statute.

would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.[6]

To prevail, Hickle is not required to prove that the firing was motivated *solely* by his National Guard obligations and the absences from work that were necessitated by those obligations. It is enough for Hickle to prove that his National Guard obligations were *a motivating factor* in the employer's decision to fire him. If Hickle proves motivating factor, he wins, unless the employer can *prove* (not just say) that it would have fired him anyway for lawful reasons unrelated to his military service.[7]

Hickle, through his excellent lawyers, also asserted that the firing violated section 4112.02(A) of the Ohio Revised Code.[8]

After a lengthy and contentious period of discovery, AMC filed a motion for summary judgment (MSJ) under Rule 56 of the Federal Rules of Civil Procedure. A district judge should grant a defendant's MSJ *only if* the judge can say, after a careful review of the evidence, that there is no evidence (beyond a "mere scintilla") in support of the plaintiff's case and that no reasonable jury could find for the plaintiff based on the record created during discovery. Senior District Judge George C. Smith granted the employer's MSJ.

Hickle appealed to the United States Court of Appeals for the 6th Circuit, the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee. As is always the case in our federal appellate courts, the case was heard by a panel of three judges: Judge Danny Julian Boggs, Judge Karen Nelson Moore, and Judge Jane Branstetter Stranch. Judge Moore wrote the opinion and was joined by the other two judges in a unanimous panel decision reversing the summary judgment for AMC and remanding the case to the district court for trial.

In her scholarly opinion, Judge Moore wrote:

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[6] 38 U.S.C. 4311 (emphasis supplied).

[7] 38 U.S.C. 4318(c)(1).

[8] A federal district court hearing and adjudicating a federal claim, under USERRA or some other statute, can also adjudicate closely related state law claims that are part of the same case or controversy. *See* 28 U.S.C. 1367. USERRA does not supersede or override a state law that provides *greater or additional rights.* 38 U.S.C. 4302(a). It is often worthwhile to bring a state law claim, along with the federal USERRA claim, because the state law might authorize more meaningful relief than the limited relief available under 38 U.S.C. 4323(d). Please see Law Review 15088 (October 2015).

We review de novo a district court's grant of summary judgment. *Savage v. Fed. Express Corp.*, 856 F.3d 440, 446 (6th Cir. 2017). Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and affidavits accrued during discovery demonstrate "that there is no genuine dispute as to any material fact" to present to a jury. Fed. R. Civ. P. 56(a), (c). The moving party—here, AMC—has the burden of showing that no such genuine dispute of fact exists, even with evidence presented in the light most favorable to the non-moving party—here, Hickle—and with all inferences drawn in his favor. *See Bobo v. United Parcel Serv., Inc.*, 665 F.3d 741, 748 (6th Cir. 2012). In deciding a motion for summary judgment, we do not engage in "jury functions" such as making credibility determinations and weighing the evidence. *Id.* (quoting *Anderson*, 477 U.S. at 255). If there remains any material factual disagreement as to a particular legal claim, that claim must be submitted to a jury. *Id.*

Hickle presents to the court claims of wrongful termination under USERRA, 38 U.S.C. § 4311, and Ohio law that forbids an employer to discriminate based on military status, Oh. Rev. Code § 4112.02(A). The parties do not contest the district court's use of the USERRA framework to determine the Ohio law claims. *See Hickle*, 296 F. Supp. 3d at 891-92.

USERRA protects "[a] person who is a member of . . . or has an obligation to perform service in a uniformed service" from being "denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership . . . or obligation." 38 U.S.C. § 4311(a). "An employer shall be considered to have engaged in actions prohibited [by USERRA] . . . if the person's membership . . . or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership . . . or obligation for service." *Id.* § 4311(c)(1).

We use a two-step process to evaluate claims of discrimination in violation of USERRA. *Savage*, 856 F.3d at 447. The plaintiff must first make out a prima facie case of discrimination "by showing, by a preponderance of the evidence, that his protected status was a substantial or motivating factor in the adverse employment action." *Id.* (quoting *Petty v. Metro Gov't of Nashville-Davidson Cty.*, 538 F.3d 431, 446 (6th Cir. 2008)). If the plaintiff establishes a prima facie case of discrimination, "the employer then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the adverse action anyway, for a valid reason." *Id.* (quoting *Hance v. Norfolk Southern Ry. Co.*, 571 F.3d 511, 518 (6th Cir. 2009)).

A. Hickle's Prima Facie Case

A plaintiff can present a prima facie case of discrimination using either direct or circumstantial evidence. *Bobo*, 665 F.3d at 755. We turn first to Hickle's direct evidence.

1. Direct Evidence

The district court reached two incorrect conclusions that led it to hold that Hickle "has not offered any direct evidence of discrimination on the basis of his military activity." *Hickle*, 296 F. Supp. 3d at 887. First, it erred when it concluded that, because Adler did not have the authority to fire Hickle, Hickle could have proceeded only under the cat's paw theory. *Id.* at 886. In fact, Hickle does have evidence that ties some people involved in the termination decision to Adler's discriminatory comments. The decisionmaker (Bradley) and those with direct input (Kalman and Melton-Miller) knew about Adler's persistent, discriminatory comments. Hickle repeatedly complained to Kalman, who had direct input into the termination decision, about Adler's behavior. Furthermore, the actual decisionmaker (Bradley) knew that Hickle had heard that Adler was conspiring to get him fired, and knew that Adler told Hickle to gather employees' statements. R. 30-1 (Bradley Dep. at 32-35, 37-38) (Page ID #487-89). In sum, the decisionmaker knew that Hickle was told to commit a fireable offense—gathering statements and thereby impeding an investigation—by someone Hickle had repeatedly said had made discriminatory comments threatening his job. Yet the decisionmaker chose to fire Hickle.

In *Bobo*, we found sufficient direct evidence to constitute a prima facie case in remarkably similar circumstances. There, a direct supervisor (Morton) without the authority to terminate employees expressed disapproval of the plaintiff-employee's military obligations, including writing a memorandum saying that he "did not want [the employee] volunteering for additional military duty when he was needed at [work.]" 665 F.3d at 744. That memorandum was read by Morton's supervisor, Wagner. *Id.* at 755. Bobo, the plaintiff-employee, also engaged Wagner in conversations about his military leave. *Id.* Wagner was present at the meeting where managers decided to terminate Bobo. *Id.* Replace "Morton" with "Adler" and "Wagner" with "Kalman," and the facts would match almost exactly what occurred here. We found direct evidence of a USERRA violation in *Bobo*, and we do so here, too.

Next, the district court erred by finding that Hickle could not make out a claim under the "cat's paw" theory of liability. *Hickle*, 296 F. Supp. 3d at 887. The "cat's paw" theory of liability, endorsed by the Supreme Court in *Staub v. Proctor Hospital*, 562 U.S. 411, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011), deals with the realities of highly stratified workplaces. In *Staub*, the Court held that "if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA." *Id.* at 422 (footnote omitted). The district court held that Hickle could not proceed under the cat's-paw theory because he "has not offered any evidence that Adler issued [the direction to obtain statements relating to the conspiracy plot] with the *intention* of causing Plaintiff's termination." *Hickle*, 296 F. Supp. 3d at 886. This was an error.

Hickle offered evidence that Adler persistently made anti-military comments, up to and including threatening to get him fired for "something else" when Hickle had to miss the Avengers weekend for military duty. He offered evidence that she was, in fact, plotting to get him fired. This evidence is more than sufficient for a reasonable jury to infer that Adler intended to cause Hickle's termination. The district court cited language in Hickle's initial text to Adler to reach a different conclusion, but that was an error because the district court ignored the context of the text messages. When Hickle was first alerting Adler to the fact that someone told him about Adler's plot, he said he didn't believe it, "but it's part of what all three people told me that supervisors told them." R. 33-8 (Text Messages) (Page ID #853). This does not mean, as the district court concluded, that at the time Hickle did not feel Adler was trying to get him fired; rather, it is an example of an employee trying to be diplomatic with his supervisor. Hickle said as much in his deposition. R. 29-1 (Hickle Dep. at 287) (Page ID #176) ("I didn't want Jackie to retaliate against me and become upset. I did want her to know that I did hear about this plot and that I was aware of it."). The district court ignored its mandate to construe the evidence in the light most favorable to Hickle by ignoring Hickle's deposition testimony that offers a reasonable explanation why he did not accuse Adler immediately of plotting against him.

Having shown that evidence exists that Adler intended to cause Hickle's termination, we must address whether Adler's act was the proximate cause of Hickle's termination. The record shows that this is a question for a jury to decide. Certainly, the chicken-finger incident and the issues of Hickle's demeanor, communication, and professionalism were part of the investigation and cited by Bradley as a reason for termination. Bradley stated in her deposition, however, that she made her decision based on all the findings presented and singled out "impeding the investigation" as a reason. Nevertheless, the defendant insists that it broke the chain of causation by conducting a thorough and independent investigation.

We disagree. First, as best as we can tell[5], the investigation consisted mostly of gathering statements from a few employees, and was not necessarily thorough. For example, Melton-Miller said she could not locate any witnesses to Adler's threat to terminate Hickle, when in fact Keeton was a party to the conversation. R. 31-1 (Melton-Miller Dep. at 39) (Page ID #556). Hickle went so far as to email Bradley about the shortcomings of the investigation, saying it was "concerning to [him] that [Melton-Miller] did not ask for any statements" about the USERRA issues he presented. R. 33-10 (May 11, 2015 Email) (Page ID #865-66). Second, the investigation was not necessarily independent; for example, Melton-Miller described Kalman as her "partner" in the investigation. Finally, as a matter of general policy, we should bear in mind why the cat's-paw doctrine exists: in stratified workplaces, such as AMC, biased direct supervisors who lack firing authority can easily influence those who have such authority to take adverse actions. AMC points to its own extremely stratified termination procedure in an attempt

to insulate itself from liability, when in fact its procedure demonstrates circumstances in which a biased direct supervisor can make a "cat's paw" of upper management.

2. Circumstantial Evidence

Even if Hickle did not have direct evidence of discriminatory intent, he also presented circumstantial evidence that suggests AMC was motivated by anti-military animus. The district court correctly concluded that Hickle made out a prima facie case of discrimination by circumstantial evidence. It focused, correctly also, on AMC's inability to present a cogent explanation of its "impeding the investigation" allegation. *Hickle*, 296 F. Supp. 3d at 887. Therefore we pause only to mention that, unlike the district court, we do not consider this a "close question." *Id.* at 888. The district court thought it strong evidence in AMC's favor that AMC had never denied Hickle's requests to take time off for military obligations. We do not find this fact to be determinative, as there could be numerous situations in which an employer would grant requests for military leave (albeit grudgingly) for years and nevertheless finally wrongfully terminate an employee for taking such leave. Certainly, granting Hickle's leave requests helps AMC's case, but it does not insulate AMC from charges of retaliation.

B. AMC's Rebuttal

Because Hickle made out a prima facie case of discrimination, AMC has the burden of showing that it would have terminated Hickle even absent his military service. It cannot do so. The district court pointed to the chicken-finger incident to conclude that "AMC has therefore carried its burden to establish that it made 'a reasonably informed and considered decision before taking an adverse employment action.'" *Id.* at 889 (quoting *Escher v. BWXT Y-12, LLC*, 627 F.3d 1020, 1030 (6th Cir. 2010)). As discussed above, however, it remains an open question whether the decisionmaker relied solely on the chicken-finger incident in deciding to terminate Hickle, and whether she would have reached the same conclusion in the absence of the charges of impeding the investigation.

Escher, which the district court cites, is inapposite; in that case, the decisionmaker did not know of the plaintiff's complaints about military leave, conducted a thorough investigation, and concluded that termination was necessary based solely on nondiscriminatory reasons. 627 F.3d at 1030-31. Here, Bradley knew of Hickle's USERRA complaints and knew that Adler told Hickle to take action that would amount to impeding the investigation; nevertheless, Bradley seems to have considered the charge of impeding the investigation relevant to the decision. Thus, the honest-belief rule does not help the defendant. The "particularized facts that were before [the employer] at the time the decision was made," *Escher*, 627 F.3d at 1030 (quoting *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 708 (6th Cir. 2006)), included Adler's anti-military comments and her text to Hickle telling him to collect statements. This was not a case in which the decisionmaker

> was acting on a clean record and in ignorance of lurking discriminatory motives. The decisionmaker was fully aware of the facts suggesting that the "impeding the investigation" charge was pretextual. In sum, a jury could conclude, based on this set of facts, that taking military leave, a protected act under federal and Ohio law, was a motivating factor in AMC's decision to terminate his employment.
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> **III. CONCLUSION**
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> For the reasons stated above, we **REVERSE** the district court's judgment and **REMAND** for further proceedings consistent with this decision.[9]

Please note that we discuss in detail, in our "Law Review" column, each of the appellate court decisions that Judge Moore cites in her scholarly opinion. I invite the reader's attention to Law Reviews 17047 and 17048 (May 2017), concerning *Savage v. Federal Express Corp.,* 856 F.3d 440 (6th Cir. 2017); Law Reviews 13036 (March 2013) and 17016 (March 2017), concerning *Bobo v. United Parcel Service, Inc.,* 665 F.3d 741 (6th Cir. 2012); Law Reviews 0864 (December 2008) and 12075 (August 2012), concerning *Petty v. Metropolitan Government of Nashville-Davidson County,* 571 F.3d 511 (6th Cir. 2009); Law Review 16031 (April 2016), concerning *Hance v. Norfolk Southern Railway Corp.,* 571 F.3d 511 (6th Cir. 2009); Law Reviews 11022 (March 2011) and 17016 (March 2017), concerning *Staub v. Proctor Hospital,* 562 U.S. 411 (2011); and Law Reviews 10054 (September 2010) and 13057 (May 2013), concerning *Escher v. BWXT, Y-12, LLC,* 627 F.3d 1020 (6th Cir. 2010). We also discuss scores of other appellate court decisions in other circuits.

Because the Court of Appeals reversed the District Court's summary judgment, the case will now be remanded back to the District Court for trial, unless the parties settle. When a plaintiff employee survives or successfully overturns the employer's motion for summary judgment, the defendant employer often makes a serious settlement offer that should be given careful consideration.

I congratulate attorneys Peter G. Friedmann and Gregory Mansell for their diligent, effective, and apparently successful representation of the National Guard member.

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[9] *Hickle,* 2019 U.S. App. LEXIS 18501, at 14-24.

ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

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