

CONSIDERATION OF ARREST RECORDS IN EMPLOYMENT DECISIONS *by: Juan Felipe Santos*

Pursuant to the U.S. Equal Employment Opportunity Commission's *Policy Guidance on the Consideration of Arrest Records in Employment Decisions*, the use of arrest records alone as an absolute bar to employment may result in disparate impact against protected groups under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. Sec. 2000e, et seq.¹ However, conduct which indicates unsuitability for a particular position is a basis to deny employment. Where it appears that the applicant or employee was arrested for engaging in conduct which was job-related, and such conduct was relatively recent, denial of employment is justified.

Moreover, an employer has to be prepared to show a business necessity justification for the practice of using arrest records in employment decisions. Business necessity rests on issues of job relatedness and credibility. The likelihood that the employee engaged in the conduct alleged also must be evaluated.

A. Job-relatedness

An employer may deny employment opportunities to persons based on any prior conduct which indicates that they would be unfit for the position in

question, whether the conduct is evidenced by an arrest, conviction or other information provided to the employer. It is the conduct, as it relates to the position held or sought, not the arrest or conviction *per se*, which the employer may consider. To determine whether the alleged conduct demonstrates unfitness for a particular job, an employer must consider: (1) the nature and gravity of the offense or offenses; (2) the time that has passed since the conviction or arrest and (3) the nature of the job held or sought.

Even where the employment at issue is not a law enforcement position or one which gives the employee easy access to the possessions of others, close scrutiny of an applicant's character and prior conduct is appropriate where the applicant, if employed, could pose a threat to the safety and well-being of others.

For example, in the case of *Gregory v. Litton Systems*, 316 F Supp. 401 (C.D.Cal.1970), aff'd 472 F.2d 631 (9th Cir. 1972), the court determined that an employer's policy of refusing to hire anyone "who had been arrested on a number of occasions" violates Title VII because the policy adversely impacted against African Americans and was not

justified by business necessity. The court found no business justification because the employer neither examined the particular circumstances surrounding the arrests nor considered how the charges made against the employee might relate to the position to be held. Since the
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employer failed to establish a business justification, it was enjoined from using arrest records to make hiring decisions. In other words, a business justification can rarely be demonstrated when the employer automatically denies employment opportunities based exclusively on arrest records.

In another case, *McCray v. Alexander*, 1982 WL 451 (D.Col. 1982), aff'd 1985 WL 15467 (8th Cir. 1985), a security guard was discharged for killing a motorist, while off-duty, in a traffic dispute because the employer concluded that, despite the guard's acquittal, the conduct showed poor judgment as to the use of deadly force. The court upheld the employer's decision because, after conducting a thorough investigation, the employer was able to relate the charges to the position held by the employee.

B. Employee engaged in the alleged conduct

An arrest record does no more than raise a suspicion that an applicant may have engaged in a particular type of conduct. Thus, the investigator must determine whether the applicant is likely to have committed the conduct alleged. This is the most difficult step because it requires the employer either to accept the employee's denial or to attempt to obtain additional information and evaluate his/her credibility. An employer need not conduct an informal trial or an extensive investigation to determine an employee's guilt or innocence. However, the employer may not perfunctorily allow the person an opportunity to explain and ignore the explanation where the person's claims could easily be verified by a phone call (i.e. to a previous employer or a police department). The employer is required to allow the person a meaningful opportunity to explain the circumstances of the arrest and to make a reasonable effort to determine whether the explanation is credible before

eliminating him/her from employment opportunities.

In cases alleging race discrimination based on the use of arrest records as opposed to convictions, courts have generally required not only job-relatedness, but also a showing that the alleged conduct was actually committed.

For example, in several instances, the Equal Employment Opportunity Commission ("EEOC") determined that a potential police or security officer could not be rejected based on one arrest five years earlier for riding in a stolen car since there was no conviction and the applicant asserted that he did not know that the car was stolen. In instances such as this, the EEOC has found that there was not enough evidence to conclude that the employee actually engaged in the alleged conduct.

In another case, airport employees were discharged after an employer's investigation of the facts that led to the arrest of the employees on charges of conspiracy to distribute cocaine. The employees were given the opportunity to present their side of the story. However, the employer concluded that the arrested employees' conduct adversely affected passenger safety, might have harmed the company's reputation, and might have adversely affected the company's business contracts. In other words, the employer found that the conduct that led to the arrest was job-related. The court upheld the employer's decision.

It is important to mention that in this last case the company had a written policy subjecting employees to disciplinary action when committing "any act of an illegal nature when off duty which harms or has the potential to harm the company's reputation."

Consequently, it is recommended that Employee Manuals include a rule or

policy similar to the one described in the preceding case, which provides the employee with a guidance as to the type of conduct that could potentially affect his/her employment relationship.

To summarize, an employer can rarely demonstrate a business justification when automatically denying employment opportunities based exclusively on an applicant's arrest record. On the other hand, an employer should only discharge an employee who has been arrested if it may reasonably determine that (1) the employee actually engaged in the alleged misconduct and (2) the conduct is job-related.

In order to determine whether the employee is likely to have committed the conduct alleged, an employer has to carefully investigate the facts that led to the arrest based on the charges against the employee and provide him/her a meaningful opportunity to explain his/her side of the story. If after the investigation, the employer reasonably concludes that the employee is likely to have engaged in the alleged conduct, the first part of the test is met.

Secondly, the alleged conduct has to be job-related. That is, the employer has to be able to demonstrate that the conduct will adversely affect the normal functioning of the company, its reputation, or that it poses a threat to the safety and well being of other employees. Hence, an employer has to show that the employee is not fit to occupy the position held by considering: (1) the nature and gravity of the offense; (2) the time that has elapsed since the arrest; and (3) the nature of the job held. By following the foregoing guidelines an employer can minimize its liability as a result of discharges or denial of employment based on arrest records. ■

¹The disparate impact theory focuses on the discriminatory results of an employment practice and not on the discriminatory intent of the employer.

BEWARE OF WHERE THE ACT 80 EXCEPTIONS ARE GOING

by: José Iván Ayala Santana

Recently, we have seen a trend where claims are made alleging “labor harassment” as a cause of action. However, a *per se* labor harassment cause of action has not been recognized in our jurisdiction, although, as will be discussed below, the Puerto Rico Supreme Court has seemingly carved out a cause of action for severe “moral harassment” in the work place.

Harassment is not necessarily the same as discrimination, but if an employee is harassed because she is a woman (or because he is a man), a sex based discrimination claim could be made. The same would apply to harassment based on a person’s protected category such as age, race, national origin or religion, among others. However, if an employee is harassed at the work place for reasons that are not protected by law, then there is no discrimination cause of action available. In that case, if the harassment results in a termination, the employee may be entitled to a “severance pay.”

Generally, employers do not incur civil liability, other than statutory severance pay, when an employee, contracted for an indefinite period of time, is discharged without “just cause.” Unless an allegation of discrimination or tort kicks in, the employer will only have to pay earned wages up to the moment of discharge, and severance pay as stipulated by the Puerto Rico Unjust Dismissal Act, Act 80 of May 15, 1976 (“Act 80”). Absent a discrimination or tort claim, the “mesada”, as Act 80’s severance pay provisions are usually referred to, is the exclusive remedy available to a former employee. It includes all liquidated damages that an unjust discharge may have caused the employee.

However, the Puerto Rico Supreme Court has recognized various exceptions to the exclusive remedy doctrine. The employer will be subject to additional civil liability when a termination is coupled with an independent tort such as defamation. Also, the Puerto Rico Supreme Court has stated that an employee’s remedy is not limited to the severance pay when the discharge is contrary to public policy or violates the employee’s constitutional rights. Rivera v. Security Nat. Life Ins. Co., 106 D.P.R. 504 (1974). Complicating the matter further are the local laws which protect employees from discrimination and retaliation.

The risk of these awards is not reduced by the employer’s willingness to “voluntarily” pay the “mesada.” On the contrary, absent a release or a disclaimer, a voluntary payment may be inferred as an admission of the absence of “just cause” for the termination.

On the other hand, an employee can be discharged for any valid reason that amounts to “just cause,” even if not enumerated in Act 80. Having “just cause” for a dismissal means that no severance pay is due to the discharged employee; and more importantly, that the employer will have a valid defense against a discrimination or retaliation claim.

In sum, currently a *per se* labor harassment cause of action has not been recognized, so as to allow actions to proceed based purely on harassment that does not involve one of the exceptions mentioned above or cross the constitutional threshold. However, if the right case came along, the Supreme Court may create it.

There are many pitfalls to be avoided when considering an employee’s termination. These potential risks are not avoided by “voluntarily” paying the “mesada;” on the contrary, they may be increased. Employers should foster a professional work environment where respect is always present and decisions to terminate employees are only reached after good evidence of “just cause” under Puerto Rico law is available. Only in this way can the employer substantially reduce its vulnerability to very expensive employment claims.■

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NEWS UPDATE ON PROPOSED COBRA REGULATIONS

by: Elaine Maldonado Matías

They specifically provide new standards for the timing, content, and administration of various types of COBRA notices, which include: a new deadline for the delivery of the initial COBRA notice; a new requirement for "reasonable procedures" for COBRA-related notices by covered employees and qualified beneficiaries; and two new notices

On May 28, 2003, the United States Department of Labor ("DOL") issued proposed regulations that directly affect the administration of COBRA by employers. According to the DOL announcement made on September 17, 2003, the final regulations will not become effective until six months after they are issued. The DOL projects the issuance of the final rules for early 2004. This means that the regulations will not become effective before August 1, 2004.

The proposed rules require employers to revise COBRA forms, summary plan descriptions, and COBRA procedures. They specifically provide new standards for the timing, content, and administration of various types of COBRA notices, which include: a new deadline for the delivery of the initial COBRA notice; a new requirement for "reasonable procedures" for COBRA-related notices by covered employees and qualified beneficiaries; and two new notices required of plan administrators not mentioned in the COBRA statute: the "notice of unavailability of COBRA coverage" and "notice of termination of COBRA coverage."

Regarding the administration of COBRA, employers should bear in mind that, for the first time, the DOL specifies a 90-day deadline by which the COBRA initial (also called "general") notice shall be provided to covered employees and spouses. These notices shall be provided within 90 days after coverage begins, subject to certain exceptions. For example, if an employee or spouse has a COBRA qualifying event before such 90-day period expires, the initial notice must

be provided by the time that an election notice is required.

To satisfy the initial notice requirement, the proposed regulations allow COBRA information to be included in the plan's summary plan description (known as a "SPD"), if the SPD is furnished to covered employees and spouses within the 90-day period mentioned above.

Pursuant to these regulations, specifically required contents must be included in the initial notice, and it must be "written in a manner calculated to be understood by the average plan participant."

With respect to a covered employee or qualified beneficiary's obligation to provide notice to the plan administrator of certain qualifying events (such as, divorce, legal separation and ceasing to be a dependent under the terms of the group health plan), the proposed rules provide that plans must establish reasonable procedures for the furnishing of these notices. The covered employees and qualified beneficiaries need to understand what their obligations are. Thus, procedures will only be deemed "reasonable" if they are described in the SPD or in the initial notice, and meet the other requirements listed in these rules.

The procedures stated in the plans may request covered employees and qualified beneficiaries to provide notices within certain time limits and/or impose consequences for failure to meet these requirements, only if they are "informed, through the furnishing of the plan's (SPD or initial COBRA notice), of both the responsibility to provide the notices and the plan's procedures for providing such notices to the administrator." However,

if the plan does not establish reasonable procedures, then practically any oral or written communication made to a variety of individuals within the employer or plan administrator's organization will be considered an adequate notice by the covered employees and qualified beneficiaries.

Regarding the COBRA election notices, the proposed regulations state that they must be in writing. Furthermore, these notices must contain 15 specified provisions. Also, as required for the initial notice, they must be "calculated to be understood by the average plan participant."

As to the two new notices not mentioned in the COBRA statute, plans will be required to provide a "notice of unavailability of continuation coverage". This is required when the plan administrator receives notice of a divorce, legal separation, loss of dependent status under the plan, or a disability, and it is determined that the corresponding individual is ineligible for COBRA. The regulations also specify the required contents of this notice and state that it must be provided within the same time frame as an election notice.

Plan administrators must also provide a written notice ("notice of termination of continued coverage") to qualified

beneficiaries receiving COBRA coverage in the event COBRA coverage ends earlier than the maximum period of continuation coverage. This notice must be delivered to qualified beneficiaries "as soon as practicable following the administrator's determination that continuation coverage shall terminate;" and it must contain information described in the regulations.

Plan administrators and employers may be relieved to know that there is sufficient time before the proposed regulations are finalized and become effective. Nevertheless, we recommend that they should start now taking the proposed regulations into account in their COBRA compliance efforts. ■

CHANGES IN TIME LIMITS FOR WAGE AND HOUR CLAIMS by: Iraida Diez

On September 30, 2003, the Supreme Court of Puerto Rico decided the case of Olga M. Rodríguez Rosado et als v. Syntex (F.P.), Inc., et als, 2003 T.S.P.R. 143.

The Court held that the filing of a wage and hour claim under Article 13 of the Wage and Hour Act, Act No. 379 of May 15, 1948, as amended, 29 L.P.R.A. Sec. 282 ("Act 379"), does not interrupt the statute of limitations with respect to other possible plaintiffs who decide to join the case later on. In other words, the statute of limitations established by Act 379 to file a wage and hour claim is not tolled by the filing of a representative action under Article 13 of Act 379. The current statute of limitations for wage and hour claims is three years. When the employee is still working with the employer, his/her claim will include those salaries owed during the three years prior to the date the judicial complaint was filed. Individuals who have ceased to work with the employer

have a term of three years, counted from the time of the discharge, to sue.

The Court also held that an employee who has filed a wage and hour claim and who continues working for the employer, may also claim for the period after the filing of the complaint. This means that even though there is a limitation as to how far back a wage and hour claim may go, an employee who continues to work may claim past the date in which the judicial claim was filed. Plaintiffs will only have to amend their original wage and hour complaints to include the period after the presentation of the original complaint. They will not have to file a separate independent action.

In view of this development, it is important that employers make sure that their payment practices are in compliance with Puerto Rico statutes, in order to avoid wage and hour claims. In the event a wage and hour claim has

already been filed against the employer, verifying that the payment practices are in compliance with local statutes or that they have been corrected to comply with them, will limit the time period for which the employer might be held liable. ■

Even though there is a limitation as to how far back a wage and hour claim may go, an employee who continues to work may claim past the date in which the judicial claim was filed

POLICY OF NOT RE-HIRING A PERSON WHO VIOLATES A DISCIPLINARY RULE IS FOUND TO BE A VALID EXPLANATION FOR NOT RE-HIRING

by: James D. Noël

The U.S. Court of Appeals for the Ninth Circuit had held that an employer could not refuse to re-hire an employee who tested positive for drugs and refused to participate in a rehabilitation program, based on a policy of not hiring persons who were discharged for violations of its disciplinary rules. The Ninth Circuit Court concluded that said policy was contrary to the Americans with Disabilities Act ("ADA"). However, as discussed below, in December, 2003, the Supreme Court reversed this decision.

In Hernández v. Hughes Missile Systems Company, et als, 298 F.3d 1030 (9th Cir. 2002), the facts were the following:

1. The plaintiff, Joel Hernández tested positive for cocaine.
2. His employer, Hughes Missile Systems Company ("Hughes"), was also aware that Hernández had an alcohol problem.
3. Hernández was given the alternative of either resigning or being terminated. In the "Employee Separation Summary" it was stated that he "quit in lieu of discharge" and that the reason for leaving was "discharge for personal conduct."
4. Over two and a half years later, Hernández applied for a job at Hughes as a Calibration Service Technician or a Product Test Specialist.
5. Hughes rejected the application.
6. Hernández sued Hughes under the ADA, and eventually the District Court dismissed the case on a motion for summary judgment by Hughes.

The ADA does not protect an employee or job applicant who is currently engaged in illegal drug use; however it does protect a qualified individual with a drug addiction who has been successfully rehabilitated

The Ninth Circuit Court of Appeals reversed the District Court and remanded the case for further proceedings. The Ninth Circuit Court found that there was sufficient evidence for a jury to conclude that Hernández was "qualified" for the position yet his application was rejected because he had a record of a prior drug addiction.

The Ninth Circuit Court held that a blanket policy by an employer not to re-hire employees who left the Company because of violations of its rules of conduct, was in violation of the ADA when applied to employees who are rehabilitated drug addicts and the only prior work related offense was having tested positive for the use of drugs. The ADA does not protect an employee or job applicant who is currently engaged in illegal drug use; however it does protect a qualified individual with a drug addiction who has been successfully rehabilitated.

Hernández was alleging that he was not re-hired because he had a "record of a disability" and/or because he was "regarded as" being disabled, in violation of the ADA. However, the person who rejected the job application was not aware of Hernández' record of drug addiction because of a company policy which kept current employees from finding out what the prior improper conduct of a former employee was. The Ninth Circuit Court understood that having a company policy which prohibits the rehiring of a former

employee who has violated its rules of conduct and keeping information as to the nature of the violation away from decision makers, constituted a willful inducement of ignorance by the hiring decision maker. The Ninth Circuit Court stated that “an employer may not avoid responsibility for its violations of the ADA by seeking to rely on lack of knowledge. Accordingly, Hughes’ unwritten policy is not a ‘legitimate nondiscriminatory reason’ for its rejection of Hernández’ application.”

Raytheon (Hughes was subsequently acquired by Raytheon Co.) challenged the Ninth Circuit Court’s decision. (*Raytheon Co. v. Hernández*, U.S. No. 02-749, certiorari granted). On December 2, 2003, the Supreme Court held that the Ninth Circuit Court improperly applied an “adverse impact” analysis to Hernández’ “disparate treatment” claim.

The Supreme Court explained that “disparate treatment” takes place when an employer treats an individual less favorably than others because of a protected characteristic. Therefore, the issue in disparate treatment cases is whether the protected trait motivated the employer’s action. On the other hand, adverse impact cases involve a facially neutral employment practice which falls more harshly on one group than another and cannot be justified by business necessity.

Hernández’ case was for disparate treatment, i.e. that the employer refused to re-hire him because it regarded him as disabled and/or because of his record of a disability. Therefore, the query should have focused on evidence of the employer’s intent to discriminate, or the lack of said evidence. A plaintiff who lacks direct evidence of intentional discrimination may use the burden-shifting framework first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). First, the plaintiff needs to establish a *prima*

facie case of discrimination. This is done by showing that the plaintiff: (i) belonged to a protected group; (ii) was qualified for the job; (iii) was rejected or fired despite his or her qualifications; and (iv) that after the rejection or discharge, someone else performed the duties of the position.

Once the plaintiff meets the *prima facie* test, the employer must articulate a non-discriminatory reason for its conduct. In this case, the Supreme Court said that Raytheon’s proffer of its neutral no re-hire policy satisfied its obligation under *McDonnell Douglas* to provide a legitimate, nondiscriminatory reason for refusing to re-hire Hernández. After the employer does this, the plaintiff is given the opportunity to show by competent evidence that the reasons proffered by the employer were a pretext for a discriminatory decision.

Thus, the question was whether there was sufficient evidence from which a jury could make a reasonable inference that the employer made its employment decision based on Hernández’ status as disabled despite its proffered explanation. The Supreme Court explained that the Ninth Circuit Court had erroneously concluded that, as a matter of law, the policy was not a legitimate, nondiscriminatory reason sufficient to defeat a *prima facie* case of discrimination. It had improperly focused on factors that pertain only to adverse impact claims. According to the Supreme Court, the employer’s no-hire policy was a legitimate, nondiscriminatory reason for refusing to re-hire an employee who was terminated for violating workplace conduct rules. ■

FINAL FLSA OVERTIME RULE TO BE ISSUED IN MARCH ACCORDING TO THE DOL

by: José A. B. Nolla-Mayoral

On March of 2003, the Federal Register published a proposal by the United States Department of Labor (“DOL”) to revamp its overtime and minimum wage pay exemption regulations under the Fair Labor Standards Act of 1938 (“FLSA”). The proposal would drastically change the exemptions to the minimum wage and overtime pay requirements. The DOL invited the public to submit written comments up to June 30, 2003; it expected to implement the regulations late that year or early in 2004, after the public comment period. See *Labor Perspectives*: Summer 2003 issue.

However, the Labor Department’s regulatory makeover stalled when Congress blocked funding for implementing it in the appropriations process. Yet, the omnibus appropriations bill without such funding restrictions was approved by the House in early December of 2003, and just recently by the Senate. This paved the way for the Labor Department to proceed with its plans. Whether the rules will go into effect in 2004 is still contingent on last minute pressure, keeping in mind that we are in an election year.

The Labor Department now plans to issue the final rule by the end of March of 2004.

The proposed rule would revamp the requirements, such as the duties tests for exemption from the FLSA as an executive, administrative, professional, computer or outside sales employees. In general, the proposal would also raise the salary threshold for workers to qualify to be exempt from overtime pay. The threshold under which workers are automatically entitled to overtime pay would increase in most cases to \$425 a week, in some instances from \$155 a week. Also, “Highly Compensated Employees” who are paid \$65,000 (\$1,250 a week) or more annually (counting base salary, commissions, non-discretionary bonuses and other non-discretionary compensation), who perform non-manual work, and meet any of the criteria of executive, administrative or professional functions would be exempt. We shall remain attentive to the publication of the final rule since much has been published for and against the proposal, and it may still be amended taking into account the public comments received by the DOL. ■

The Labor and Employment Department

	Telephone	Fax	E-mail address
Jorge Antongiorgi	(787) 250-5659	(787) 759-2740	jab@mcvpr.com
María Antongiorgi	(787) 250-2624	(787) 759-2741	maj@mcvpr.com
José I. Ayala	(787) 250-5617	(787) 759-2752	ja@mcvpr.com
Juan M. Casellas	(787) 250-5680	(787) 759-2743	jmc@mcvpr.com
Francisco Chévere	(787) 250-5615	(787) 759-2744	fc@mcvpr.com
Maggie Correa Avilés	(787) 250-5621	(787) 759-2745	mc@mcvpr.com
Iraida Díez	(787) 250-5817	(787) 759-2746	id@mcvpr.com
Agustín Fortuño-Fas	(787) 250-5631	(787) 759-2748	aff@mcvpr.com
Katherine González	(787) 250-5697	(787) 759-2749	kg@mcvpr.com
Alfredo Hopgood-Jovet	(787) 250-5689	(787) 759-2750	ah@mcvpr.com
Aníbal Irizarry	(787) 250-5646	(787) 759-2751	ai@mcvpr.com
Rica López de Alós	(787) 250-2632	(787) 759-2753	rla@mcvpr.com
Elaine Maldonado Matías	(787) 250-5670	(787) 759-2754	emm@mcvpr.com
Patricia M. Márvez	(787) 250-2636	(787) 759-2765	pm@mcvpr.com
María A. Mercado Betancourt	(787) 250-2633	(787) 759-2755	mam@mcvpr.com
Anita Montaner	(787) 250-5652	(787) 759-2756	ams@mcvpr.com
Karen Morales	(787) 250-3607	(787) 759-2757	kmr@mcvpr.com
María V. Múnera Pascual	(787) 250-5643	(787) 759-2758	mvmp@mcvpr.com
Sandra L. Negrón Monge	(787) 250-2638	(787) 759-2759	sln@mcvpr.com
James D. Noël III	(787) 250-5673	(787) 759-2760	jdnl@mcvpr.com
José A.B. Nolla	(787) 250-2613	(787) 759-2761	jan@mcvpr.com
Luis Palou Balsa	(787) 250-5671	(787) 759-2762	lpb@mcvpr.com
Miguel Palou Sabater	(787) 250-5686	(787) 759-2763	mpps@mcvpr.com
Miguel A. Rivera	(787) 250-5634	(787) 759-2717	mar@mcvpr.com
Javier Rivera Carbone	(787) 250-5619	(787) 759-2767	jrc@mcvpr.com
Juan F. Santos	(787) 250-5627	(787) 759-2795	jfs@mcvpr.com
Pedro J. Torres Díaz	(787) 250-2634	(787) 759-2768	pjt@mcvpr.com
Radamés (Rudy) A. Torruella	(787) 250-5679	(787) 759-2769	rat@mcvpr.com

McV
McConnell Valdés

270 Muñoz Rivera Avenue
Hato Rey, Puerto Rico 00918
PO Box 364225
San Juan, Puerto Rico 00936-4225

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