

Civil Rights

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Introduction

Grace Chung Becker
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This issue of the United States Attorneys' Bulletin (Bulletin) features the ever-expanding work of the Civil Rights Division (Division). The Division's work has affected the lives of people across the nation for just over 50 years now, and we are pleased to share some of our experiences. The history of the Division began with the passage of the Civil Rights Act of 1957—the first federal civil rights legislation enacted into law following Reconstruction. The Division was charged with enforcing all federal statutes affecting civil rights, investigating civil rights violations, and coordinating civil rights enforcement throughout the Department of Justice (Department).

Much of the Division's early work centered on the enforcement of the Supreme Court's 1954 decision in *Brown v. Board of Education*, 347 U.S. 343 (1954), and the desegregation of the nation's public schools. As the civil rights movement progressed, Congress passed additional civil rights statutes and the Division's jurisdiction expanded. Today the men and women of the Division work with our partners in U.S. Attorneys' offices (USAOs) throughout the country to ensure equal opportunities in employment and education, equal access to housing and public accommodations, and an equal right to cast a ballot.

Last year the Division celebrated its 50th anniversary, which was quite a milestone. While the country has changed dramatically in those years, the Division's mission remains unchanged and the work remains just as relevant today as it was 50 years ago. Over the past half-century, the Division has grown and expanded its efforts to fight discrimination wherever it is found.

This issue of the Bulletin focusing on the work of the Civil Rights Division arose out of the desire to make USAOs aware of the Division's recently acquired jurisdiction in matters involving the servicemembers' rights: both employment-related discrimination under the Uniformed Services Employment and Reemployment Rights Act (USERRA), Pub. L. No. 103-353, Table 2 Statutes at Large (1994) (codified in scattered sections of 38 U.S.C. Chapter 43), which is now assigned to our Employment Litigation Section, and credit and housing issues under the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. App. §§ 501-596, which are within the jurisdiction of our Housing and Civil Enforcement Section. The Civil Rights Division is very grateful to the Office of Legal Education for this opportunity to address such an important topic and audience.

There are initiatives and/or enforcement areas which may not be well known outside the Division and the articles in this Bulletin cover these areas. In addition to our work on behalf of servicemembers under the SCRA and USERRA, this issue features an article describing the Voting Section's election monitoring program. With the upcoming presidential election in November, there will be a great need for attorneys and support staff from USAOs to help with election coverage. This article provides some basic information about election monitoring as well as contact information for those who would like to volunteer to assist.

While many associate the Americans with Disabilities Act (ADA) with removing architectural barriers that limit access to buildings for persons who use wheelchairs, the ADA covers other important areas which sometimes receive less attention. The Disability Rights Section's article addresses effective communication in the health care arena, which can be a life-or-death issue for persons who are deaf or have limited hearing and need medical treatment.

The Civil Rights Division also is responsible for enforcing several federal statutes aimed at ensuring religious liberties, an issue that took on increased urgency after the 9/11 attacks led to a dramatic rise in discrimination and violence directed at Muslims, as well as at Sikhs and others who were perceived to be Muslim. In his article, the Special Counsel for Religious Discrimination highlights some of the key statutes and provides case examples involving both civil and criminal enforcement.

The Division's criminal jurisdiction includes not only the traditional enforcement areas of official misconduct and hate crimes but also the burgeoning area of human trafficking. The intent of this article is to alert USAO personnel who may not be familiar with human trafficking enforcement as to what these crimes involve, including the operations of the 42 federally-funded task forces around the country. Issues involved in hate crime prosecutions, as well as the "Cold Case Initiative," (the Department's effort to investigate and close unsolved murders from the civil rights era) are highlighted.

The Coordination and Review Section's article on language diversity discusses the important obligations of all federal offices including USAOs, to provide language assistance to individuals who do not speak English including witnesses and others who may contact the office for assistance. In addition, in immigration enforcement as well as in routine encounters with other persons, Assistant U.S. Attorneys (AUSAs) may encounter issues with individuals who face citizen-status discrimination. The article by the Civil Rights Division's Office of Special Counsel for Immigration-Related Unfair Employment Practices provides guidance on the contours of unlawful immigration-related discrimination.

We would like to thank our AUSA partners who contributed to this Bulletin. AUSA Judith Levy from the Eastern District of Michigan who has worked on almost every type of civil rights case describes some of her civil rights work in her article, "Handling Civil Rights Cases—An Assistant U.S. Attorney's Perspective." Also

included in this issue is the compelling firsthand account of prosecuting an ADA case involving effective communication in hospitals by AUSA Gregory Brooker, the Civil Chief for the District of Minnesota. Read about Western District of Michigan AUSA Maarten Vermaat's outstanding criminal prosecution of an SCRA violation based on the unlawful eviction of a servicemember's family—a misdemeanor case that netted a 6-month jail sentence for the landlord, as well as full restitution for the victims. The Division thanks these three AUSAs for their work on civil rights cases and for sharing their experiences in articles for this Bulletin and would like to recognize all the AUSAs around the country with whom we have worked for helping us enforce the nation's civil rights laws.

Enjoy reading and learning about these special areas of civil rights jurisdiction. Please consult the many resources for USAOs cited in these articles, and do not hesitate to contact the Civil Rights Division if more information is needed about how to get involved in any of the Division's enforcement issues.❖

ABOUT THE AUTHOR

❑ **Grace Chung Becker** currently serves as the Acting Assistant Attorney General in the Civil Rights Division of the Department of Justice. Ms. Becker was a Deputy Assistant Attorney General in the Division from March 2006 - December 2007 and previously served as a federal prosecutor in the Criminal Division. Ms. Becker has held positions as an Associate Deputy General Counsel at the Department of Defense, Counsel to the Senate Judiciary Committee, and Assistant General Counsel at the United States Sentencing Commission. Earlier in her career, Ms. Becker clerked for Judge James L. Buckley on the United States Court of Appeals for the District of Columbia Circuit, and Judge Thomas Penfield Jackson on the United States District Court for the District of Columbia.✉

Department of Justice's Enforcement of the Servicemembers Civil Relief Act

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I. Introduction

The Department of Justice (Department) plays a key role in the enforcement of the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. App. §§ 501-596. The SCRA provides a range of relief to active duty servicemembers, including:

- reducing the rate of interest for debts incurred before entering active duty to 6 percent;
- protecting servicemembers against default judgments, evictions, mortgage foreclosures, and repossessions of property;
- giving servicemembers the ability to terminate residential and automobile leases.

Military legal assistance attorneys are the first line of defense in enforcing the SCRA. Servicemembers seeking help under the SCRA should first contact the appropriate military legal assistance office, although the Department will accept inquiries directly from servicemembers when necessary. The Department can direct servicemembers to the closest military legal services office by referring them to the online military legal assistance office locator at <http://legalassistance.law.af.mil/content/locator.php>.

A military legal assistance attorney who cannot obtain voluntary compliance with the SCRA should move up the chain of command through the appropriate staff judge advocate and the legal assistance service chief. In the event of an emergency situation involving SCRA compliance, in which time or circumstances do not permit notice to a staff judge advocate and

legal assistance service chief as set out above, legal assistance attorneys are authorized to make direct contact with the Department and then notify their staff judge advocate or legal assistance service chief as soon as possible thereafter.

Fortunately, most individuals and institutions comply with the SCRA as soon as a servicemember or military attorney educates them about the law. In order to provide more information on this important area, the Civil Rights Division has launched a Web site dedicated to the protection of the rights of servicemembers: <http://www.usdoj.gov/crt/military>. This Web site provides information about how the Department, in partnership with other federal agencies, can help servicemembers protect their financial security through the SCRA. The Web site also provides information about how the Department can protect servicemembers' civilian employment rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and their voting rights under the Uniformed and Overseas Citizen Absentee Voting Act of 1986 (UOCAVA).

United States Attorneys' Offices (USAOs) have a significant role to play in enforcing the SCRA. The Housing and Civil Enforcement Section coordinates and consults with offices that would like to get involved in SCRA enforcement.

II. Examples of the Department's work under the SCRA

Since the Civil Rights Division's Housing and Civil Enforcement Section obtained authorization to handle SCRA matters for the Department in 2006, the Section has received numerous inquiries from military legal assistance attorneys and from servicemembers directly. These inquiries have related to a variety of legal rights safeguarded by

the SCRA. Many of these have been brief conversations. Others have developed into formal Department investigations. Below is a sampling of the situations the Department has encountered under the SCRA.

A. Automobile repossessions without a court order

Army Reservist David Phelps and his wife, Lynda Phelps, entered into a contract to buy a car. Soon afterward David Phelps was called up to active duty as an Assistant Chaplain in the Pentagon. He and his wife were late in making a payment. In the middle of the night, American Honda Finance Corporation repossessed their car without a court order, in violation of the SCRA, 50 App. U.S.C. § 532(a)(1) (2003), drove the car to an impoundment lot, and prepared to sell it at auction a few days later. An Army attorney tried to educate Honda's Recovery Department about the SCRA but was told that the only way to get the car back was for the servicemember and his wife to pay off the entire \$14,000 balance owed on the car immediately. The Army attorney then referred the matter to the Civil Rights Division.

I managed to talk to personnel in the Recovery Department long enough to get their fax number in order to fax them the reservist's orders. They refused to release the contact information for their corporate counsel so I looked up Honda in Martindale-Hubbell and found the legal department for their corporate headquarters in Torrance, California.

Once I got in touch with a Senior Counsel for Honda North America, Inc., things started going the government's way quickly. The lawyer immediately arranged for Honda to hold off on the sale of the vehicle, to have the vehicle redelivered to the reservist's home, and to "unwind" the repossession, including refunding any repossession or storage fees or any other fees or charges associated with the repossession. Honda also refunded a prorated share of the monthly car payment so that the reservist and his wife would not be charged for the days when they did not have possession of the car. Finally, Honda

directed the credit bureaus to delete any negative entries on the credit reports pertaining to the repossession.

Corporate counsel had a "bigger picture" view of the equities in this case than did the employees in the Recovery Department. The corporate counsel referred to this situation as a "reputational issue," and said that he could not stand the image of the Assistant Chaplain taking care of wounded soldiers while worrying that Honda was taking away his car in the middle of the night.

The government completed the inquiry by asking Honda to submit all their written policies pertaining to the SCRA. As required by the SCRA, Honda's policies prohibited it from unilaterally rescinding or terminating a contract with a military-account customer or assigning the collateral for repossession without first initiating court action. We closed the investigation without taking any further action based on Honda's prompt and positive response to the issues raised in this matter, as well as Honda's assurances that it would comply with the SCRA.

This investigation is a good example of how the Department might be able to give an extra push after the military legal services office has exhausted its efforts. I learned some valuable lessons during the course of this investigation. First, do whatever it takes to get *written* notice of the servicemember's request and a copy of the military orders into the hands of the company. This is the single most important thing you can do. Second, do not be afraid to go over the collection agent's head. You might have to go all the way up to the corporate headquarter's legal department to find someone who will devote proper attention to the SCRA matter.

B. Enforcement of mortgage prepayment penalties against servicemembers

Section 523 of the SCRA, 50 App. U.S.C. § 523(b) (2003), provides that a court may reduce or waive any penalty in a contract if the servicemember's ability to perform an obligation in the contract is materially affected by his or her military service. This issue arises most frequently

in the situation where someone takes out a home mortgage that has a prepayment penalty (often of several thousand dollars) and then receives a permanent change of station order (PCS) to relocate to another metropolitan area.

One investigation involved a major lender that refused to waive a prepayment penalty even though the servicemember received a PCS order to transfer from one base to another over 100 miles away. The servicemember bought a house with a mortgage from Lender A with a 3-year prepayment penalty. Two years later she received a PCS order relocating her to the other base. By this time, her mortgage had been sold to Lender B. She asked Lender B to waive the prepayment penalty, but it refused because it erroneously believed that the SCRA protected only servicemembers who entered into military service after they took out the mortgage loan.

The government attorney hopes to resolve this matter without filing a lawsuit. Under a tentative agreement, Lender B will refund the entire prepayment penalty to the servicemember. The lender also adopted a new policy waiving the prepayment penalty in certain circumstances if PCS orders require a servicemember to move 30 miles or more.

C. 6% maximum interest rate

Section 527 of the SCRA, 50 App. U.S.C. § 527 (2003), provides that lenders must reduce the interest rate to 6 percent on all loans incurred by a servicemember before he or she enters military service. The lender must forgive all interest charges over 6 percent during the time of military service. To seek relief from this provision, the creditor must go to court and show that the military service did not materially affect the servicemember's ability to pay the loan at a rate in excess of 6 percent.

The Civil Rights Division has ongoing investigations of several lenders for potential violations of the 6 percent provision. The Division attorneys have found that some lenders are not automatically reducing the interest rates on credit cards, home mortgage loans, and other loans even

after being notified by servicemembers about their military service.

When servicemembers are dealing with large creditors, they often face difficulty ensuring that their written request and military orders get to the correct person in the correct department. Some of the customer service agents may not be familiar with the SCRA and may or may not be helpful to the servicemember. Many servicemembers have had trouble obtaining the appropriate fax number when faxing in their notice and orders. In addition, bank personnel may not have much experience deciphering military orders and may deny the request based on an inaccurate reading of the orders.

In reviewing complaints based on the 6 percent provision, government attorneys have learned that the single most important thing for the servicemember to do is to make the request in writing, attach the relevant military orders, and deliver these documents to the correct person. Then, unfortunately, the servicemember may have to do significant follow-up to ensure that the lender applies the benefit retroactively to the first day of military service and maintains the benefit until the last day of service. The servicemember must also be sure to send in any extended orders he or she receives.

A large lender may have a special SCRA department or a "special loans" department. One department may assure the servicemember that the interest rate will be lowered to 6 percent while the other department keeps sending deficiency notices or keeps taking out the higher amount as an automatic debit from the servicemember's bank account. This can become a bureaucratic nightmare for the servicemember.

In situations in which the servicemember and the military legal assistance attorney have exhausted their resources, the military may refer the matter to the Department. At that point, we raise the issue to the highest possible level in the company (the corporate counsel's office). We typically get fast relief for the individual complainant and then move on to determining

whether the lender has violated the rights of other servicemembers.

For example, within two days of sending a notice-of-investigation letter to a major mortgage lender, government attorneys were able to convince the bank to remove derogatory information from a servicemember's credit report so that he could retain his security clearance, prevent an involuntary discharge from the military, and deploy to Afghanistan later that week. Later, the government attorneys worked out a payment plan for the servicemember that included an interest rate of 6 percent for all the periods of active duty as required by the SCRA. Due to the actions of the government attorneys the servicemember was able to keep his house from going into foreclosure. This followed several months of fruitless efforts by the servicemember to negotiate his own repayment plan and to invoke the 6 percent provision.

D. Enforcement of storage liens without a court order

Under Section 537 of the SCRA, 50 App. U.S.C. § 537 (2003), a person holding a storage lien on a servicemember's property may not foreclose or enforce any lien on such property without a court order. In a proceeding to foreclose or enforce a lien, a court may stay the proceeding or adjust the obligation to preserve the interests of all parties. A person who knowingly violates this provision is guilty of a misdemeanor and may be fined and/or imprisoned for up to 1 year.

The Civil Rights Division has received information from the military that some towing companies have a practice of enforcing storage liens on active duty servicemembers' cars without first obtaining a court order. In April 2008, the Civil Rights Division opened their first investigation of this type against a towing company.

E. Criminal prosecution under the SCRA

The SCRA contains several criminal provisions, including 50 App. U.S.C. § 531 (2003), which prohibit a landlord from knowingly

evicting a servicemember or the servicemember's dependents from their residence during a period of military service without a court order. The maximum monthly rent cannot exceed a threshold set by the Department of Defense, which was \$2,400 when the statute was passed and is adjusted annually for inflation. The 2008 limit is slightly over \$2,800. Updated information on the rental limit is published annually in the Federal Register.

The USAO for the Western District of Michigan recently brought a criminal prosecution under the SCRA, *United States v. McLeod*, 2008 WL 114789 (W.D. Mich. Jan. 9, 2008) and obtained an extremely successful outcome. The first-hand description of the case, written by Assistant United States Attorney (AUSA) Maarten Vermaat, follows.

My Prosecution of a Criminal Case under the SCRA:

United States v. Randall Wayne McLeod, Sr.

United States v. McLeod, 2008 WL 114789 (W.D. Mich. Jan. 9, 2008)

AUSA Maarten Vermaat

During my work as an AUSA in the Western District of Michigan, I have prosecuted many serious criminal violations, but one of my misdemeanor prosecutions—a criminal violation of the SCRA—has ended up being one of my most memorable cases.

The story begins in the fall of 2004. A soldier in the U.S. Army was deployed on training and left behind his pregnant wife and their two children in a rental property (a mobile home) in Michigan's Upper Peninsula. While away from home visiting family for Thanksgiving, the wife went into preterm labor. As a result, she was unable to make the December rent payment on time. Only 12 days after the rent was due, the landlord, Randall McLeod, went into the mobile home, removed all of the property he found inside (including children's toys, clothing, and military

memorabilia), changed the locks, and hung a "no trespassing" sign on the door. The landlord took these actions without obtaining a court order.

Over the next several months, the soldier attempted to resolve this matter by contacting the landlord directly, reporting the eviction and seizure of property to the local sheriff, and then asking Army Legal Aid attorneys for help. All of these efforts failed.

At that point, the Army Legal Aid attorney called and asked that the USAO take action. Ultimately, I was assigned to review the matter as a possible violation of 50 App. U.S.C. § 531 (2003), which makes it a Class A misdemeanor to evict a servicemember or a servicemember's dependents without a court order as long as the rent is under an amount set by the Defense Department. This amount is adjusted annually for inflation and was \$2,465 per month at the time of the incident. The victims' actual monthly rent was \$250. At my request, an FBI agent interviewed the landlord. McLeod admitted the crime in its entirety though he claimed that he took custody of the home and property because he thought it was abandoned. (He maintained that position throughout the proceedings. However, "abandonment" is not a valid defense to an SCRA charge.) Prior to the initiation of a federal criminal action, the victims, with the assistance of a Legal Services attorney, sought relief through a civil action under Michigan law, which allows for treble damages in some cases. The victims obtained a default judgment—but not treble damages—when the landlord failed to respond to the suit. As a result of this civil litigation, the landlord was ordered to pay a total of \$15,300.

After the victims were unable to compel the landlord either to pay the civil judgment or to return any of their personal effects, in September 2006 I initiated our prosecution by filing an information charging a criminal violation of the SCRA. The defendant ended up pleading guilty to the charge in May 2007. The plea agreement specified that the defendant would make "full

restitution to the victims of his crime for the losses that he caused."

The sentencing hearing on September 19, 2007, before U.S. Magistrate Judge Timothy P. Greeley was hotly contested. The judge ultimately applied the Vulnerable Victim enhancement and denied the defendant Acceptance of Responsibility points. Then, at the government's request, the court departed upward for "extreme conduct" based on the defendant evicting the pregnant wife of an absent servicemember with her two young children in the middle of winter and never returning their personal property to them. Noting that the crime was only "a misdemeanor, but it's a pretty horrendous one," the court sentenced the defendant to 6-months imprisonment and ordered him to pay \$15,300 in restitution. (The defendant ended up appealing the restitution amount, but the restitution order was affirmed by the District Court. *See United States v. McLeod*, 2008 WL 114789 (W.D. Mich. Jan. 9, 2008)). The sentencing judge made clear that if the defendant did not pay the full restitution amount during his year of supervised release he would be incarcerated for the other 6 months. I am cautiously optimistic that the victims will finally receive reimbursement of their losses from this ordeal.

Like most criminal AUSAs, I spend most of my time prosecuting felony offenses under Titles 18, 21, and 26. Nevertheless, the United States obviously has a strong interest in protecting soldiers, sailors, airmen, and marines and their dependents from unscrupulous and occasionally even predatory landlords. Some military families, like the family in this case, are more vulnerable than their civilian counterparts because military deployments and training can split up the family at the most inopportune times, such as during a pregnancy. This case was particularly rewarding for me because it gave me a chance to help out just such a family.

This case was undoubtedly unusual in that the landlord/defendant bypassed a number of

opportunities to resolve this matter before the initiation of a criminal prosecution. He simply did not think the government would take the time to prosecute him. In contrast, most of these cases will be resolved somewhere along the progression from informal discussions with the landlord, to involvement of legal aid attorneys for the military, to civil proceedings. Our willingness occasionally to prosecute these cases and publicize the results is certain to enhance the effectiveness of lower-level efforts at resolution. It amazed me that this misdemeanor case received incredibly extensive local press coverage whereas many of the drug cases I prosecute that result in very long sentences do not attract nearly as much media attention. We hope this case will send a strong message that will discourage unscrupulous creditors and landlords from violating the rights of servicemembers and their families in the Western District of Michigan.

Maarten Vermaat has been with the USAO in the Western District of Michigan since May 2003. He spent a year at the main office in Grand Rapids, MI, and then moved up to the Northern Division office in Marquette.

III. What can USAOs do to enforce the SCRA?

USAOs have concurrent jurisdiction along with the Civil Rights Division to enforce the SCRA. All complaints and settlements must be approved by the Assistant Attorney General for Civil Rights. Many SCRA inquiries can be resolved successfully through letters and phone calls. AUSAs are encouraged to handle these inquiries as they have done in the past and to contact the Housing and Civil Enforcement Section for assistance.

Many USAOs, particularly those located near military facilities, probably already receive a steady stream of SCRA inquiries. As soldiers start returning from Iraq and Afghanistan and servicemembers have more time to learn about and enforce their SCRA rights, we expect these inquiries to increase.

IV. Conclusion

The Civil Rights Division views the safeguarding of the benefits of the SCRA as a very serious matter and is proud to be of service to our nation's men and women in uniform. The Division is committed to the vigorous enforcement of the Act and wants to help military legal assistance officers make sure that servicemembers are receiving the full benefits of the law.

If AUSAs would like to discuss SCRA issues with attorneys in the Civil Rights Division, please contact Steven H. Rosenbaum, Chief of the Housing and Civil Enforcement Section at (202) 514-4713 or Steven.Rosenbaum@usdoj.gov, or Elizabeth A. Singer, Director of the United States Attorneys' Fair Housing Program at (202) 514-6164 or Elizabeth.Singer@usdoj.gov. ❖

ABOUT THE AUTHOR

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Enforcement of the Uniformed Services Employment and Reemployment Rights Act by the Department of Justice

Karen Woodard
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Civil Rights Division

I. Introduction

Noncareer members of the armed forces who serve their country, whether on overseas deployments, temporary reserve duty, or other forms of military service, have special employment rights under the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 108 Stat. 3149 (codified in scattered sections of 38 U.S.C.), commonly referred to as "USERRA." In passing USERRA, Congress intended to clarify and strengthen prior veterans' rights statutes and encourage noncareer service in the military. The basic purpose of USERRA is to ensure that servicemembers who leave their civilian employment and serve honorably in support of the mission of the United States' military have the assurance that once their service is completed they will be able to return to their civilian careers with as little disruption and difficulty as possible.

Since the events of September 11, 2001, the number of National Guard and Reserve personnel called to some period of active duty has increased. While the Department of Justice's (Department) Civil Division and some of the U.S. Attorneys' offices (USAOs) have handled USERRA complaints for many years, in September 2004 the Attorney General transferred responsibility for representing servicemembers from the Civil Division to the Employment Litigation Section

(ELS) of the Civil Rights Division. At that time, the Department and the Department of Labor (DOL) entered into a Memorandum of Understanding to confirm both agencies' commitment to protecting the rights of servicemembers and to describe how the agencies will work together to ensure that USERRA rights are fully protected. Since assuming jurisdiction, ELS has provided representation to numerous servicemembers in USERRA actions and also has continued the Department's partnership with USAOs to vigorously enforce USERRA on behalf of servicemembers.

One example of the Department's USERRA enforcement is a case filed on behalf of Army National Guard reservist Mary Williams. On May 16, 2008, the Department filed a complaint in the case of *Mary V. Williams v. Gibson County, Tennessee*, No. 1:08-CV-01117 (W.D. Tenn. May 16, 2008), and also entered into a Consent Decree with Gibson County to resolve Ms. Williams' complaint. The Decree was filed with the court on May 19, 2008.

This case involves allegations that Gibson County failed to properly reemploy and promote Ms. Williams upon her return from 2 years of service with the Army National Guard in Iraq. Upon her return from active duty in July 2006, Ms. Williams promptly informed Gibson County that she wanted to return to her part-time Emergency Medical Technician (EMT) position. Gibson County did not reemploy Ms. Williams, and instead told her that she would be placed on the part-time EMT list to await available shifts. Gibson County, however, continued to give part-

time shifts to EMTs with less seniority than Ms. Williams. After making repeated attempts to gain reemployment, Ms. Williams finally was allowed to return to work as a part-time EMT in October 2006, 4 months after she sought reemployment. At that time, Gibson County also had an opening for a full-time EMT position for which Ms. Williams was eligible. However, the county did not properly credit Ms. Williams with seniority for her time away on active duty and instead promoted an EMT with less seniority than Ms. Williams. Under USERRA's escalator principle Ms. Williams was entitled to the full-time EMT position because Gibson County filled its full-time EMT positions based on seniority.

According to the terms of the Consent Decree, which was approved and entered by the court on May 21, 2008, Gibson County was required to promote Ms. Williams to a full-time EMT position retroactive to the date she should have been promoted in October 2006 and pay her \$17,000 to compensate her for lost wages and other monetary losses she suffered as a result of Gibson County's actions.

II. USERRA's protections

USERRA covers both voluntary service (when a servicemember volunteers for duty or training) and involuntary service (when a servicemember is ordered to duty or training). USERRA protects servicemembers in all five branches of the armed services, the Army National Guard, the Air National Guard, and the Commissioned Corps of the Public Health Service. USERRA applies both to full-time active duty servicemembers and reserve duty servicemembers in their civilian jobs and to private employers, as well as to federal, state, and local governments.

USERRA establishes a wide range of employment protections for noncareer servicemembers, including protection from discrimination and retaliation based on military service and the right to prompt reemployment with their preservice employer after military service. USERRA establishes a "floor," not a

"ceiling," for employment rights. Thus, an employer may provide greater rights than those guaranteed by USERRA but cannot refuse to provide any right or benefit guaranteed by the statute.

A. Discrimination based on military service

USERRA prohibits discrimination based on an individual's service in the military. Specifically, an employer cannot take any action based on a person's current obligations as a member of the uniformed services, prior service in the uniformed services, or intent to join the uniformed services. Title 38, United States Code, Chapter 43, § 4311 states:

[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.

On January 12, 2006, in the Northern District of Texas, ELS filed its first USERRA class action lawsuit on behalf of three American Airlines pilots and a class of similarly situated pilots. The complaint alleged that American Airlines violated USERRA by not allowing its pilots on military leave to accrue vacation and sick leave benefits to the same extent as pilots on comparable forms of nonmilitary leave. In addition, the complaint alleged that American Airlines violated USERRA by not permitting pilots on military leave to bid on flights to the same extent as pilots who took comparable forms of nonmilitary leave. The complaint sought class certification, reinstatement of the pilots' vacation, sick leave, and other benefits.

On April 17, 2008, the parties filed a settlement agreement that was preliminarily approved by the court on May 13, 2008. The settlement agreement requires that American Airlines pay 353 pilots a total of \$345,772.80 for

the loss of vacation and sick leave benefits and provide currently employed pilots with sick leave credits having an estimated value of \$215,000. The settlement agreement also calls for American to modify its existing policies and practices to ensure that in the future all pilots who are called to serve in the military will continue to accrue vacation and sick leave benefits. *Woodall et al. v. American Airlines*, No. 3:06-CV-00072 (N.D. Tex. Jan. 12, 2006). The flight bidding claim was resolved separately with one pilot and was not part of the class action. This case is currently awaiting final court approval after a fairness hearing.

Legal framework. Courts use a burden-shifting framework to determine whether an employer has discriminated against a servicemember because of his or her military service. Under this framework, a servicemember claiming discrimination bears the initial burden of proving, by a preponderance of the evidence, that the member's military service was a "substantial or motivating factor" in the employer's decision. To prove discrimination under USERRA, the servicemember must initially establish that military service was a motivating factor in an employment decision. In other words, military service need only be one of the reasons for an employment action. Once the servicemember reaches this threshold, the burden shifts to the employer to prove by a preponderance of the evidence that the action would have been taken in the absence of military service. If the employer meets this burden, the servicemember can prevail only if he or she can establish that the action would not have been taken but for his or her military service.

Retaliation. USERRA also prohibits employers from retaliating against a servicemember because of the servicemember's attempt to enforce his or her rights under the Act. USERRA also protects employees, even if they are not servicemembers, from being retaliated against for their participation in an investigation or case under the statute. The same burden-

shifting framework that is used to prove discrimination applies to retaliation cases.

A good example of a discrimination case is *Michael McLaughlin v. Newark Paperboard*, No. 2:04-CV-01648 (W.D. Pa. Oct. 28, 2004), a case handled by the USAO for the Western District of Pennsylvania. Michael McLaughlin had served as an officer in the Pennsylvania National Guard since 1980. In 1998, he was hired as a manager at Newark Paper Board's Greenville plant. On August 8, 2001, after giving proper notice to his employer, Mr. McLaughlin departed for his annual 2-week military training. On August 27, 2001, the day Mr. McLaughlin was scheduled to return to work, Newark Paperboard terminated him. Mr. McLaughlin had never been reprimanded or disciplined for any reason and had a good performance record. The complaint alleged discrimination based on military status and sought reinstatement, back pay, and liquidated damages.

Tragically, Mr. McLaughlin was killed in January 2006 while serving in Iraq. After consulting with McLaughlin's wife, the USAO and ELS agreed to continue the lawsuit on Mr. McLaughlin's behalf with Mrs. McLaughlin substituted as the plaintiff. Just prior to the start of the trial and after losing a motion for summary judgment, Newark Paper Board agreed to a confidential settlement in the case.

B. Reemployment

USERRA provides a servicemember with the right to reemployment with his or her preservice employer following qualifying service in the uniformed services. To qualify for reemployment under the statute, the servicemember must meet three basic requirements:

- provide advance notice of servicemember's absence to his or her employer;
- return from service within 5 years; and
- make a timely application for reemployment.

Advance Notice. The servicemember or an appropriate officer of the uniformed services must give advance written or verbal notice to the

employer of the servicemember's intended absence due to military service. In giving this advance notice, the servicemember does not have to indicate the expected length of service or whether the servicemember intends to return to his or her position after service. The servicemember must, however, inform his or her employer that he or she is leaving for military service to have reemployment rights upon completion of that service. Advance notice is not required if giving notice was precluded by military necessity or if giving notice was otherwise unreasonable or impossible.

ELS has handled a number of matters in which the notice under USERRA was in issue. One case involved Army Reserve Second Lieutenant Wesley McCullough who was employed as a firefighter with the city of Independence, Missouri. As part of his reserve duty, Mr. McCullough was required to drill one weekend a month and participate in annual training. In compliance with USERRA's advance notice requirement, Mr. McCullough provided his supervisors with a yearly drill schedule indicating the days he would be away for military service. He also verbally informed his supervisors of these drill dates prior to leaving for service. Although Mr. McCullough gave advance verbal notice of his need to be away for weekend drills on two specific occasions, Fire Department officials declined to accept his verbal notice of these drill dates or the previously supplied annual drill schedule as advance notice of his military service and informed him that he had to submit written documentation of this service. The Fire Department then placed Mr. McCullough on 2 days suspension without pay specifically for not providing written documentation of his military service.

Mr. McCullough filed a USERRA complaint, which was referred to ELS after DOL's attempts to resolve the complaint failed. After informing the city of our intention to file suit on Mr. McCullough's behalf, the city agreed to settle the complaint by consent decree. In the decree, the city agreed to rescind the discipline it had given

Mr. McCullough and pay him for the time he was suspended. The city also agreed to amend its policies specifically to allow for verbal notice of military service. *McCullough v. City of Independence, Missouri*, No. 4:05-CV-00946, (W.D. Mo. Oct. 7, 2005).

Length of service. The servicemember's cumulative length of military service cannot exceed 5 years per employer. The 5-year limitation starts anew with each employer. There are certain exceptions to the 5-year limitation that involve unusual service requirements beyond the servicemember's control. These exceptions include the period of time:

- beyond 5 years that is required to complete an initial period of obligated service (usually involves special programs requiring additional time for training);
- during which the servicemember, through no fault of the member, was unable to obtain orders releasing the member from service;
- for service performed to fulfill periodic National Guard or reserve duty or to fulfill periodic professional development training (includes yearly 2-week reserve duty, weekend drills, and military training);
- the service the member was ordered to or retained to, either by statute or by emergency, in time of war, invasion, rebellion, or in support of an operational mission; and
- the service the person performs to mitigate economic hardship caused by his or her employer's violation of USERRA.

The 5-year period also does not include the period of absence before or after service. Thus, the time the servicemember uses to prepare for duty and the period between the person's release from duty and the time he or she seeks reemployment or reports back to work is not part of the 5-year period.

Timely application for reemployment. The servicemember must report or submit an application (written or verbal) for reemployment

to the employer in a timely fashion. A servicemember's timely application for reemployment depends upon his or her length of service.

If a servicemember has served between 1 and 30 days, the member must report to his or her employer by the beginning of the first regularly scheduled work period that begins on the next calendar day following completion of service, after allowance for safe travel home from the military duty location and an 8-hour rest period. For example, a servicemember who completes service at 11:00 p.m. one day cannot be required to report to work before 7:00 a.m. the next morning even if his or her next scheduled shift occurred earlier. If it would be impossible or unreasonable for the servicemember to report back within these time limits, the member must report back to work as soon as possible. These reporting requirements are the same for servicemembers who are absent from work to take a fitness-for-service examination regardless of the length of the servicemember's absence.

If the servicemember has served between 31 and 180 days, the member must submit an application for reemployment no later than 14 calendar days after completion of service. If the servicemember has served 181 or more days, the member must submit an application for reemployment no later than 90 calendar days after completion of service. In both of these instances, if submission of a timely application is impossible or unreasonable, the application must be submitted as soon as possible.

If these requirements for reemployment are met, the servicemember must be promptly reemployed. Prompt reemployment is not defined by the statute, but USERRA regulations indicate that barring unusual circumstances, reemployment should occur within 2 weeks of the servicemember's application. It is important to note that a servicemember's reemployment rights are not automatically forfeited if the member fails to report to work or to apply for reemployment within the required time limits. Under these circumstances, however, reemployment is no

longer protected by USERRA and the servicemember will be subject to the employer's rules governing unexcused absences.

Depending upon length of service, a servicemember who is reemployed in accordance with USERRA has certain protections from discharge. A servicemember who has served between 31 and 180 days cannot be discharged within 180 days of reemployment except for cause. A servicemember who has served more than 180 days may not be discharged within 1 year of reemployment except for cause. This protection is designed to ensure that the returning servicemember has a reasonable amount of time to get readjusted to his or her position after a long absence. Just cause for discharge may be based either on the servicemember's conduct or an application of the escalator principle (discussed below). In both instances, the employer bears the burden of proving that it had just cause to discharge the member during the protected period.

Reemployment position. As a general principle, a servicemember must be reemployed in a position in which the member would have been employed if his or her employment had not been interrupted by service or in a position of like seniority, status, and pay that the member is qualified to perform. This is known as the "escalator principle." As the Supreme Court described in *Fishgold v Sullivan Drydock and Repair*, 328 U.S. 275, 284-85 (1946), the servicemember "does not step back on the seniority escalator at the point [the servicemember] stepped off," but "steps back on at the precise point [the member] would have occupied had [the member] kept his [or her civilian] position continuously during [military service.]" This in essence requires the servicemember to be reemployed with the same pay and benefits as other similarly situated employees who remained employed.

It is important to note that the employment escalator can go up, but it can also go down. Therefore, the returning servicemember is also subject to any pay or benefit *decreases* that he or she would have suffered if he or she had not been

on military leave. Also, an employer is not required to reemploy a servicemember in a position he or she is not qualified to perform. The employer, however, must make "reasonable efforts" to enable the returning servicemember to qualify for the position. Reasonable efforts have included providing training that does not cause an undue hardship on the employer.

The escalator principle also applies to missed promotions and missed promotional opportunities. A servicemember returning from service must be promoted upon his or her return from service if there is "reasonable certainty" that the member would have been promoted but for his or her absence. A servicemember is not automatically entitled to receive a promotion that is based on some measure of performance, but the member must be allowed a fair opportunity to compete for a promotion missed because of military service. This requirement often applies when a promotion is conditioned upon the servicemember's success on a promotional examination, such as with police officers. In that case, if the servicemember missed an opportunity to take a promotional examination while away on service, he or she normally must be given a make-up examination and be placed in the same position he or she would have occupied had he or she taken the examination at its regular time. This could mean receiving a promotion or being placed on an eligibility list for a promotion. Any missed promotion must be retroactive to the date it would have occurred had the member's employment not been interrupted by service.

The recently resolved case of *United States v. New York State Dep't of Corr. Serv.* (NYSDOCS), No. 1:08-CV-426 (Apr. 23, 2008), is a good example of the application of the escalator principle. This case, which was resolved through the filing of a Complaint and Settlement Agreement entered by the court on April 23, 2008, involved a USERRA complaint filed by National Guard reservist Patrick Anson. Mr. Anson, a Correctional Officer with the state of New York, was called to active duty on the morning of 9/11 and served on active duty for nearly 2 years.

At the time of his activation, Mr. Anson had been scheduled to take a Correction Sergeant promotional examination, but he missed the examination while on active duty. Mr. Anson later took and passed a make-up examination, but upon his promotion to Correction Sergeant he was denied retroactive seniority. Under NYSDOCS policy, eligibility to sit for the Correction Lieutenant exam is based on the officer's seniority in the Sergeant position. Due to NYSDOCS' failure to credit Mr. Anson with the proper seniority based on the results of the Correction Sergeant exam, he was also denied the opportunity to take the Correction Lieutenant exam. NYSDOCS has since corrected Mr. Anson's Correction Sergeant seniority and paid him the appropriate amount of back pay and benefits related to that promotion. The settlement agreement reached between the United States and NYSDOCS provides Mr. Anson the opportunity to take a make-up Correction Lieutenant promotional exam and, if he passes, requires that he receive the appropriate retroactive seniority, back pay, and benefits.

Statutory exceptions to reemployment. USERRA provides employers with only three exceptions to the reemployment requirement. An employer is not required to reemploy a returning servicemember if the employer's circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employer may be excused from reemploying a servicemember if a layoff or reduction-in-force occurred while the servicemember was away that would have included the servicemember. This defense may not be available to the employer, however, if the servicemember's position simply has been filled by another employee.

An employer is not required to reemploy a servicemember if it would impose an undue hardship on the employer. Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of the nature and cost of the action needed, the overall financial resources of the facilities involved and the number of persons employed at

the facility, the overall financial resources and size of the employer, and the type of operation of the employer.

Lastly, an employer is not required to reemploy a servicemember whose employment was for a brief, nonrecurring period and there was no reasonable expectation that such employment would continue for an indefinite or significant period. This does not necessarily include servicemembers who have left a part-time position, seasonal position, or a temporary position. With these positions, a servicemember could still have a reasonable expectation that his or her employment would continue.

It is significant that these are considered affirmative defenses in a reemployment claim and that the employer thus has the burden of proof. A determination as to whether any of these defenses apply is a fact-specific decision that must be made on a case-by-case basis.

C. Damages

Servicemembers who prevail in a USERRA action may be entitled to receive a monetary award for loss of wages or benefits and an award of liquidated damages if the court determines that the employer's actions were willful. Liquidated damages are defined as an amount equal to the amount of loss wages or benefits. 38 U.S.C. § 4323(d). The court may also use its equitable powers to grant temporary or permanent injunctions, restraining orders, or contempt orders. Also, when appropriate, a servicemember may be entitled to reinstatement with remedial seniority, back pay, and benefits.

III. Enforcement process

USERRA provides that, in some circumstances, the Attorney General may represent servicemembers in their USERRA claims against private, state, or local government employers. In order to have a servicemember's USERRA case reviewed by the Attorney General, the member must first file a complaint with the Department of Labor. Through its Veterans Employment Training Service (VETS) DOL will

investigate the complaint and may attempt to resolve it voluntarily. DOL and VETS resolve many of these complaints at the investigation stage, but if they cannot, upon the servicemember's request, DOL will forward the complaint to the Department. The Department then conducts a de novo review of the complaint to determine whether representation is appropriate. Significantly, the servicemember is not required to submit his or her USERRA claim to DOL or the Department before filing a complaint in federal district court. The servicemember always has the right to file a USERRA lawsuit in court with private counsel.

In cases where the Department decides to offer representation to the servicemember in his or her claim against a private employer, the Department attorney will serve as the servicemember's attorney and will file the lawsuit in the name of the servicemember, not the United States. In actions against state governments, the action is filed on behalf of the United States as was the case in the *United States v. New York State Dep't of Corr. Serv.* lawsuit discussed above. It should be noted that offering representation to servicemembers can present some unique attorney-client issues that are not present in the other cases handled by the Department where the United States is a party to the action.

IV. Employment Litigation Section's handling of USERRA referrals

The Employment Litigation Section always looks for opportunities to involve USAOs in jointly handling USERRA referrals. USERRA cases provide a unique opportunity for Department attorneys and AUSAs to support our nation's servicemembers and acknowledge their sacrifices. Since the Civil Rights Division became responsible for USERRA enforcement in September 2004, both ELS and the USAOs have worked diligently to increase the number of USERRA complaints filed and resolved on behalf of servicemembers. Among the many deserving and grateful victims we have represented are Staff

Sergeant Brendon McKeage and former servicemember Sean Thornton.

Mr. McKeage was employed as the Chief of Police for the Town of Stewartstown, New Hampshire until being deployed to Iraq in 2004. While serving in Iraq, Mr. McKeage received a letter from the town telling him that he no longer had a job. When the citizens of Stewartstown learned that their Chief of Police had been terminated while serving his country, they voted to censure the town for its "outrageous and illegal" conduct. Despite this public uproar the town still refused to reemploy Mr. McKeage in his former position upon his return from duty. Mr. McKeage filed a USERRA complaint with DOL that was subsequently referred to the Department. We met with town officials and were able to negotiate a consent decree that included a payment in back wages to Mr. McKeage, No. 07-CV-6-PB (Mar. 27, 2008).

Mr. Thornton was employed by Wal-Mart as a cashier when he enlisted in the Air Force in 2006. At the time of his enlistment, Mr. Thornton informed his supervisors that he was leaving Wal-Mart to join the Air Force. Upon his honorable discharge from the Air Force approximately two months later, Mr. Thornton timely sought reemployment with Wal-Mart but was told that he would have to reapply for his cashier position because he was no longer listed as an employee. After trying unsuccessfully to be reemployed in his previous position, Mr. Thornton filed a USERRA complaint with DOL that was referred to the Department. After filing a lawsuit on his behalf, the Department was able to negotiate a consent decree requiring Wal-Mart to pay Mr. Thornton back wages for its failure to reemploy him. On May 21, 2008, the Court approved and entered the Consent Decree resolving the complaint. *Thornton v. Wal-Mart*, No. 06:08-CV-471-ORL-18 (May 21, 2008).

V. Conclusion

There is a great deal of additional information and resource materials that are available to AUSAs who wish to handle USERRA referrals. Information regarding USERRA's protections can be found on the Department's Web site at www.servicemember.gov or on DOL's Web site at www.dol.gov/vets, which includes the full text of USERRA, Pub. L. No. 103-353, 108 Stat. 3149 (codified in scattered sections of 38 U.S.C.) and the accompanying regulations codified at 20 C.F.R. § 1002 (2006). Information regarding USERRA's protections and USERRA cases handled by the Department also can be found on the Department's Web site at www.servicemember.gov or on ELS's Web site at www.usdoj.gov/crt/emp. Additional information about USERRA can be found on DOL's Web site at www.dol.gov/vets/. The Employment Litigation Section is proud of the work we and our partners in USAOs have done in the past to enforce USERRA and look forward to our continued collaboration to ensure that the rights of our servicemembers are protected.❖

ABOUT THE AUTHOR

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Election Monitoring

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I. Introduction

The Civil Rights Division monitors elections across the country to ensure compliance with federal voting rights laws and to monitor compliance by jurisdictions subject to consent decrees and other court orders enforcing these statutes. The Voting Section supervises and coordinates hundreds of monitors who gather and document information in polling places during elections held throughout the year. The evidence collected during these elections plays a critical role in the Voting Section's efforts to ensure that jurisdictions comply with federal voting rights laws and that all voters have equal access to the polls regardless of race, color, or membership in a language minority group.

This article discusses the Voting Section's election-monitoring efforts, as well as the role of Department of Justice (Department) personnel during elections. Specifically, the statutes enforced by the Voting Section are identified, election monitoring with federal observers provided by the Office of Personnel Management (OPM) is discussed, and "attorney" monitoring in which attorneys and nonattorney staff from the Department are sent by the Voting Section to gather information at the polls on election day is described.

Election monitoring during a presidential general election—such as November 4, 2008—frequently relies upon attorneys and nonattorneys from outside the Voting Section. The monitoring represents an exciting opportunity for personnel from the Civil Rights Division and United States Attorneys' offices to assist the Voting Section in gathering information that will help to protect one

of the most fundamental rights that citizens have—the right to vote.

II. The statutes enforced by the Voting Section

The Voting Section has responsibility for enforcing federal voting-rights statutes including the following:

- the Voting Rights Act of 1965, as amended;
- the National Voter Registration Act of 1993 (NVRA);
- the Voting Accessibility for the Elderly and Handicapped Act of 1984;
- the Uniform and Overseas Citizen Absentee Voting Act of 1986 (UOCAVA); and
- the Help America Vote Act of 2002 (HAVA).

Federal monitors may observe violations of the Voting Rights Act and HAVA on election day while other statutes (such as the NVRA) may involve violations that occur before the election even happens.

The Voting Rights Act, adopted initially in 1965 and extended in 1970, 1975, 1982, and 2006, is widely considered one of the most successful pieces of civil rights legislation ever adopted by the United States Congress. The Act codifies and effectuates the constitutional guarantee that no person shall be denied the right to vote on account of race, color, or membership in a language minority group.

Section 2 of the Voting Rights Act guarantees that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement" of the right to vote on account of race, color, or membership in a language minority group. 42 U.S.C. § 1973 (1982). Over the past 43 years, the Voting Section has brought numerous

enforcement actions under § 2 to ensure that all voters have equal access to participate in the election process.

The Voting Rights Act has provisions designed specifically to protect the rights of language minority voters, such as §§ 4(f)(4) and 203. 42 U.S.C. §§ 1973b(f)(4), 1973aa-1a (2006). These provisions require certain covered jurisdictions to provide bilingual written materials and other assistance to Hispanic, Asian American, Alaskan Native, and American Indian voters when their populations reach a certain threshold as determined by the Census. In 2002, the Bureau of the Census published the most recent list of jurisdictions covered by § 203 of the Voting Rights Act. *See* 67 Fed. Reg. 48,871 (July 26, 2002). A list of jurisdictions covered by § 4(f)(4) of the Voting Rights Act can be found at 28 C.F.R. 55, Appendix.

Section 208 of the Voting Rights Act provides that voters who need assistance to vote because of blindness, disability, or inability to read or write can receive assistance from the person of the voter's choice, other than the voter's employer, agent of the employer, or officer or agent of the voter's union. 42 U.S.C. § 1973aa-6 (1982). Finally § 11 of the Voting Rights Act prohibits any person from intimidating, threatening, or coercing any person who is voting or attempting to vote. 42 U.S.C. § 1973i(b) (2006).

Congress passed HAVA in order to improve the administration of elections by establishing minimum standards for states to follow in several key areas of election administration. These standards, which apply to elections for federal office, include requirements regarding provisional ballots for voters who believe they are registered but whose names do not appear on the voter registration list, requirements related to voting systems and state-wide voter-registration databases, and requirements regarding information provided to voters.

The National Voter Registration Act, also known as the NVRA or the Motor Voter Act, requires that states make voter registration

available to all applicants at all driver's license offices, public assistance and disability offices, and through the mail. The NVRA also requires that states ensure that:

- eligible voters who submit a timely application are added to the voter registration list;
- voters not be removed from the list without following the protections in the NVRA, including the notice and timing requirements; and
- states undertake the efforts required by the NVRA to remove ineligible voters from the rolls.

Although violations of this statute typically occur before election day, federal monitors sometimes record evidence of potential problems under this statute that would warrant further investigation.

All federal voting statutes enforced by the Civil Rights Division relate to ensuring that citizens have equal access to the franchise. Monitoring elections allows the Division to gather evidence and assess compliance with these important civil rights statutes.

III. The decision to monitor elections

In determining whether to recommend sending federal monitors, the Voting Section considers several factors. First, the Section surveys jurisdictions currently subject to existing court orders, consent decrees, and settlement agreements authorizing federal observers or monitors. The Section also considers jurisdictions where violations of the Voting Rights Act or other federal voting-rights statutes have recently occurred or jurisdictions where the Section has received complaints indicating a need to monitor for compliance with the federal voting-rights statutes. Finally the Section considers sending monitors to jurisdictions where substantial and credible evidence, including citizen complaints and requests for monitoring from civic participation organizations or election officials,

indicates the need to monitor for compliance with federal voting-rights laws.

As a result of these considerations, the Section sends hundreds of monitors to elections across the country each year. In calendar year 2006, for example, the Department sent 966 OPM federal observers and 575 Department staff members to monitor 119 elections in 81 jurisdictions in 24 states. In calendar year 2007, the Department sent 525 federal observers and 167 Department staff members to monitor 52 elections in 39 jurisdictions in 13 states. Examples of recent election monitoring (also called election "coverage") include:

- monitoring a 2006 special mayoral election in the Mississippi Delta in which voters elected the city's first African-American mayor;
- monitoring jurisdictions subject to consent decrees for violations of the minority language requirements of Section 203 of the Voting Rights Act; and
- monitoring federal elections for compliance with the requirements of the NVRA and HAVA.

IV. Federal observer coverage

A. Background on the federal observer program

The Civil Rights Division has two types of monitoring: monitoring with federal observers hired by OPM and monitoring with Department attorneys and nonattorney professional staff, typically called "attorney coverage."

Federal observers are typically intermittent employees of OPM who are assigned at the request of the Attorney General to monitor polling-place activities on election day and, sometimes, ballot counting procedures. The Voting Section can request the assignment of federal observers in certain jurisdictions subject to the special provisions of the Voting Rights Act. These observers are legally permitted to enter polling places in the covered jurisdictions and

observe assistance provided to voters. They document their observations in detailed reports, which Department personnel review to ensure that the observers have recorded all relevant information. Federal observers have participated in election monitoring for over four decades, since the enactment of the Voting Rights Act in 1965.

B. The assignment of federal observers

The Voting Rights Act has two avenues for the appointment of federal observers: by a federal court order under § 3(a) of the Voting Rights Act, 42 U.S.C. § 1973a(a) (2006); or by certification by the Attorney General under § 8 of the Voting Rights Act, as amended, 42 U.S.C. § 1973f (2006). A court may authorize observers in a legal proceeding under any statute to enforce the voting guarantees of the Fourteenth or Fifteenth Amendments to the United States Constitution. The Attorney General, in turn, can authorize observers in jurisdictions covered under § 4 of the Voting Rights Act, but only under circumstances identified by the statute. *See* 42 U.S.C. § 1973f (2006), as amended by Pub. L. No. 109-246, 120 Stat. 577, 578-79 (2006).

As of July 1, 2008, court orders authorized federal observers in 18 political subdivisions in 9 states: specifically, Arizona (1), California (4), Illinois (1), Louisiana (1), Massachusetts (2), New Mexico (2), New York (1), South Dakota (2), and Texas (4). (The United States was not a party to the two South Dakota cases). In addition, federal observers are authorized by Attorney General certification in 148 political subdivisions in 9 states: Alabama (22), Arizona (3), Georgia (29), Louisiana (12), Mississippi (50), New York (3), North Carolina (1), South Carolina (11), and Texas (17). The last county certified for federal observers by the Attorney General was Titus County, Texas in 2002. A list of jurisdictions covered by the federal observer provisions of the Voting Rights Act can be found on the Voting Section website at http://www.usdoj.gov/crt/voting/examine/activ_exam.htm.

Jurisdictions certified for federal observers by the Attorney General may seek termination of the

authority to assign federal observers pursuant to § 13 of the Voting Rights Act. 42 U.S.C. § 1973k (2006). No jurisdiction to date has sought such termination and in many cases local jurisdictions welcome the presence of federal observers. Most court orders authorizing federal observers, however, include an expiration date after which observers are no longer authorized in that jurisdiction unless the Voting Section obtains an extension.

In cases where federal observers are not authorized, the Department can separately assign Department staff to jurisdictions as part of an investigation where there is credible evidence of violations of federal voting rights laws. These monitors, however, do not have federal statutory authority to enter polling places without the permission of local and/or state authorities.

C. A typical federal observer coverage

Federal observer coverages can be very different with each election. Legal issues vary from state-to-state as do the controversies that can arise during the course of an election. Nevertheless, Voting Section personnel can safely identify some elements of observer coverage as "typical." For example, each federal observer coverage has a captain assigned by OPM, who oversees and coordinates OPM personnel and a lead attorney—usually a Voting Section attorney—who coordinates Department personnel and works closely with the captain during the election.

The lead attorney has several responsibilities with election coverage:

- to identify the polling places where observers will be stationed;
- to maintain contact with county officials and Voting Section supervisors about issues that arise on election day;
- to train observers on completing the observer report;
- to supervise and coordinate any additional Department personnel; and

- to review the reports prepared by federal observers on the night of the election.

The role of other Department staff members includes visiting polling sites on election day, at the direction of the lead attorney, and reviewing observer reports in the evening.

At least two federal observers are assigned to monitor each polling place. These observers record information in a forty-plus page standard report provided by OPM. The observers interview poll officials and voters on election day and typically tally the number of voters who leave the polling place without voting, who receive provisional ballots because their names are not on the list of registered voters, and who receive assistance (such as language assistance) from poll officials at the site. The observers also document confusion over procedures, disputes between poll officials and voters, and other disruptions that occur at the polls. In the evening, cocaptains review the reports, after which Department staff members review and ensure that the report is objective, understandable, and complete, with details included about voters who experienced problems and any actions taken by poll officials.

An 18 to 20-hour day is typical for the lead attorney, as well as other Department personnel. The Voting Section uses these reports in its investigations and litigation so thorough and complete reports are essential. In jurisdictions where a federal court authorized federal observers, the Section will file these reports with the court with personal information of voters redacted due to privacy concerns.

In the training of federal observers, OPM and the lead attorney stress several key points, which apply equally for Department personnel who volunteer on election coverage. Federal observers may not provide advice about election procedures or processes. A bedrock principle for all election monitoring is that Department staff and OPM federal observers do not interfere in the election process even when they witness potential or likely violations of federal law. Observers (and Department staff) must resist answering even

seemingly innocuous questions from poll workers such as "How are we doing?" lest the observers make a statement that a defendant could later use in a court proceeding. The role of federal observers is to gather and document information, not to offer advice or tell poll workers what to do. When faced with a question from poll officials, observers can instead ask the poll workers their views on how the election process went, rather than answering the query.

Federal observers may not assist voters or officials in any capacity (including serving as a translator) nor may observers comment on anything they hear or see while at the polling place. At times, observers must use their best poker faces and dutifully record statements by poll officials that the observers may view as offensive or prejudiced against minority voters. Federal observers must not attempt to resolve disputes even though poll officials and others sometimes ask federal observers to mediate disagreements. Finally, federal observers must refer all press inquiries to the Department's Press Office at 202-514-2007. All of these rules apply with equal force to Department personnel assigned to an election coverage.

V. "Attorney" monitoring

In jurisdictions where federal observers are not authorized, the Civil Rights Division can send "attorney" monitors—Department attorneys and nonattorney staff—to gather information and interview voters and poll workers on election day. Attorney monitoring generally requires the permission of the local jurisdiction. Although most jurisdictions cooperate with the Division and allow monitors to enter polling places, in a few cases, Department monitors must gather information from voters and other sources from outside the polling locations.

During a federal observer coverage, the OPM federal observers gather information and include that information in their reports. In contrast, on attorney coverage, Department personnel collect information first-hand and often complete investigative reports about the evidence. The

typical attorney-monitoring team includes one attorney and one nonattorney staff member. The team interviews voters, poll workers, and other persons present at the polls. The team frequently focuses on the procedures used by poll officials in processing voters (including steps poll workers take when voters do not appear on the voter rolls).

As with federal observer coverage, each attorney coverage includes a lead attorney who coordinates and supervises the other Department personnel in the field. The role of Department staff is to gather information. They are not allowed to interfere in the election process even to correct mistakes or violations committed by poll officials. Instead, the teams report what they observe to the lead attorney, who in consultation with a Voting Section supervisor, decides whether to contact the jurisdiction about the incident or take other steps as necessary (such as court action).

The information gathered during attorney coverage is critically important to the law enforcement efforts of the Voting Section. The information recorded in investigative reports must be complete, objective, and understandable. For example, if a poll worker makes inappropriate comments to a minority voter it is not sufficient for the attorney team to simply record that "the poll worker was rude to voters." Details are essential, including the name of the poll worker and the voter involved, the exact statement made, the tone of voice of the poll worker, and the presence of other voters in the room. Special care is given to interviewing voters, which usually occurs outside the polling place as the voters are leaving.

Attorney teams may stay at one site for the entire day or visit multiple sites throughout the day. At the end of the day the lead attorney typically reviews the investigative reports and questions the team members to ensure that all necessary information is included in the reports.

VI. Conclusion

Election monitoring with OPM federal observers or Department personnel is a critical component of the Division's efforts to enforce federal voting-rights laws. Voting Section attorneys can use the evidence collected and the witnesses identified during election monitoring to build their cases in jurisdictions that have failed to comply with the Voting Rights Act and other critical voting-rights statutes. Department staff who participate in election monitoring can witness history in the making as voters make choices that directly affect their hometowns, their states, and their country. For many, participating in election monitoring can be one of the most unique and rewarding experiences of their professional careers.

For additional information and training on election coverage please review the four-part Election Monitoring training in the "Civil Rights" category of Video on Demand available through JUSTLearn on the Office of Legal Education's Web site at http://10.4.203.131/kc/login/login.asp?kc_ident=kc0001.

The Department is in the process of developing online forms to be completed by Department staff members interested in volunteering for election coverage. In the interim, Department personnel can e-mail the Election Monitoring mailbox, vem@usdoj.gov, to express interest. ❖

ABOUT THE AUTHOR

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Changing Lives and Changing Communities: Expanding the Reach of Accessible Health Care to Deaf and Hard of Hearing Persons Through the U.S. Attorney Program for Americans with Disabilities Act Enforcement

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I. Changing lives

The local newspaper has an emotional letter to the editor written by a deaf woman.

In her letter, the woman described how, while shopping one evening, she collapsed with tremendous pain in her legs. She was taken to the emergency room (ER). Staff in the ER began to talk at her and ask questions. Being deaf made it nearly impossible for the woman to communicate with the ER staff. They finally shoved a notepad into her hand but, because of the pain, she could barely keep her eyes open or even breathe. Hours later she was sent to the inpatient wing of the hospital without knowing the reason or the possible duration of her stay. She was taken for tests and had to undergo surgical

procedures with little understanding of what was happening to her. She finally learned her diagnosis later in the week when a hearing relative came to visit. (Hypothetical situation).

The Civil Rights Division, together with the United States Attorneys' offices (USAO), is working to eradicate situations like this.

Currently, situations similar to this one are common. All too often, the circumstances involving deaf patients obtaining medical treatment raise great urgency. Assistant U.S. Attorneys (AUSAs) working in partnership with the Civil Rights Division have resolved complaints involving these compelling issues while enforcing the Americans with Disabilities Act (ADA). The ADA requires hospitals and physicians to provide communication aids, such as qualified interpreters, so that hospital personnel are able to communicate effectively with patients who are deaf or hard of hearing. Making the law a reality across an entire hospital system and throughout the nation requires creativity and committed enforcement efforts. This article explores effective communication in the health-care setting and includes a discussion of the ADA and related regulations dealing with effective communication, a case study by an AUSA highlighting the successful litigation of an important effective-communication case, and a

description of the U.S. Attorney Program for ADA enforcement.

II. The law: The ADA and effective communication

The ADA establishes a federal mandate that seeks to eliminate discrimination against individuals with disabilities. The ADA requires hospitals and medical providers to ensure that their communication with individuals who are deaf or hard of hearing is as effective as their communication with others. *See* 42 U.S.C. § 12182(b)(2)(A)(iii) (1990); 28 C.F.R. § 35.160 (2007); 28 C.F.R. § 36.303 (2007); 28 C.F.R. pt. 36, App. B at 713-716 (2007). A hospital does this by providing communication aids, known in the law as "auxiliary aids or services," which include qualified sign-language interpreters, the exchange of written notes, text telephones (TTYs) that assist deaf or hard of hearing persons in making phone calls, and a variety of other aids listed in the regulation. 42 U.S.C. § 12102(1) (1990); 28 C.F.R. § 36.303 (2007); 28 C.F.R. § 35.104 (2007). The specific type of auxiliary aid or service that will be necessary in a given context will depend upon the needs of the individual and the nature of the communication at issue.

The first thing a hospital must consider is the needs of the individual with the disability. A hospital should consult with the individual to discover what auxiliary aid or service is likely to be most appropriate. Some individuals who are deaf use American Sign Language (ASL). A qualified sign-language interpreter may be appropriate for someone who uses ASL while an oral interpreter—an interpreter who faces the deaf individual and carefully mouths the communication—might be necessary for others.

The nature of the communication depends on its length, complexity, and importance. In the health-care context, communications such as the intake, diagnosis, and presurgical meetings may require qualified interpreters for effective communication, whereas a question about where the restroom is located may be handled through

the exchange of written notes. It is important to evaluate the context carefully. The exchange of written notes might seem straightforward enough to someone who is not deaf but may be difficult for a person whose first language is ASL. Although ASL uses English words and signs, the grammar is distinct. For that reason, someone whose first language is ASL may not read or write in English as confidently as someone for whom English is a first language. The hospital must consult with the deaf or hard-of-hearing individual to determine which type of auxiliary aid or service is necessary for effective communication.

Under the ADA, interpreters must be "qualified," which does not refer to certification but rather to the appropriateness of the interpreter for the situation. 42 U.S.C. § 12102(1)(A) (1990); 28 C.F.R. §§ 35.104, 36.104 (2007). For example, in a medical setting, a qualified interpreter must be capable of using a specialized medical vocabulary. Considerations such as confidentiality also fall under the "qualified" requirement so hospitals cannot require family members or friends to interpret for deaf or hard-of-hearing patients. It is not only patients, but also the spouses or companions of patients who may be entitled to appropriate auxiliary aids or services under the ADA.

A health-care provider is not required to undertake any action that constitutes an undue burden, a significant difficulty or expense, or a fundamental alteration—a modification so significant that it alters the essence of the service being provided. Undue burden must, however, be measured against the total resources available to an entity. For example, the cost of an interpreter is not measured against the billing for a single appointment but against the resources of the facility more generally. If providing a particular auxiliary aid or service were to constitute an undue burden or fundamental alteration, the medical provider would still be required to provide an alternative that would ensure communication to the maximum extent possible.

Essential services like health care became a priority in the early years of ADA enforcement. In

1995, the Department of Justice (Department) intervened and resolved a lawsuit brought by the Office of Protection and Advocacy in Connecticut against ten acute-care hospitals for failing to provide sign language and oral interpreters for persons who were deaf or hard of hearing. *See Connecticut Ass'n of the Deaf v. Middlesex Mem'l Hosp.*, No. 395-CV-02408-TPS (D. Conn. Aug. 20, 1995). In a comprehensive consent decree signed by all of the parties and 22 other acute-care hospitals, the Department worked out many of the provisions for making both individual medical centers and the state-wide system fully accessible to individuals who were deaf or hard of hearing. This agreement spawned others which collectively provided a solid model for AUSAs who want to replicate these accomplishments in their communities. The models for settlement agreements and consent decrees have to be tailored to meet the unique demands of the particular health-care system and its rural or urban setting, but the basic elements for how to make a major medical center accessible to individuals who are deaf or hard of hearing remain fairly constant.

Through the U.S. Attorney Program for ADA Enforcement, U.S. Attorneys' Offices (USAOs) across the country have enforced the ADA's effective communication requirements in a number of landmark matters with far-reaching and rewarding results. Recently, for example, three USAOs settled matters with major medical health-care systems requiring comprehensive policies for effective communication in a range of situations from previously-scheduled appointments to emergency care, including among other things the provision of qualified interpreters in a timely manner. *United States v. Methodist LeBonheur Healthcare, Inc.*; *United States v. Cook County Hosp.*; *United States v. Norwegian Am. Hosp.*; *United States v. Meadowcrest Hosp.* In New York, the USAOs for the Southern and Eastern Districts resolved lawsuits by consent decrees which also ensured that the hospitals at issue would meet the communications needs of a variety of deaf or hard-of-hearing individuals. *See United States v. Saimovici v. United Parkway*

Hosp., Inc., No. 1-05-CV-07712 (S.D.N.Y. Sept. 1, 2005). In addition to injunctive relief, most of these resolutions also required the payment of monetary damages to complainants and civil penalties to the United States. The text of all these settlement agreements is available at <http://www.ada.gov>.

As technology has continued to develop, the issues in these cases are likewise evolving. Presently, an auxiliary aid or service called video-interpreter services (VIS) offers another means for individuals who are deaf or hard of hearing to gain access to health-care services. This technology is essentially a realtime video interpreter. The advantage of VIS is that it provides access 24 hours a day, 7 days a week, and may respond immediately in emergency settings or serve as a stopgap until a qualified interpreter arrives. A system like this may also provide access in rural areas where qualified interpreters may be dispersed, remote, or scarce.

In *United States v. Dimensions Health Corp. d/b/a Laurel Reg'l. (Laurel)*, the Disability Rights Section developed standards for ensuring the effective use of VIS, including adequate staff training and proficiency; high-resolution and high-quality video over a high-speed internet connection, including a clearly delineated picture of the face, mouth, and hands; and the clear transmission of voices, among others. The provisions of the *Laurel* decree have been incorporated into numerous United States Attorney settlement agreements. The text of this settlement agreements is available at <http://www.ada.gov>.

III. Case study: *United States v. Fairview Health Serv., No. 04-CV-4955 (D. Minn. Mar. 24, 2004)*

Like most AUSAs, I handle a wide variety of cases, both affirmative and defensive. Enforcing the ADA constituted a very small part of my federal practice back in 2002 when I received a letter Michael and Linda White of Minneapolis had written to the United States Attorney.

In their letter, Michael and Linda White, who are married, stated that they were both deaf and were recent patients at a hospital in Minneapolis owned and operated by Fairview Health Service, a large health-care provider in Minnesota. The Whites explained that in 2001, Michael's kidneys began to fail and that Fairview had approved Linda to be a kidney donor to Michael. The kidney transplant was scheduled to take place at a large Fairview hospital in June 2002. For the important pretransplant meeting with surgeons, the Whites had requested that Fairview provide an interpreter fluent in American Sign Language (ASL). In their letter to the United States Attorney, the Whites detailed how Fairview hired a totally unqualified interpreter for the lengthy meeting. The Whites became concerned when at one point the interpreter hired by Fairview threw up her hands and quit interpreting right when the surgeons were discussing the risks of the kidney-transplant surgery. The interpreter explained that she was not trained to interpret medical terminology and could not keep up with the instructions of the surgeons. The Whites were worried that they had not obtained all the information about the upcoming transplant. After the meeting, they requested two qualified interpreters the day of the surgery since they would be admitted to different rooms in the large hospital.

On the day of the surgery, Fairview failed to provide two interpreters for the Whites who were in separate operating rooms on different floors of the hospital. As a result, the one interpreter was forced to shuttle between the two rooms to interpret crucial presurgery information to each of the Whites. Linda White stated that during the application of anesthesia she did not have an interpreter present to explain what was occurring. Following the 6-hour transplant, the Whites were placed in rooms on different floors of the hospital. For the postoperative meeting with surgeons, Fairview provided only one interpreter who went back and forth between the two floors but kept missing the surgeons, who tried to communicate complicated information by notes.

The Whites experienced complications from the transplant surgeries and were hospitalized for extended periods, but Fairview failed to provide interpreters and relied on handwritten notes by nurses and doctors. These informal notes failed to provide effective communication regarding the complicated nature of the Whites' recovery. At an important discharge meeting, where the doctors needed to convey information about critical post-surgery care to the Whites, Fairview failed to provide any sign language interpreter.

After reading the letter from the Whites, I contacted Roberta "Robbie" Kirkendall, one of the coordinators of the U.S. Attorney Program in the Civil Rights Division's Disability Rights Section (DRS) and coordinated the opening of an ADA investigation against Fairview. Using models supplied by DRS, I drafted letters to Fairview requesting information regarding the Whites' complaint. The Whites had obtained an attorney at the Disability Law Center of Minneapolis and through counsel, I obtained from the Whites a signed release to obtain the medical information regarding their hospitalization at Fairview. A large Minneapolis law firm representing Fairview responded to my letter and eventually I obtained many documents regarding Fairview's policies and procedures on accommodating persons with disabilities and the specific information concerning the hospitalization of the Whites.

While the investigation of the Whites' complaint against Fairview was ongoing, Julie Oberley of Minneapolis logged onto the Department's ADA Web site and filed a complaint against Fairview regarding the lack of services her husband received at a Fairview hospital in Minneapolis in March and April of 2002. Her deaf husband was deceased at the time she filed the complaint, but she did not want other families to experience what she had as a companion of a deaf patient. DRS contacted me regarding the Oberley complaint and Oberley's complaint was consolidated with the one received from the Whites.

In her complaint against Fairview, Julie Oberley stated that throughout her husband's long

hospitalization in 2002, Fairview had routinely relied upon her to interpret for her husband. Julie Oberley explained that during many of the times she was asked to interpret she was emotionally distraught, given the complicated medical condition of her husband. She repeatedly asked the hospital to provide an interpreter for her husband, especially for scheduled procedures, but the hospital continued to rely on her to interpret. Late one night Mrs. Oberley was called at home by a hospital nurse who informed her that Mr. Oberley was bleeding internally and that he was undergoing emergency surgery. Julie Oberley explained that she would be in no condition to interpret following the surgery and requested that Fairview provide an interpreter for her husband. When she arrived at the hospital waiting room, she was approached by a woman who identified herself as a sign-language interpreter who had been called by Fairview to interpret. Mrs. Oberley was appalled when she observed the interpreter trying to interpret in the recovery room. At one point the interpreter stopped signing because she could not interpret the surgeons' medical terminology. At that point, Julie Oberley began to interpret for her husband even though she was emotionally distraught regarding her husband's medical condition.

After I received Julie Oberley's complaint, I contacted Fairview's representatives and began discussing a global settlement of both complaints. A week before a scheduled meeting with Fairview to discuss the complaints of the Whites and Julie Oberley, I was shocked to find in my office yet another complaint against Fairview on my desk. This letter was from Michael and Ariana DeMarco of St. Cloud, Minnesota. The DeMarcos explained how they were both deaf and that Ariana DeMarco had a surgical procedure performed at a Fairview hospital in May of 2003. Ariana DeMarco stated that she had requested a TTY in her room so that she and her husband could communicate with their families following the surgery. Fairview could not find an operable TTY during the 3-day hospitalization. The DeMarcos also complained that for important postsurgery meetings and a crucial discharge meeting,

Fairview had failed to provide an interpreter for them.

At the same time the Whites and the DeMarcos filed their ADA complaints, they also filed complaints against Fairview with the Minnesota Department of Human Rights alleging violations of the state law for the same conduct detailed in their federal complaints. I thus coordinated my investigation with that of the state and eventually reached out to an assistant state attorney general in order to find a resolution of both the state and federal complaints in a global consent decree.

With the invaluable help of Deb Madaras, a paralegal in my office who had been trained by DRS as an ADA investigator, I began holding monthly meetings with all of the parties to negotiate a consent decree.

The discussions were moving smoothly with regard to the equitable relief, but the parties could not agree on the monetary relief for the aggrieved parties. With a draft consent decree agreed to except for the money, the parties hired a private mediator to help settle the monetary claims. After a long 10-hour mediation, Fairview agreed to pay a total of \$208,000 in damages to the aggrieved parties and civil monetary penalties to the United States and the State of Minnesota.

In December 2004, I filed a complaint against Fairview in federal district court. The State of Minnesota, invoking supplemental jurisdiction, intervened in the federal case. The parties immediately filed the consent decree, which was signed by the judge that afternoon. The consent decree covered five large separate hospitals owned and operated by Fairview throughout Minnesota.

The Fairview consent decree was the first agreement in the country that required a specific level of certification for interpreters in the medical field. Though not required in the ADA, this certification was included because the State of Minnesota required such certifications under the state human rights laws. The specific certification requirement in the decree ultimately resulted in

the seven major hospital chains in the Minneapolis-St. Paul area forming a consortium, which then entered into a comprehensive agreement with a large interpreter service to pay highly certified sign language interpreters to be on call 24/7 to back up the hospitals' in-house, certified interpreters. Because the consortium covers all scheduled appointments as well as emergency room visits, the level of complaints received by the hospitals from deaf patients has decreased dramatically since 2004.

My work on the Fairview case was one of the highlights of my career as an AUSA. The day the settlement was announced the aggrieved parties held a press conference to discuss what the consent decree meant to them as deaf patients and as companions of deaf patients. Linda White told the reporters assembled that she hoped that no deaf patient would have to experience what she had endure because of the failure of a hospital to accommodate her disability.

In initiating and investigating an effective communication case under the ADA in a district, the prosecutor may want to consider the following:

- If no effective communication complaints have been received in the district, consider conducting a compliance review under the ADA. If it is decided to conduct a compliance review, DRS has model compliance letters and agreements for the prosecutor to review. Consider forming a working group and conducting a survey of the deaf and hard-of-hearing community to obtain information as to which hospitals to review.
- If the USAO does not regularly receive ADA complaints, the AUSA may want to reach out to the deaf and hard-of-hearing community by meeting with local independent living centers, interpreter associations, ADA associations, or disability law centers. These groups receive many complaints from deaf individuals that could form the basis of an ADA complaint. Contact your state attorney general's office or

the state office that investigates complaints under the state disability laws.

- After an ADA case is settled, consider having the United States Attorney hold a press conference with the aggrieved parties. In the Fairview case, the AUSA organized a press conference during which the Whites and Julie Oberley told their stories to the media. The story of the settlement ran on the front page of both the Minneapolis and St. Paul daily newspapers and was covered by local television and radio. If a press conference seems to be inappropriate, consider issuing a press release regarding the settlement in order to highlight that the USAO is enforcing the ADA.
- No matter the size of the case, the AUSA will want to tap into the resources that DRS has to help streamline the ADA investigation and settlement discussions. The Department has model agreements, consent decrees, justification memos, and legal research to help the AUSA.

IV. Changing communities: The U.S. Attorney Program for ADA Enforcement

The Civil Rights Division's U.S. Attorney Program for ADA Enforcement was developed to assist AUSAs who wish to become involved in assisting with the burgeoning number of cases which have arisen since the enactment of the ADA in 1990. The program began as a pilot project with a focus on effective communication in the nation's 9-1-1 call services in 1995. Since then, the project has expanded to include over half of the USAOs, which handle more than 500 matters annually. AUSAs in the program have resolved matters ranging from:

- achieving barrier removal in a chain of 700 restaurants;
- ensuring wheelchair accessibility in a town hall;

- obtaining an injunction against a local zoning authority that refused to grant permits to a center serving individuals with mental illness; and
- providing child care services for a child with HIV.

DRS staffs the U.S. Attorney Program with two attorneys, an architect, and an administrative assistant, all of whom are full-time consultants ready to assist AUSAs in identifying complaints and resolving them.

The coordinating attorneys will discuss with the AUSA the best way to develop each matter, answer legal and strategic questions, provide model documents from letters to settlement agreements or consent decrees for use in resolving matters, and review substantive communications and documents. On request, Division attorneys may also participate in negotiations and in drafting memoranda or agreements. The U.S. Attorney Program recognizes that AUSAs have active caseloads often including time-sensitive defensive litigation responsibilities. Accordingly, the coordinating attorneys can provide as much assistance as the AUSA may need. Because the Civil Rights Division has an interest in maintaining consistent policies and precedent nationwide, all substantive resolutions must be reviewed by the coordinating attorney, the Disability Rights Section Chief, and the Civil Rights Division's Office of the Assistant Attorney General.

The U.S. Attorney Program has been an extremely effective mechanism for enhancing the Department's ability to enforce the ADA. Although the ADA has made great strides in opening mainstream American life to people with disabilities, barriers remain in every community across America. The USAOs are best situated to expand the impact of the Civil Rights Division's ADA efforts. AUSAs have close ties to the communities where they live and work. Through these efforts, USAOs substantially augment the nation's awareness of and sensitivity to issues

facing individuals with disabilities in their communities and throughout the country.

Investigating complaints filed under the ADA is rewarding work and can be an important part of the affirmative civil enforcement work done by a USAO. If an AUSA is interested in learning more about the U.S. Attorney Program for ADA Enforcement, please contact the Program's coordinators, Roberta Kirkendall at (202) 307-0986 or Roberta.Kirkendall@usdoj.gov (alphabetically Alabama through Minnesota, and Southern and Eastern Districts of New York) or Kate Nicholson at (202) 514-0547 or Katherine.M.Nicholson2@usdoj.gov (Mississippi through the end of the alphabet).

V. Resources for AUSAs

- The Web site <http://www.ada.gov>, which is maintained by the DRS, has a variety of important technical assistance materials and resources for AUSAs, as well as businesses and local governments.
- The U.S. Attorney Program for ADA Enforcement hosts monthly conference calls on ADA topics and case enforcement strategies. For more information, contact Robbie Kirkendall at Roberta.Kirkendall@usdoj.gov.
- The Civil Rights Division and the National Advocacy Center have produced several television programs on ADA issues, which are available on Video on Demand. These shows are also broadcast periodically on the Justice Television Network (JTN). Check the JTN schedule for the next show.❖

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Federal Laws Protecting Religious Freedom

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I. Introduction

The Department of Justice (Department) is charged with enforcing a wide range of civil rights statutes designed to protect against religious discrimination and crimes based on religious bias and to preserve religious liberty. Titles II, III, IV, and VII of the Civil Rights Act of 1964 bar discrimination on the basis of religion, among other prohibited classifications, in public accommodations, public facilities, public education, and employment respectively. Criminal statutes, such as the Church Arson Prevention Act, 18 U.S.C. § 247 (2002), make it a federal crime to attack persons or houses of worship based on their faith. And in 2000, Congress passed the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (2000) (RLUIPA), which protects houses of worship, religious schools, and other religious institutions from discriminatory or unduly burdensome application of zoning and land marking laws and protects the right of persons confined to certain institutions to the free exercise of their religious beliefs.

As the United States has become more religiously diverse, protecting religious freedom

has become increasingly important. The United States today is home to more than 2,000 different faiths and denominations. Religious discrimination is a growing problem. For example, from 1992 to 2005 complaints of religious discrimination in employment filed with the Equal Employment Opportunity Commission (EEOC) went up 69 percent. During this same period, sex discrimination complaints rose 6 percent, national origin discrimination complaints rose 8 percent, and racial discrimination complaints actually decreased by 9.5 percent. Similarly in enacting RLUIPA in 2000, Congress found widespread discrimination against religious institutions and particularly against religious minorities by state and local officials making land-use decisions. The attacks of 9/11 and the resulting increase in bias crimes and discrimination against Muslims, as well as Sikhs and others mistakenly perceived to be Muslim, underscored the need for rigorous enforcement of religious civil rights laws.

To address these concerns, in 2002 the Civil Rights Division created the position of Special Counsel for Religious Discrimination within the Office of the Assistant Attorney General. The attorney filling this position is to coordinate the Division's enforcement of the various laws within its jurisdiction protecting religious freedom and to oversee education and outreach in this area. From fiscal years 2001 to 2006, the Division sharply

increased enforcement of these various laws as set forth in the Attorney General's *Report on Enforcement of Laws Protecting Religious Freedom: Fiscal Years 2001-2006* (available at <http://www.FirstFreedom.gov>). To underscore the Department's commitment to enforcing these laws, in February 2007 the Attorney General launched a new initiative, *The First Freedom Project*. This initiative takes its name from the fact that religious freedom, which is the first right set forth in the Bill of Rights, is often referred to as "the First Freedom." The initiative includes:

- a commitment to increased enforcement;
- a series of seminars around the country to educate religious, community, and civil rights leaders, attorneys, and local government officials about these laws;
- other public education efforts including the <http://www.FirstFreedom.gov> Web site; and
- creation of a Department-wide Task Force on Religious Freedom.

The cases and issues discussed below are discussed in greater depth on the First Freedom Project Web site and in the report cited above.

II. Department enforcement of laws protecting religious freedom

A. Education

The Civil Rights Division's Educational Opportunities Section enforces Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6 (1972), which prohibits discrimination based on religion in public primary and secondary schools, as well as public colleges and universities. In primary and secondary schools, Title IV is triggered when a student is "deprived by a school board of the equal protection of the laws." *Id.* at (a)(1). In the higher education context, Title IV only applies when a student is "denied admission or not permitted to continue," *id.* at (a)(2), on the basis of protected classifications, such as religion. Additionally, Title IX of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2 (1972), permits the Attorney General to intervene in any action in

federal court involving any subject matter "seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of race, color, religion, sex or national origin," if such intervention is timely made and the Attorney General certifies that the case is of "general public importance." *Id.* The Attorney General has delegated responsibility for enforcement of these provisions to the Assistant Attorney General for the Civil Rights Division.

From 2001-2006, the Civil Rights Division's Educational Opportunities Section reviewed 80 cases and opened 33 investigations involving various types of religious discrimination, resulting in 2 consent decrees, 1 settlement, and 13 friend-of-the-court briefs. The largest category of these cases involved harassment based on religion with Muslims being the most frequent victims. For example, the Division reached a settlement in March 2005 in a case involving an elementary school teacher in the Cape Henlopen, Delaware school district who ridiculed a Muslim elementary student in front of the class because her mother wore a head scarf, told the student that Islam preached hate, and proselytized the student with her Christian faith. The settlement required, among other things, training for all teachers in the district and specific performance goals for the teacher in question.

The next largest category of cases involves students who were barred from engaging in religious expression where comparable secular expression is permitted. The Division, for example, filed a friend-of-the-court brief in a New Jersey case where a student was barred from singing a contemporary Christian song at a Friday night talent show held at the school. The court ruled that the singing was a constitutionally protected individual expression of the student and not government religious speech barred by the Establishment Clause as the school district had argued. *O.T. v. Frenchtown Elementary Sch. Dist. Bd. of Educ.*, No. 3:05-CV-2623 (D. N.J. Dec. 11, 2006). These cases also can involve speech during the school day. For example, the Division filed an

amicus brief in a case in which high school students were suspended for handing out candy canes with religious messages attached. *Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98 (D. Mass. 2003). The Division also reached a settlement in June 2007 in a case in which the Lewisville (Texas) Independent School District had forbidden Muslim high school students from praying in a common area during lunch where other students gathered for various secular purposes. The settlement permits the prayers in a common room adjacent to the cafeteria.

Other religious-discrimination-in-education cases handled by the Division have included cases where student religious groups sought the same access as other student clubs to hold meetings, *see, e.g., Donovan v. Punxsutawney Sch. Dist.*, 336 F.3d 211(3d Cir. 2003) (holding student Bible club must be permitted to meet during activities period during school day when other student-created clubs were permitted to meet at this time); cases where students were barred from wearing religious head-coverings, *see, e.g., Hearn and United States v. Muskogee Pub. Sch. Dist.*, No. 6:03-CV-00598-S (E.D. Okla., consent decree filed May 20, 2003) (United States intervened and obtained consent decree in case in which Muslim girl had been barred from wearing religious head scarf to school when other students had been permitted to wear head-coverings for medically-related reasons in past and superintendent made exceptions to dress code on case-by-case basis); and refusal to grant excused absences for religious holidays, *see, e.g., Scheidt v. Tri-Creek Sch. Corp.*, No. 2:05-CV-00204 (N.D. Ind., complaint filed May 18, 2005) (Division filed amicus brief in case involving student threatened with suspension for exceeding the one-religious-holiday maximum for excused absence when unlimited excused absences were available for attending the state fair, serving as a page at the state legislature, and medical and family reasons; case resolved by settlement).

B. Employment

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1991), prohibits discrimination in public and private employment on a number of bases including religion. It also requires employers to make reasonable accommodation of employees' religious observances and practices unless doing so would cause the employer undue hardship. The Department has responsibility for bringing suits under Title VII against state and local governmental employers. Under § 706 of Title VII, 42 U.S.C. § 2000e-5 (1991), individual charges of discrimination against state and local governmental entities must be filed first with the EEOC, which refers charges to the Civil Rights Division if the EEOC made a reasonable cause determination and conciliation failed. When a pattern-or-practice of discrimination by a governmental entity is alleged, the Civil Rights Division may file suit on its own volition under § 707 of Title VII, 42 U.S.C. § 2000e-6 (1972).

Since 2001, the United States has filed four pattern-or-practice cases under Title VII involving religious discrimination. In *United States v. Los Angeles Metro. Transit Auth.*, No. 2:04-CV-07699 (C.D. Cal., consent decree filed, Oct. 4, 2005), the United States reached a consent decree requiring implementation of measures to accommodate bus drivers whose faith requires them to refrain from work on the Sabbath. In *United States v. New York Dep't of Corr.*, No. 1:07-CV-02243 (S.D.N.Y., settlement entered Jan. 18, 2008), the United States, through the United States Attorney's Office (USAO) for the Southern District of New York, reached a settlement requiring implementation of a procedure to assess claims by corrections officers requesting exceptions to uniform and grooming rules that conflict with their religious practices. A similar suit that remains ongoing is *United States v. New York Metro. Transit Auth.*, No. 1:04-CV-04 237 (E.D.N.Y., complaint filed Sept. 30, 2004), in which the United States is suing on behalf of Muslim and Sikh bus and subway operators who have been forbidden to wear turbans and head-scarves with their uniforms. The fourth pattern-or-

practice case involved a challenge by state employees in Ohio who had conscientious objections to supporting the state employees' union because of the union's advocacy of certain social causes that conflicted with their religious beliefs. The United States reached a consent decree requiring the employees to be permitted to donate an amount equivalent to their union dues to charity. *United States v. Ohio*, No. 2:05-CV-00799 (S.D. Ohio, consent decree filed Sept. 5, 2006).

C. Housing and lending discrimination

The Civil Rights Division's Housing and Civil Enforcement Section, in conjunction with the USAOs, enforces the Fair Housing Act (FHA), 42 U.S.C. § 3601 (1995) and the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 (1991). Both of these statutes include religion as a protected classification. From 2001 through May 2008, the Housing and Civil Enforcement Section opened 18 FHA and ECOA investigations into religious discrimination. The Department also filed five religious discrimination lawsuits under these statutes during the same period.

The lawsuits filed by the Department have included denial of housing based on religion, *see, e.g., United States v. Hillman Hous. Corp.*, No. 1:02-CV-0626 (S.D.N.Y., consent decree entered Oct. 27, 2004) (case alleging that co-op board denied couple purchase of apartment because of their ethnicity and religion); harassment based on religion, *see, e.g., United States v. San Francisco Hous. Auth.*, No. 4:02-CV-04540 (N.D. Cal., consent decree entered Jan. 16, 2004) (alleging failure to take action to prevent tenant-on-tenant violence against Muslims); and collecting religious information on credit applications, *see United States v. Fid. Fed. Bank*, No. 02-03906 (E.D.N.Y., complaint filed July 8, 2002) (resolved by settlement).

The Housing and Civil Enforcement Section has also investigated a number of cases involving discrimination in the "terms and conditions" of the sale or rental of housing with regard to religious expression by residents. These have included

cases involving allegations that Jewish residents were not allowed to put mezuzahs on their door frames when secular items were permitted, that residents were barred from holding Bible studies in common areas that could be reserved for various purposes, and that a Catholic resident was told by a condominium association to take down a statue of the Virgin Mary from her balcony.

D. Public accommodations and public facilities

The Housing and Civil Enforcement Section also enforces Titles II and III of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1964). Title II prohibits discrimination in public accommodations, such as restaurants and motels, on the basis of race, color, religion, or national origin. From 2001-2006, the Division opened seven Title II investigations involving religion. These cases have involved a range of issues. For example, the Division settled a case in which a restaurant in Springfield, Virginia told a Sikh man that he had to remove his turban to enter the restaurant. *Settlement Agreement Between the United States and F & K Mgmt., Inc., D/B/A Hard Times Café and Santa Fe Cue Club* (Feb. 28, 2003) available at <http://www.usdoj.gov/crt/housing/documents/hardtimessettle.htm>. The settlement required posting of nondiscrimination notices, other publication of the restaurant's nondiscrimination policies, and training for its employees. Two similar cases in Pennsylvania were resolved quickly by the establishments in response to Civil Rights Division investigations.

Title II of the Civil Rights Act of 1964 protects against discrimination in public accommodations that are privately owned businesses open to the general public. Title III of the Act, 42 U.S.C. § 2000b (1964), protects against discrimination in public facilities which are publicly owned and operated facilities open to the public, such as parks and community centers. Title III authorizes the Attorney General to bring suit when a person has been denied equal access to public facilities. For example, in the case of *Barton v. City of Balch Springs* a group of seniors brought a federal suit against a city-run senior

center that had told seniors that they could no longer pray before meals, sing Gospel songs, or hold Bible studies. After the Civil Rights Division opened an investigation, the city settled with the seniors. *Barton v. City of Balch Springs*, No. 3:03-CV-2258-G (N.D. Tex., settlement reached Jan. 8, 2004).

E. The land use provisions of RLUIPA

___ Houses of worship and religious schools often face discrimination from local zoning authorities or face unjustifiably burdensome restrictions on their ability to use their property for worship and religious instruction. In nine hearings over the course of 3 years, leading up to the enactment of the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000, 42 U.S.C. § 2000cc-2000cc(5) (2000), Congress compiled what it termed "massive evidence" of widespread discrimination against religious institutions by state and local officials in land-use decisions. *See* 146 Cong. Rec. S7774-81 (daily ed. July 27, 2000) (Joint Statement of Sen. Hatch and Sen. Kennedy). In particular, Congress found that minority religions are disproportionately disadvantaged in the zoning process. For example, Congress found that while Jews make up only 2 percent of the U.S. population, 20 percent of recorded zoning cases involved synagogues. Overall, faith groups constituting 9 percent of the population made up 50 percent of reported court cases involving zoning disputes. Congress found that even well-established religious denominations frequently faced discrimination and exclusion. Additionally, Congress found that zoning codes and land-marking laws sometimes exclude religious assemblies in places where they permit fraternal organizations, theaters, meeting halls, and other places where large groups of people assemble for secular purposes. In other situations, Congress found that zoning codes or land-marking laws may permit religious assemblies only after highly discretionary proceedings before zoning boards or land-marking commissions, which can, and often do, use that authority in discriminatory ways.

To address these concerns, Congress unanimously enacted RLUIPA. RLUIPA prohibits zoning and land-marking laws that substantially burden the religious exercise of churches or other religious assemblies or institutions unless implementation of such laws is the least restrictive means of furthering a compelling governmental interest. This prohibition applies in any situation where: (1) the state or local government entity imposing the substantial burden receives federal funding; (2) the substantial burden affects or removal of the substantial burden would affect, interstate commerce; or (3) the substantial burden arises from the state or local government's formal or informal procedures for making individualized assessments of a property's uses. 42 U.S.C. § 2000cc(a) (2000).

Furthermore, RLUIPA prohibits zoning and land-marking laws that: (1) treat churches or other religious assemblies or institutions on less than equal terms with nonreligious institutions; (2) discriminate against any assemblies or institutions on the basis of religion or religious denomination; (3) totally exclude religious assemblies from a jurisdiction; or (4) unreasonably limit religious assemblies, institutions, or structures within a jurisdiction. *Id.* § 2000cc(b).

In addition to creating a private cause of action, RLUIPA authorizes the Attorney General to bring suits to enforce the Act. The Attorney General has delegated this responsibility to the Assistant Attorney General for the Civil Rights Division. Within the Civil Rights Division, cases under RLUIPA's land-use provisions are handled by the Housing and Civil Enforcement Section. Since 2001, the Division has reviewed 156 RLUIPA matters and has opened 38 full investigations. Seventeen of these full investigations have been resolved favorably without the filing of a lawsuit.

The Department has filed five lawsuits under RLUIPA. Three of these suits were successfully resolved. *United States v. City of Hollywood*, No. 05-60687 (S.D. Fla., consent decree entered July 7, 2006) (denial of permit to Orthodox Jewish synagogue in residential neighborhood where

such permits were routinely granted to other houses of worship and nonreligious assemblies); *United States v. Maui County*, 298 F. Supp. 2d 1010 (D. Haw. 2003) (Christian church that incorporated organic farming as part of its belief system barred from agricultural district where various secular assemblies were permitted); *United States v. City of Waukegan*, No. 08 C 1013 (N.D. Ill., consent decree entered Feb. 25, 2008) (zoning code provisions were more restrictive for houses of worship than for nonreligious assemblies and institutions such as clubs, lodges, meeting halls, and theaters). Two of these suits, filed by the USAO for the Southern District of New York, are pending. *United States v. Village of Suffern*, No. 06-CV-7713 (S.D.N.Y., filed Sept. 26, 2006) (denial of zoning approval to group operating a Shabbos House next to hospital where Orthodox Jews can stay to visit the sick without breaking the Sabbath), and *United States v. Village of Airmont*, No. 05-CV-5520 (S.D.N.Y., filed June 10, 2005) (suit alleging that village banned boarding schools specifically to keep Hasidic Jews who educate their young men in boarding schools from settling in the village).

The Division has also filed eight friend-of-the-court briefs in federal appellate cases raising important issues under RLUIPA. *See, e.g., Midrash Sephardi v. Town of Surfside*, 366 F.3d.1214 (11th Cir. 2004) (arguing that a town barring two small Orthodox Jewish congregations from locating in its commercial district, but permitting fraternal organizations and other secular assemblies, violated the equal-terms provision of RLUIPA; Court of Appeals agreed and ruled for the plaintiff); *Guru Nanak Sikh Soc'y v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006) (arguing that county imposed a substantial burden on Sikh congregation where only zones in which houses of worship were allowed were residential and agricultural zones by special use permit, and the congregation had purchased property in each zone and had both projects rejected).

F. Rights of institutionalized persons

The Civil Rights Division's Special Litigation Section is charged with enforcing federal laws

protecting the rights of persons in certain institutions operated by state or local governments, including prisons, juvenile detention facilities, mental health institutions, and nursing homes. Section 3 of RLUIPA, 42 U.S.C. § 2000cc-2 (2000), provides that if a regulation imposes a substantial burden on the religious beliefs or practices of persons confined to certain institutions, the government must show a compelling justification pursued through the least restrictive means. In addition to creating a private cause of action for institutionalized persons, RLUIPA also authorizes the Attorney General to bring suits to enforce this provision. The Division has not filed any suits under Section 3 of RLUIPA to date, but has conducted preliminary inquiries in a wide range of subject matters involving alleged RLUIPA violations including access to clergy and religious meetings, provision of kosher meals and other religious dietary accommodations, and access to religious items and texts, among others.

Under the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997-1997j (1980), and the pattern-or-practice provision of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (1994), the Special Litigation Section of the Civil Rights Division can investigate conditions in certain institutions and file lawsuits to remedy a pattern-or-practice of unlawful conditions. Sometimes these cases include religious discrimination elements. For example, the Civil Rights Division found that juveniles in detention facilities in Raymond and Columbia, Mississippi and in Alexander, Arkansas, were being denied their constitutional rights by being required to participate in Christian religious programs. Findings letter from the Civil Rights Division on *Matter of Oakley and Columbia Training Sch.*, (June 19, 2003); findings letter from the Civil Rights Division on *Matter of Alexander Youth Serv. Ctr.* (Nov. 8, 2002). The Division stressed in both findings letters that while juveniles confined to facilities have the right under the Constitution and RLUIPA to engage in religious activities and that religious instruction can further the

rehabilitative mission of the institutions, juveniles cannot be forced to participate.

G. Crimes against persons and property based on religion

There is perhaps no religious right as basic as the right to gather for worship or simply to walk down the street without fear of being attacked because of one's faith. The Civil Rights Division's Criminal Section in conjunction with USAOs around the country prosecutes violations of criminal civil rights statutes. In the area of religion-based bias crimes against individuals, these violations encompass 18 U.S.C. § 241 (1996) (conspiracy to deprive a person of his or her civil rights), 18 U.S.C. § 245 (1996) (criminal interference with federally protected activities), and 42 U.S.C. § 3631 (1996) (criminal interference with housing rights).

Two provisions specifically address vandalism and arson of religious property and interference with a person's exercise of his or her religion at a house of worship. The Church Arson Prevention Act, 18 U.S.C. § 247 (2002), makes it a crime to deface, damage, or destroy religious real property or interfere with a person's religious practice in situations affecting interstate commerce. The Act also bars defacing, damaging, or destroying religious property because of the race, color, or ethnicity of persons associated with the property.

Recent prosecutions under these statutes include *United States v. Reid*, 2007 WL 3072053, slip op. (E.D. Pa. Oct. 19, 2007), in which a Philadelphia woman pleaded guilty to a federal charge of criminal interference with employment on the basis of race and religion by sending an anonymous, threatening note to her supervisor who is Muslim and Arab-American. The defendant was sentenced to 8 months confinement and 2 years probation. In *United States v. Laskey*, 6:05-CR-60053 (D. Or. Apr. 21, 2005), members of the white supremacist group known as the Volksfront pleaded guilty to throwing rocks with swastikas etched in them through the windows of a synagogue in Eugene, Oregon during services

and were sentenced to prison terms ranging from 1 to 11 years. In addition, in *United States v. Nunez-Flores*, No: 3:04-MJ-04159(W.D. Tex. Sept. 20, 2004), the defendant pleaded guilty to throwing a Molotov cocktail at an El Paso mosque and placing another on its utility meter, resulting in a 171-month prison sentence. Similarly, in *United States v. Dropik*, No. 1:05-CR-00207 (E.D. Wis., W.D. Mich. Aug. 31, 2005), a man pleaded guilty to burning two churches because he was angry at African-Americans. He was sentenced to 63 months in prison.

III. Conclusion

Preserving religious liberty requires an ongoing commitment to protecting this most basic freedom for people of all faiths. Through *The First Freedom Project*, the Division hopes to educate the public, religious and community leaders, and government officials about the range of religious-freedom rights that all Americans possess, ways that these rights can be respected, and how to contact the Department with potential violations. Through continued vigorous enforcement of these laws by the Division and USAOs, the Department can help protect these important rights. ❖

ABOUT THE AUTHOR

□ **Eric W. Treene** joined the Civil Rights Division in 2002 as the first Special Counsel for Religious Discrimination. Prior to that, he was Litigation Director at the Becket Fund for Religious Discrimination where he represented Christians, Jews, Muslims, Sikhs, Native Americans, and Buddhists in a wide range of religious liberty cases. He is the author of a number of articles about constitutional law.✉

Selected Issues in Criminal Civil Rights Enforcement

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The Criminal Section works in close partnership with the 93 U.S. Attorneys' Offices (USAOs) to enforce the nation's criminal civil rights statutes. Many of these investigations and prosecutions generate intense public interest and at times involve historically significant events in our nation. These cases include *United States v. Price*, 383 U.S. 787 (1966); the prosecution of law enforcement officers and their Klansmen co-conspirators for the brutal murders of three civil rights workers in Mississippi in 1964 on which the movie *Mississippi Burning* was based; the prosecution of National Guardsmen who fatally shot students at Kent State University in 1970; and the 1992 successful federal prosecution of officers involved in the notorious videotaped beating of Rodney King in Los Angeles after the officers' acquittal in state court sparked widespread rioting in the city.

The jurisdiction of the Civil Rights Division's criminal enforcement includes four major priority areas: official misconduct, hate crimes, human trafficking, and access to reproductive health services. Because of the significant challenges posed by these investigations and prosecutions, the Criminal Section has forged strong working relationships with USAOs throughout the country to leverage the specialized expertise of prosecutors within the Civil Rights Division and the litigation skills and knowledge of local practice of Assistant United States Attorneys (AUSAs). Indeed, most criminal civil rights cases are staffed with attorneys from both the Criminal Section and the local USAOs. These joint endeavors have proven to be the most effective

means of successfully prosecuting these notoriously challenging cases, and this strategy is even memorialized as official policy in the *U.S. Attorneys' Manual*. USAM Sections 8-3.100 to 8-3.140.

There is much to say about all aspects of criminal civil rights jurisdiction and the Division has developed extensive materials describing the often complex statutes, case law, and prosecution strategies in these difficult cases. The text of the criminal civil rights statutes and examples of successful prosecutions are available on the Criminal Section's Home Page of the Civil Rights Division's Web site at <http://www.usdoj.gov/crt/crim/index.html>.

This article and the three that follow it will focus on three of the key areas of the Civil Rights Division's criminal enforcement efforts: hate crimes, civil rights era cold cases, and human trafficking. Hate crime prosecutions have always been at the heart of the Civil Rights Division's enforcement program. This article, written by Bobbi Bernstein, offers insight into the complex nature of the federal hate crime statutes by walking through some of the unique challenges that are inherent to hate crime prosecutions. The following article, written by Paige Fitzgerald, discusses the Department's recently launched "Cold Case" initiative. This initiative has provided a unique opportunity for the Civil Rights Division, along with our partners in the USAOs and the Federal Bureau of Investigation, to right some of the wrongs of the past by reviewing homicide cases from the civil rights era to determine whether there is federal jurisdiction to bring prosecutions or to investigate further to determine whether sufficient evidence can be developed to support prosecutions in either federal or state court.

Human trafficking cases have been a part of the Department's enforcement effort since the Reconstruction Era when Congress passed several criminal statutes enforcing the Thirteenth Amendment's prohibition against slavery and involuntary servitude. The passage of the Trafficking Victims Protection Act (TVPA) in 2000, however, provided dramatically enhanced legal tools to combat this problem including broader criminal statutes, programs to raise awareness of this often-hidden crime, and critical protections for the rights of trafficking victims. This article, written by Robert Moossy and Hilary Axam, explains some of the key provisions of the TVPA and provides examples of cases in which these new statutes were effectively used.

The vigorous enforcement of the federal criminal civil rights statutes is a vital part of the Civil Rights Division's core mission and one which we could not accomplish without our partners in the USAOs. We hope these articles provides some helpful information regarding the Criminal Section and the federal criminal civil rights statutes we are all privileged to enforce.❖

ABOUT THE AUTHOR

❑ **Mark Kappelhoff** is the Chief of the Criminal Section of the Civil Rights Division. He joined the Criminal Section in 1998 and served as a Trial Attorney and Deputy Chief where he prosecuted the full range of cases handled by the Section. He previously served as a Trial Attorney in the Environmental Crimes Section of the Environment and Natural Resources Division.⌘

Federal Hate Crime Prosecutions

*Bobbi Bernstein
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I. Introduction

A black child wakes, terrified, to the sound of fire crackling outside her bedroom window. She looks outside and sees a six-foot-tall wooden cross burning in her front yard.

An Arab family hosting a birthday picnic in a public park is chased and assaulted by bald teenagers shouting "White Power!"

A gay man is harassed at a bar then beaten outside the bar by a mob yelling "faggot."

A black man is beaten to death on the street by a defendant who had proclaimed an hour

before that he would kill the next black person he saw.

What constitutes a hate crime? Although the term "hate crime" is sometimes used in casual conversation to refer to any act of violence motivated by animus toward a racial or otherwise-identifiable group, a federal hate crime is much more narrowly defined. As an initial matter, there is no general federal hate crime statute. A bias-motivated threat or act of violence is only prosecutable federally when the evidence proves that the crime was motivated by a prohibited bias motivation *and* was specifically intended to interfere with a victim's enjoyment of a right or activity protected by federal law.

II. Federal hate crime statutes - 18 U.S.C. § 245 (1996) & 42 U.S.C. § 3631 (1996)

Several statutes provide federal jurisdiction over bias-motivated crimes. Title 18 U.S.C. § 245(b)(2) (1996), sometimes referred to as the federal hate crime statute, prohibits the use of violence or threats of violence because of a victim's race, color, national origin, religion, and because of the victim's enjoyment of one of the following six federally-protected rights specifically enumerated in the statute:

A) obtaining a public education;

B) using a program or facility provided or administered by a state or subdivision thereof;

C) applying for or working in private or state employment;

D) serving on a grand or petite jury;

E) traveling in interstate commerce or using a common carrier; or

F) using a place of public accommodation for entertainment.

In order to prove a violation of § 245(b)(2), the government must prove:

- that a defendant used or threatened the use of force;
- that the defendant acted willfully;
- that the defendant acted because of race, color, national origin, or religion; and
- that the defendant acted because the victim was enjoying or attempting to enjoy one of the listed federally-protected activities.

The statute also specifies that no prosecution under § 245(a)(1) can begin until the Assistant Attorney General for the Civil Rights Division certifies that the prosecution is in the federal interest and necessary to secure substantial justice. Prosecutors in the Criminal Section of the Civil Rights Division can provide Assistant United

States Attorneys (AUSAs) with assistance in obtaining this required certification.

Federal prosecutors have used this statute to prosecute, among many other things:

- the racially motivated murder of a Jewish radio talk-show host (for interfering with employment);
- assaults by skinheads against minorities in public parks (for interfering with the use of a state-sponsored facility);
- the attempted murder of Jewish children at a Jewish Community Center (for interfering with the use of a place of public accommodation); and
- violent threats aimed at students at public schools and universities (for interfering with education).

Although, as these examples illustrate, the federal hate crime law prohibits a variety of bias-motivated conduct, its reach is restricted by the statute's unique requirement that the government prove that the defendant acted not just with one specific motive, but with two. In any § 245(b)(2) prosecution, the government must establish both that the defendant acted because of race (or other covered characteristic) and that he or she acted *because* of the victim's enjoyment of one of the enumerated rights. Because of this dual-motive requirement for federal jurisdiction, many offenses traditionally viewed as "hate crimes," such as gay-bashings or racially-motivated assaults not linked to one of the six enumerated activities, fall outside the scope of the federal statute.

A second federal statute, 42 U.S.C. § 3631 (1996), prohibits violence (or threats of violence) motivated by a victim's race, color, national origin, religion, sex, family status, or disability (note that this statute includes bias motivations not included in § 245) if the offense is also motivated by the victim's rental, purchase, sale, or enjoyment of a home. Federal prosecutors regularly use this statute to prosecute defendants who engage in cross-burnings, assaults, threats,

arsons, and other crimes aimed at intimidating victims in the enjoyment of their homes. Recent prosecutions under this statute have involved:

- cross-burnings at the homes of black and multiracial families;
- threatening communications mailed and e-mailed to victims' homes;
- assaults intended to run minorities out of their communities; and
- acts of vandalism intended to frighten victims and drive them from their homes.

Violations of both of these hate crime statutes—§§ 245 and 3631—constitute misdemeanors unless the crimes result in bodily injury or involve another statutorily-enumerated aggravating factor. Both statutes establish maximum punishments of 10 years for crimes that result in bodily injury or involve the use (or attempted use) of a dangerous weapon, explosives, or fire, and maximum sentences of life imprisonment or death for crimes that result in death or involve attempted murder, kidnapping, or aggravated sexual abuse.

III. Conspiracy Against Rights—18 U.S.C. § 241(1996)

Although basic violations of §§ 245 and 3631 are misdemeanors if there are no aggravating factors involved, a third civil rights statute, 18 U.S.C. § 241 (1996), establishes a felony if two or more people conspire to interfere with a victim's federally-protected rights. Unlike §§ 245 and 3631, the conspiracy statute proscribes interference with *any* federal right, not just a right specifically mentioned in the statute. Section 241 is the same statute used in the color-of-law context to reach conspiracies by police officers and jailers who abuse or frame arrestees. In the hate-crime context, this statute is used to reach conspiracies aimed at interfering with federal rights, including among others:

- housing rights guaranteed by the Fair Housing Act;

- public accommodation rights guaranteed by Section II of the Civil Rights Act of 1964;
- property rights guaranteed by 42 U.S.C. § 1982; and
- other rights protected by federal law or the United States Constitution.

The civil rights conspiracy statute, unlike the general conspiracy statute codified at 18 U.S.C. § 371 (1994), has no overt act requirement. Also unlike the general statute, § 241 is always a felony even if the conduct that is the object of the conspiracy constitutes only a misdemeanor. Thus, a § 241 conspiracy aimed at driving a black family from a neighborhood is a felony even if the underlying conduct—for example, spray-painting violent threats on the victims' home—would be prosecutable only as a misdemeanor.

IV. Applying the statutes

The cross-burning that woke the terrified black child in the middle of the night would be prosecuted pursuant to § 3631 as a federal housing violation and, if two or more people were involved, pursuant to § 241 as a civil rights conspiracy. Both offenses would be felonies—§ 3631 because of the use of fire and § 241 because a civil rights conspiracy is always a felony.

The skinhead assault in a public park would be prosecuted as a violation of § 245(b)(2)(B) and § 241 as long as the government could show that the defendants acted not only because of race but also because the victims were in the park. If evidence were developed, for example, showing that the skinheads regularly congregated in the park and considered the park to be theirs, this case would be prosecuted as a federal hate crime. The § 245 offense would be a felony if the attack resulted in pain or other bodily injury.

The bias-motivated attack against a gay man at a bar would not fall within the jurisdiction of any federal hate crime statute because none of these statutes reaches violence motivated by animus related to sexual orientation.

The murder of the African-American man would likely fall outside the reach of the federal hate crime laws. If the crime were motivated simply by racial animus and not also by a desire to interfere with a federally-protected right, the offense, however horrible, would be unreachable federally. If evidence were developed, however, that showed that the defendant intended to run black people out of a particular neighborhood (to interfere with housing rights) or to impede the victim's use of a public street (to interfere with the use of a facility provided or administered by a state) the matter could be prosecuted in federal court.

V. Recent hate crime prosecutions

A. Conspiracy to threaten, assault, and murder African-Americans.

United States v. Saldana, No. 04:CR-415 (Nov. 22, 2006 and Jan. 24, 2007 C.D. Cal.). Four members of a violent Latino street gang in Los Angeles were convicted of participating in a conspiracy aimed at threatening, assaulting, and murdering African-Americans in a neighborhood claimed by the defendants' gang. Three of the defendants also were convicted of a federal hate crime violation stemming from the murder of an African-American who was killed because he was black and because he was using a public street claimed by the gang. Three of the four defendants received double life sentences, and the fourth received a single life sentence.

B. Racial cross burnings outside homes

United States v. Shroyer, No. 1:07-CR-115 (S.D. Ind. Jan. 15, 2008); *United States v. Milbourne*, No. 1:07-CR-159 (S.D. Ind. June 12, 2008); *United States v. Youngblood*, No. 2:07-CR-0358 (E.D. Mich. Dec. 14, 2007). Individuals in Indianapolis and Detroit were successfully prosecuted for burning crosses outside the homes of biracial families with the intent to interfere with the victims' housing rights.

C. Racial intimidation of a biracial family

United States v. Fredericy and Kuzlik, No. 1:06-CR-0035 (Jan. 19, 2007 and Feb. 27, 2007 N.D. Ohio). Two men were convicted in Cleveland, Ohio for their roles in pouring mercury, a highly toxic substance, on the front porch and driveway of an interracial couple and their young child. This racially-motivated act was done with the intent to force the victims out of their home.

D. Assaults by members of a national white supremacist organization

United States v. Walker, et al., No. 2:06-CR-406 (Jan. 19, 2007, Aug. 16, 2007, and Dec. 17, 2007 D. Utah). Three members of the National Alliance, a notorious white supremacist organization, were convicted for assaulting a Mexican-American bartender at his place of employment in Salt Lake City, Utah. These same defendants allegedly assaulted an individual of Native-American heritage outside another bar in Salt Lake City.

E. Race-based murder of African-American

United States v. Eye and Sandstrom, No. 4:05-CR-344 (May 9, 2008 W.D. Mo.). The defendants in this case in Kansas City, Missouri were convicted for shooting and killing an African-American man as he walked down the street. Both defendants were sentenced to life without parole.❖

ABOUT THE AUTHOR

❑ **Bobbi Bernstein** has been a prosecutor in the Criminal Section since 1996, and a Deputy Chief since 2004. In her 12 years as a civil rights prosecutor, Ms. Bernstein has worked with AUSA partners to handle numerous significant hate crime and official misconduct cases. She also worked for 2 years as a prosecutor with the Criminal Section's National Church Arson Task Force.✉

Civil Rights Era "Cold Case" Prosecutions

*Paige Fitzgerald
Special Litigation Counsel
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Civil Rights Division*

I. Introduction

In 1966, a 67-year-old African-American farm worker was picked up by three Mississippi Klansmen and driven deep into the woods. The Klansmen stopped on a bridge and shot the victim multiple times with an automatic-assault rifle, before blowing most of his head off with a shotgun, and dumping his decimated body over the bridge. His body was found days later by a family on a Sunday picnic. The only surviving Klansman was acquitted of the murder in state court in 1968.

In 1964, a group of Mississippi Klansmen picked up two black teenagers and drove them deep into the woods where they were beaten. The victims were bound, gagged, and placed in the trunk of a car before being taken to a remote location on the Old Mississippi River. Once there, they were bound to a Jeep engine block and heavy metal rails and then taken out on the river by boat, one at a time, and rolled overboard to their deaths. In 1968, a state court dismissed all charges against the only two Klansmen who are still living today.

In 1963, four Alabama Klansmen planted 19 sticks of dynamite with a delayed-time release outside the basement of a predominantly African-American church in Birmingham, Alabama. The bomb exploded as children were filing into Sunday School class, killing 4 young girls and injuring 22 others. One of the Klansmen was convicted in 1978; the two other surviving Klansmen have never been charged.

In 1964, a Mississippi deputy sheriff conspired with a group of Klansmen to murder

three civil rights workers involved in voter registration for African-Americans in Mississippi. A 1967 federal civil rights prosecution for the murders resulted in convictions for 7 of the 18 defendants. The jury considering the case of one of the ringleaders hung because one of the jurors refused to convict a preacher.

What role can a federal prosecutor play in cases such as these? The Civil Rights Division, in conjunction with United States Attorneys' offices (USAOs) and the FBI, has attempted to use its resources and expertise to address the violent criminal acts perpetuated against innocent victims during the civil rights era. Unfortunately, ex post facto concerns and the limits of federal jurisdiction will strictly curtail the Department of Justice's (Department) ability to prosecute many civil rights era cases at the federal level. Two of the most important statutes that can be used to prosecute racially motivated homicides, 18 U.S.C. § 245 (1996) (interference with federally protected activities) and 42 U.S.C. § 3631 (1996) (interference with housing rights), were not enacted until 1968. Under the Ex Post Facto Clause, these statutes cannot be applied retroactively to conduct that was not a crime at the time of the offense. Moreover, the general 5-year statute of limitations on federal criminal civil rights charges presents another limitation on such prosecutions.

Notwithstanding these constitutional and jurisdictional limitations, the Department believes that the federal government can still play an important—indeed, essential—role in these cases. In some cases, other federal statutes, which were capital at the time and thus not limited by a statute of limitations, may apply. In other cases, we are able to lend our resources to state prosecutions to achieve justice.

II. Using federal capital statutes to bring federal prosecutions

A. Federal murder, *United States v. Ernest Avants*, 367 F.3d 433 (5th Cir. 2004)

In June 2000, the Civil Rights Division and the USAO for the Southern District of Mississippi indicted Ernest Henry Avants, the Mississippi Klansman who murdered Ben Chester White, the 67-year-old African-American farm worker, in 1966. The woods in which the Klansmen committed this horrific murder happened to be part of the Homochitto National Forest. That fact, unnoticed for all these years, enabled us to use the federal statute that prohibits murder on federal land, 18 U.S.C. § 1111 (2003), which during the relevant time provided for the death penalty. Pursuant to 18 U.S.C. § 3281 (1994), capital statutes have no statute of limitations. Thus, a prosecution can be brought at any time. Avants was convicted of federal murder in 2003 and sentenced to a life term of imprisonment.

B. Federal kidnapping, *United States v. James Ford Seale*, No. 3:07-CR-9HTW-JCS (Sept. 4, 2007 S.D. Miss.)

In 2007, the Civil Rights Division and the USAO for the Southern District of Mississippi successfully prosecuted James Ford Seale, one of two surviving Klansmen responsible for the 1964 kidnappings and murders of 19-year-old Charles Moore and Henry Dee in Franklin County, Mississippi. The route taken by the Klansmen from the site of the beating to the location on the Old Mississippi River where they eventually drowned the victims crossed state lines into Louisiana before returning to Mississippi. The government was finally able to establish that fact by immunizing the other less culpable, surviving Klansman who was in the group responsible for the kidnapping and beating, but who did not participate directly in the actual murders. Once the government proved that the victims had been transported across state lines, the AUSAs were able to use the predecessor to the federal kidnapping statute, 18 U.S.C. § 1201 (2006),

which during the relevant time provided for the death penalty when the victims were not released unharmed. In June 2007, James Ford Seale was convicted of federal kidnapping. He was sentenced to three life terms. See Figures 1 and 2 on pages 45 and 46.

III. Lending federal assistance to state prosecutions

A. Sixteenth Street Baptist Church bombing (Birmingham, Alabama)

Even in cases where there is no applicable federal statute, federal prosecutors and agents can provide invaluable assistance. For example, in 1997 the FBI reopened the investigation into the 1963 bombing of the Sixteenth Street Baptist Church in Birmingham, Alabama, which resulted in the death of four young girls. Civil Rights Division attorneys worked with the United States Attorney for the Northern District of Alabama in conducting a grand jury investigation. The government was able to assume federal jurisdiction because a predecessor statute to the current arson and explosives statute, 18 U.S.C. § 844 (2004), was a capital offense and thus had no statute of limitations. Because the necessary element that the explosives traveled in interstate commerce could not be proven, the grand jury investigation was released to the State of Alabama. Ultimately, prosecutors in Alabama used that investigation as the basis for the successful prosecution of Thomas Blanton and Bobby Cherry, the last two defendants involved in the bombing. They were each sentenced to four life terms. The United States Attorney for the Northern District of Alabama was cross-designated as a state prosecutor and served as the lead prosecutor in the state trials.

B. Mississippi Burning (Philadelphia, Mississippi)

Another matter in which federal resources contributed to the conviction of a civil rights era murderer involved the reopened investigation into the 1964 murder of three civil rights workers in Philadelphia, Mississippi—an incident commonly

known today as the "Mississippi Burning" case. Although ringleader Klansmen Edgar Ray "Preacher" Killen—whose jury hung during the 1967 federal trial—could no longer be prosecuted federally, the Department remained committed to ensuring that justice would eventually prevail in the case. The FBI worked with local law enforcement and provided invaluable assistance on the reopened investigation, which resulted in Killen's indictment on January 6, 2005, for three counts of state murder. Killen was finally convicted for his involvement in the case on June 21, 2005, and sentenced to three consecutive 20-year sentences.

IV. Conclusion

As demonstrated above, typically there are three different models in which the Department can play a critical role:

- noncivil rights federal statutes, such as the federal murder or kidnapping statutes can be used to prosecute the perpetrators in federal court;

- a federal prosecutor can be cross-designated to serve as a state prosecutor using evidence from a federal investigation in a state trial when the evidence fails to establish federal jurisdiction; or
- federal and local investigators can jointly investigate a murder and provide assistance to a state prosecutor in a state prosecution.

Although the government recognizes that not every case will be resolved with a successful prosecution, the Department remains committed to seeking justice in these unsolved crimes.❖

ABOUT THE AUTHOR

❑ **Paige Fitzgerald** has been a prosecuting attorney in the Criminal Section since 1999 and currently serves as a Special Litigation Counsel heading up the Cold Case Initiative. Before joining the Criminal Section she served as a Deputy District Attorney in California.✽



Figure 1

From: UKA...Miss folder (Photographs)
Seale in Red

SEALE, Myron Wayne Jack



Figure 2

Human Trafficking: Combating Modern-Day Slavery

Robert Moossy
Director
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I. Introduction

A 14-year-old Cameroonian girl, lured into the United States on false promises of an education and a better life, is confined in the home of a suburban Michigan couple. She is never allowed to attend school and is compelled through beatings, threats, and sexual assaults to care for three children and cook and clean for the household. She is not paid and is required to work from sunrise until late at night, seven days a week.

A young 19-year-old female U.S. citizen who is impoverished and homeless is preyed upon with false promises of a stable job and housing only to be physically and sexually assaulted, held in debt, and compelled to perform acts of prostitution against her will. Her 17-year-old sister is recruited at the same time and is also offered for prostitution, but is not assaulted or threatened.

Young Central American women are enticed to enter the United States on promises of good jobs and a better life for their families. Once in the United States, they are compelled through threats to harm their families to serve as "bar girls." They are made to entertain male customers from early evening until the early hours of the morning with little rest or food. Through a scheme of fear and intimidation, they are required to remain in this condition of servitude and to turn over most of their earnings until they have paid off thousands

of dollars in smuggling debts. Other Central American women are smuggled into the United States and are required to pay a large smuggling debt, but are permitted to pay the debt through money wired by relatives and are not compelled to work as bar girls.

In the citrus groves of Florida, undocumented Mexican migrant workers are threatened with violence if they attempt to leave their jobs before paying off debts to labor contractors. When workers attempt to leave, a van driver and several others who are attempting to assist the workers are brutally beaten to prevent the workers from leaving.

The term "human trafficking" is used in common parlance to describe many forms of exploitation of human beings. While these words often evoke images of undocumented migrants being smuggled across international borders, the term has a different and highly specific meaning under the United States Criminal Code. Human trafficking crimes, which are defined in Title 18, Chapter 77, focus on the act of compelling or coercing a person's labor, services, or commercial sex acts. The coercion can be subtle or overt, physical or psychological, but it must be used to coerce a victim into performing labor, services, or commercial sex acts. Because these statutes are rooted in the prohibition against slavery and involuntary servitude guaranteed by the Thirteenth Amendment to the United States Constitution, the Civil Rights Division plays a paramount role in enforcing these statutes, alongside our partners in the United States Attorneys' offices (USAOs) and law enforcement agencies.

Contrary to some misconceptions, human trafficking crimes do not require any smuggling or movement of the victim. While undocumented migrants can be particularly vulnerable to

coercion because of their fear of authorities, traffickers have demonstrated their ability to exploit other vulnerable populations and have preyed just as aggressively on documented guest workers and U.S. citizen children. Indeed, because of the vulnerability of minors, where minors are offered for commercial sex the statutes do not require proof of force, fraud, or coercion.

The government has successfully prosecuted human trafficking crimes in agricultural fields, sweatshops, suburban mansions, brothels, escort services, bars, and strip clubs. In recent years, because of enhanced criminal statutes, victim-protection provisions, and public awareness programs introduced by the Trafficking Victims Protection Act of 2000, as well as sustained dedication to combating human trafficking, the numbers of trafficking investigations and prosecutions have increased dramatically. This is demonstrated by a 360 percent increase in convictions for the fiscal years 2001-2007 as compared to the previous 7-year period. See Figure 3 on page 52.

In 2007, the Civil Rights Division created the Human Trafficking Prosecution Unit (HTPU) within the Criminal Section to consolidate the expertise of some of the nation's top human trafficking prosecutors. HTPU prosecutors work closely with Assistant United States Attorneys (AUSAs) and law enforcement agencies to streamline fast-moving trafficking investigations, ensure consistent application of trafficking statutes, and identify multijurisdictional trafficking networks. Human trafficking crimes, like other civil rights crimes, require notification to the Criminal Section pursuant to §§ 8-3.120 and 8-3.140 of the *U.S. Attorneys' Manual*. Early notification of any case with potential human trafficking angles allows the HTPU to provide victim assistance resources, legal guidance, and coordination between districts prosecuting overlapping criminal networks on a timely basis.

The Bureau of Justice Assistance has also funded 42 Human Trafficking Task Forces to bring together federal, state, and local law enforcement authorities, government agencies,

and nongovernmental victim-service providers in a multidisciplinary approach to identify human trafficking crimes, assist human trafficking victims, and prosecute human trafficking cases. See Figure 4 on page 53.

II. Trafficking statutes

Title 18, Chapter 77, contains a number of different criminal statutes prohibiting various forms of compelled or coerced labor, services, or commercial sex. The statutes passed in the post-civil war era are sometimes referred to as Involuntary Servitude and Slavery crimes. The remaining statutes were passed as part of the Trafficking Victims Protection Act of 2000.

A. Involuntary servitude and slavery statutes

The involuntary servitude and slavery statutes, codified at 18 U.S.C. §§ 1581-1584 (2000), include § 1584's prohibition against involuntary servitude, § 1581's prohibition against peonage, and § 1583's prohibition against enticement into slavery. These statutes have been interpreted by the Supreme Court in *United States v. Kozminski*, 487 U.S. 931, 952 (1988), to require very specific forms of coercion limited to physical force or restraint, threats of physical force or restraint, or threats of legal coercion tantamount to incarceration. The involuntary servitude statute requires proof that a person was held in service to another for a term through one of these prohibited means of coercion. The peonage statute requires proof of all of the elements of involuntary servitude plus proof that the servitude was tied to the discharge of a debt.

B. Trafficking Victims Protection Act statutes

The main provisions of the Trafficking Victims Protection Act (TVPA) are the forced labor statute, 18 U.S.C. § 1589 (2000), and the sex trafficking statute, 18 U.S.C. § 1591 (2006). Both of these statutes criminalize broader forms of coercion than those prohibited under the older, involuntary servitude and slavery statutes and

include threats of nonphysical harm as well as threats of harm to third persons.

Section 1589 prohibits the obtaining of labor or services by any of three means:

- by threats of serious harm to or physical restraint of any person;
- by means of a scheme, plan, or pattern intended to cause the person to believe that they or another would suffer serious harm or physical restraint if they did not perform such services; or,
- by means of the abuse or threatened abuse of law or legal process.

To convict a defendant of forced labor, the government must prove that a defendant knowingly used one or more of these means to provide or obtain the labor or services of another person. The term "serious harm" under this statute encompasses physical and nonphysical types of harm and the statute by its terms applies to threats toward third persons, such as a victim's family members.

The sex trafficking statute, 18 U.S.C. § 1591, prohibits the recruiting, enticing, harboring, transporting, providing, or obtaining a person for commercial sex where the defendant knew that force, fraud, or coercion would be used to cause the person to engage in commercial sex or knew that the person was under 18 years of age. Where a minor is involved, no separate proof of force, fraud, or coercion is necessary. The statute also prohibits a defendant from knowingly benefitting financially or receiving something of value by participating in a venture that engages in such acts. In addition, the conduct must be in or affecting interstate or foreign commerce.

The TVPA contains additional criminal provisions including, 18 U.S.C. § 1592 (2000), which prohibits the withholding of identification documents in connection with a trafficking offense, 18 U.S.C. § 1590 (2000), which prohibits trafficking a person into servitude, and 18 U.S.C. § 1594 (2000), which makes an attempted

violation of Chapter 77 punishable to the same extent as a completed violation.

Title 18 section 1593 also requires mandatory restitution and forfeiture for any Chapter 77 violation.

III. Application of the statutes

The compelled domestic service of the 14-year-old Cameroonian girl would violate both 18 U.S.C. § 1589 and 18 U.S.C. § 1584 because it involved both physical and nonphysical forms of coercion to compel her labor and services.

The compelled acts of prostitution of the 19-year-old U.S. citizen woman would violate 18 U.S.C. § 1591 because of the use of assaults, debts, threats, and other forms of coercion to compel commercial sex acts. The fact that the victim was not smuggled internationally is of no consequence. The providing of a minor, such as her 17-year-old sister, for commercial sex would also violate 18 U.S.C. § 1591 regardless of whether any force, fraud, or coercion was used on the minor as long as the defendant knew the victim was a minor. Because of the inherently commercial and economic nature of commercial sex acts, even intrastate commercial sex activity affects interstate commerce. In addition, it often involves the use of cellular telephones, internet communications, or another similar interstate commerce nexus.

The Central American women who were compelled through threats to harm their families and other forms of nonphysical coercion directed at others are victims of forced labor in violation of 18 U.S.C. § 1589. Although they are required to entertain male customers in a sexually suggestive way, absent a commercial sex act involving the exchange of value for a sexual act, the conduct does not violate 18 U.S.C. § 1591. The women who were permitted to pay off their debts by means other than laboring for the defendants are not trafficking victims as the defendants did not provide or obtain their labor or services through coercion, but rather collected an alien smuggling debt.

The migrant workers threatened with violence are victims of forced labor as well as involuntary servitude. Men as well as women can be victims of human trafficking.

IV. Recent trafficking prosecutions

The government has successfully prosecuted numerous trafficking cases using the statutes discussed above. These cases have included both U.S.-citizen and foreign-born victims, as well as both minor and adult victims.

A. Forced labor and involuntary servitude prosecutions

In *United States v. Djoumessi*, 2007 WL 2021837 (E.D. Mich. July 12, 2007), the defendants were convicted of involuntary servitude for holding a 14-year-old Cameroonian girl as a domestic servant in their Michigan home by using a scheme of violence, threats, and sexual assault. One defendant was sentenced to 218 months imprisonment and the other was sentenced to 60 months imprisonment. They were ordered to pay the victim \$100,000 in restitution.

In *United States v. Calimlim*, 2007 WL 601467 (E.D. Wis. Feb. 22, 2007), two defendants were convicted of holding a Filipino woman as a domestic servant in their home outside Milwaukee, Wisconsin for nearly 20 years using threats of deportation and other nonviolent forms of coercion. They were each sentenced to 4 years in prison and jointly ordered to pay the victim \$960,000 in restitution.

Three defendants were convicted in *United States v. Ramos*, 130 Fed. Appx. 415 (11th Cir. 2005), for conspiring to commit involuntary servitude by using threats of violence to hold undocumented migrant workers in their service as agricultural workers in citrus groves. Two defendants were sentenced to 180 months in prison and ordered to forfeit over \$3 million in property. A third defendant was sentenced to 123 months in prison.

In a recent forced labor case, *United States v. Farrell*, No. 3:07-CR-30019 (D. S.D. Feb. 22, 2008),

two hotel owners were convicted in South Dakota for peonage, document servitude, and visa fraud for using threats of legal coercion and other threats to compel Filipino workers into service in the defendants' hotels. The lead defendant was sentenced to 50 months imprisonment and the second defendant was sentenced to 36 months.

In *United States v. Mondragon*, No. H:05-468 (S.D. Tex. May 12, 2008), eight defendants were convicted for their respective roles in a scheme to smuggle young Central American women into the United States. The defendants used threats to harm the families of the women and other forms of intimidation to compel them into service in bars, restaurants, and cantinas. Two lead defendants were sentenced to 180 months imprisonment and the defendants were ordered to pay a total of \$1.7 million in restitution to the victims. Another lead defendant is awaiting sentencing.

B. Sex trafficking prosecutions

In *United States v. Norris*, 188 Fed. Appx. 822 (11th Cir. 2006), the lead defendant, Harrison Norris, who referred to himself by his professional wrestling name of "Hardbody," was sentenced to life imprisonment for compelling multiple U.S. citizen victims to perform acts of prostitution in and around Atlanta, Georgia. He enticed some of his victims by false promises of a career in professional wrestling and kidnapped others. He then used a scheme of debts, threats, and assaults to enforce a climate of fear that he used to compel them to engage in prostitution and turn over all proceeds to him. The compelled acts of prostitution were prosecuted under 18 U.S.C. § 1591.

In a similar case, *United States v. Paris*, 2007 WL 3124724 (D. Conn. Oct. 24, 2007), ten defendants were convicted in connection with a prostitution business in the Hartford, Connecticut area that victimized U.S. citizen women and girls using threats and assaults to compel the adult women into prostitution. The lead defendant was prosecuted and convicted after trial of violating 18

U.S.C. § 1591 and committing other related offenses.

In *United States v. Carreto*, No. 1:04-CR-140 (E.D. N.Y. June 1, 2006), six defendants entered guilty pleas for violating 18 U.S.C. § 1591 by operating a trafficking ring that smuggled young Mexican women and girls into the United States illegally. The females were then forced into prostitution in Queens and Brooklyn, New York. The defendants used psychological manipulation, including promises of love and marriage, to lure vulnerable victims and then maintained control over the victims through a scheme of threats and violence. Two lead defendants were sentenced to 50 years in prison and a third was sentenced to 25 years in prison. A fourth defendant was sentenced to 80 months in prison.

ABOUT THE AUTHORS

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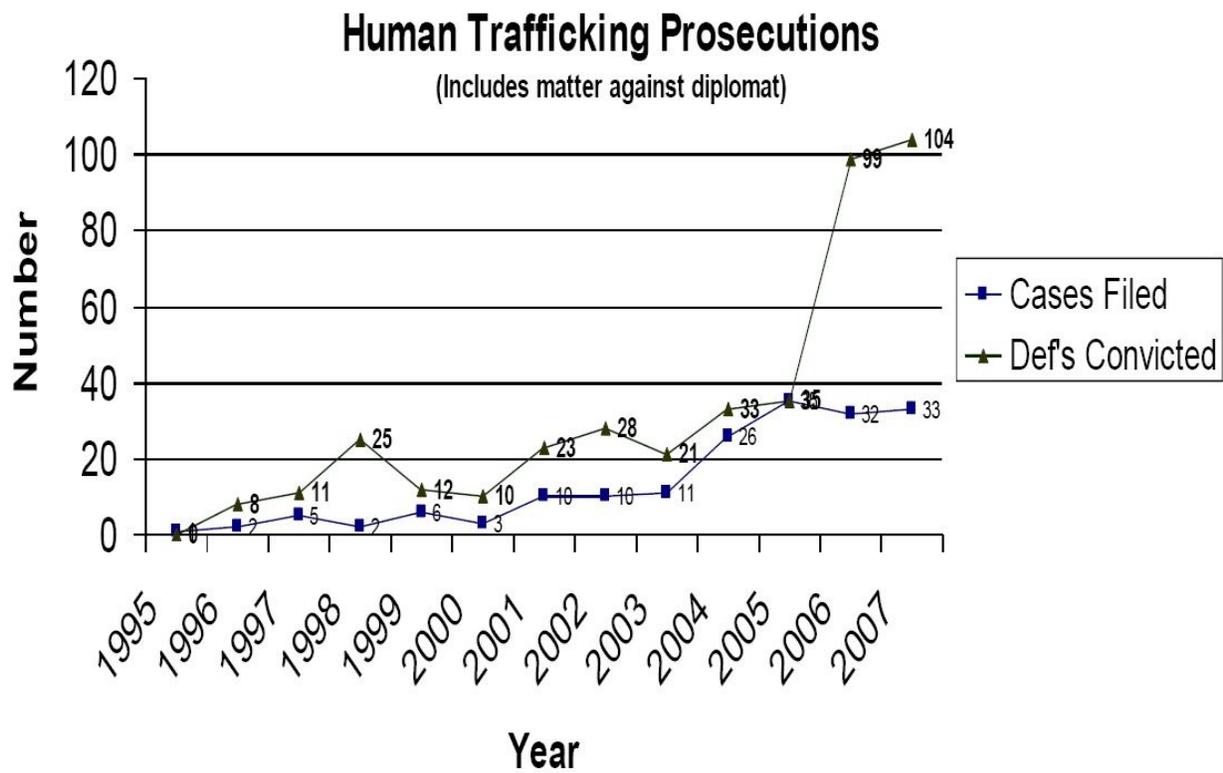


Figure 3

BJA / OVC Human Trafficking Task Forces (42)

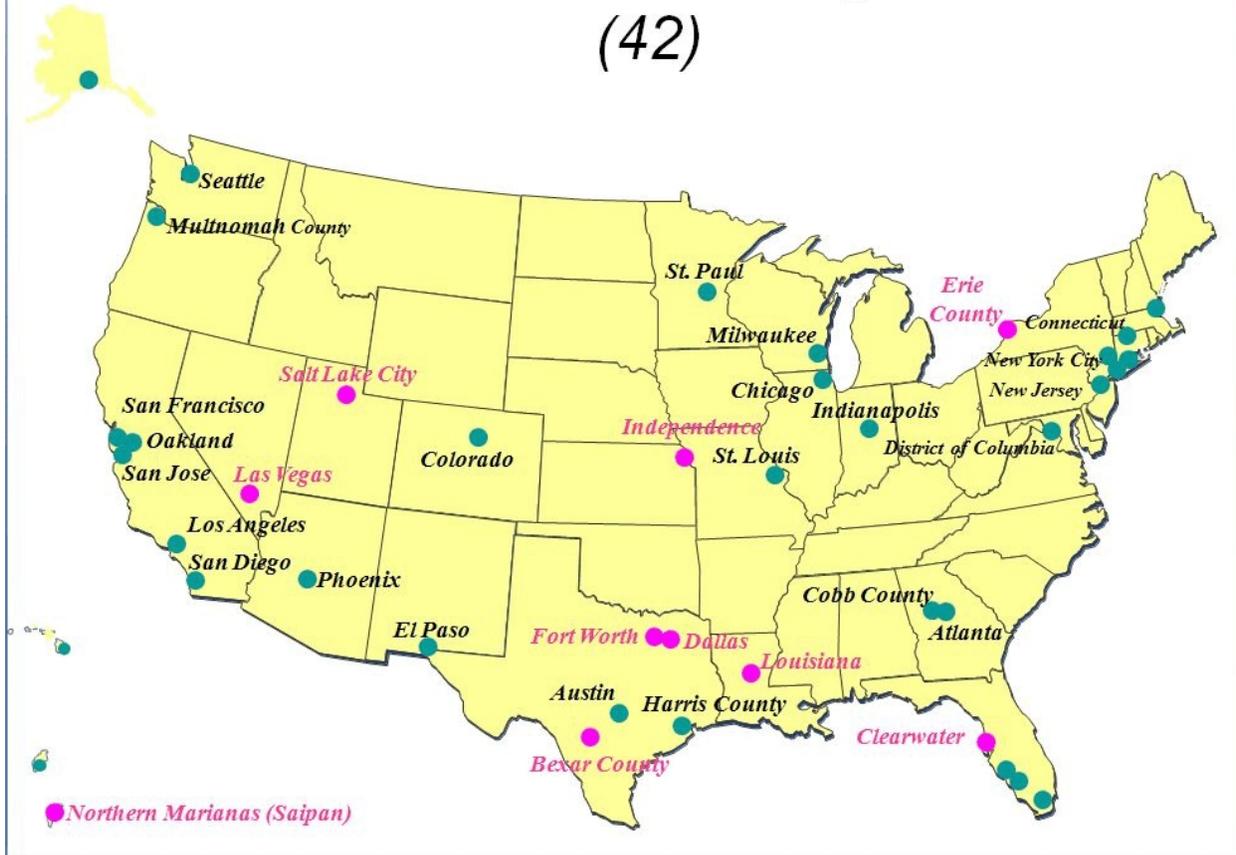


Figure 4

Linguistic Diversity and Its Implications for United States Attorneys' Offices

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I. Introduction

Assistant U.S. Attorneys (AUSAs) routinely encounter a variety of language speakers in the course of their daily work. The process for securing language interpretation or document translation can vary greatly, however, depending on which side of the office an AUSA works. Civil AUSAs can find themselves responsible for making initial determinations regarding a witness's language, searching for competent interpreters and translators, and interviewing witnesses. Conversely, by the time an AUSA on the criminal side meets a non-English speaking witness someone else may have already ascertained the witness's language and established a means of communication through a contract interpretation company, a bilingual agent, or some other means. Indeed, federal or state law enforcement agents regularly interview witnesses (whether proficient in English or not) before a prosecutor ever enters the picture.

Despite their different roles in the interpreter selection process, both civil and criminal AUSAs—and the support staff who assist in the enforcement effort—may consider interpreter and translator selection to be a peripheral part of their work. But establishing reliable communication with a witness can be central to case outcomes. Neither the AUSA who places a quick call to a contract interpretation company nor one who decides to temporarily "inherit" the interpreter that

an agent used is relieved of the responsibility of ensuring effective language assistance.

Competent language assistance involves much more than ascertaining a witness's language and finding an individual to interpret. This article demonstrates the need for U.S. Attorney's office (USAO) personnel to critically engage in attempts to bridge communication barriers and sets forth some approaches that may assist AUSAs and other USAO employees to obtain reliable information from limited English proficient (LEP) individuals.

II. Planning ahead: Why having a strategy for communicating with LEP witnesses makes sense

A. Most USAOs encounter, or are likely to encounter, LEP individuals

According to census figures nearly 47 million people, or 18 percent of the U.S. population, speak a language other than English at home. A significant proportion of these individuals are also LEP. Although the census figures are based on a limited ability to *speak* English, the term "LEP" captures far more. Individuals who have a limited ability to read, write, understand, and/or speak the English language are all LEP. LEP status also depends on context. Some nonnative English speakers may feel perfectly comfortable communicating in English for routine interactions, but find that they lose their English language abilities in stressful situations or that they lack familiarity with technical or legal terminology. *See* Department of Justice (Department), *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against*

National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June 12, 2002) (Department Guidance). As such, the number of LEP individuals in the United States may be even greater than the census data reflects.

If the sheer number of LEP individuals in the United States seems surprising, the distribution of the LEP population across the United States is even more unexpected. Language barriers are no longer just the concern of big cities or immigration hubs along the perimeter of the country. Increasingly, recent arrivals to the United States are choosing to settle in those states with historically fewer immigrants, mostly in the South and the Midwest. Thus, areas of the country lacking established immigrant networks and significant multilingual capacity are attempting to tackle the challenge of absorbing and providing services to new immigrants who are LEP.

Such figures and trends suggest that most, if not all, USAOs are affected by language barriers. Indeed, USAOs in less diverse areas of the country may feel the impact of LEP contacts even more acutely than sister districts encompassing a variety of language speakers. The following section demonstrates how language barriers have challenged investigators and AUSAs across the United States.

B. Language issues can complicate a case

The Department has encountered numerous examples of the complications that language barriers can present in cases and investigations. Such complications are in no way related to the professionalism and ability of attorneys and investigators. If anything, they illustrate the ways in which continually evolving demographic patterns stimulate transformation in our community infrastructure. The United States is not unique in facing such challenges—countries the world over are adapting to face similar needs.

The following examples are just a sampling of the complications arising from a lack of effective communication in cases and investigations. Several of the examples involve human trafficking

scenarios, owing primarily to the author's experience as a human trafficking prosecutor. Similar complications, however, can arise in all manner of cases including bank robberies, immigration cases, predatory lending investigations, terrorism investigations, tort defense, hate crimes, Racketeer Influenced Corrupt Organizations offenses, environmental investigations, and others. Indeed, reports received by the Department on language barriers encountered at the state and local level confirm that the language issue is not confined to any particular type of case or investigation. Language barriers are ubiquitous throughout the United States and arise in every conceivable type of case.

Small, tight-knit linguistic communities may offer few options for unbiased interpretation. As immigrants choose to settle in areas of the country lacking established linguistic and cultural infrastructure, new LEP arrivals may look within the linguistic community for support, assistance, and information. Unlike large cities that can offer anonymity to inhabitants of all backgrounds, some newly emerging immigrant destinations in the United States may offer few resources for individual LEP inhabitants. As a result, these individuals may necessarily remain connected to the larger linguistic community for key information and support. Such dynamics inevitably pose challenges when a member of the community is required to furnish information in a federal investigation since potential interpreters may be acquainted with the witness and/or aspects of the investigation. Thus, establishing the impartiality of the interpreter may be difficult.

Note that tight-knit linguistic communities are not exclusive to newly emerging immigrant destinations. Though anonymity is easier to achieve in large metropolitan areas that have traditionally absorbed a number of immigrants, members of a linguistic community, particularly a numerically small one, may remain interconnected even in a big city. As such, investigators and AUSAs should not assume that because they are

in a large city their interpreter and witness(es) are unfamiliar with one another.

An example of this phenomenon is apparent in the context of federal human trafficking investigations. Federal and local law enforcement officers have uncovered potential human trafficking operations in virtually every state and territory of the United States, from Alabama to New Hampshire and from Oklahoma to Alaska. Trafficking investigations have taken place in densely populated cities enjoying a variety of language resources, as well as sparsely populated rural areas where interpreters are scarce. In some cases, potential interpreters speaking an LEP witness's language have had ties to the trafficker or the trafficking operation. Not only were potential interpreters in such situations untrained and unqualified, they were likely to be biased and therefore unable to interpret impartially and without editorializing.

Such was the case in a long and well-publicized trafficking investigation that took place in the San Francisco Bay area between 1999 and 2006. Local police initiated an investigation after an 18-year-old woman found her two roommates, both young girls, unconscious in the apartment that all three shared. The young woman was distraught upon discovering her two roommates and knowing no English she called her colleagues from a local ethnic restaurant to assist her in reviving the girls. Rather than calling 911, the colleagues rolled up the unconscious victims in carpets and began carrying the concealed victims out to a waiting van. A passing motorist spotted what appeared to be a body part protruding from one of the rolled-up carpets and immediately alerted law enforcement. When law enforcement arrived on the scene they encountered numerous witnesses who spoke an unfamiliar language. One of the restaurant workers attempted to assist law enforcement by interpreting witness statements. Ultimately, this "interpreter" proved to be a human trafficking defendant and the unconscious girls his victims.

The investigation revealed the interpreter to be one of several defendants from a wealthy and

powerful family who were implicated in the human trafficking scheme. The scheme involved a number of victims, several of whom were trafficked into the United States at a very young age. The defendants hid some of the victims in overseas locations during the course of the investigation. Given the international aspects of the case and the fact that few of the victims or witnesses spoke English, the investigation and prosecution team was in dire need of accurate, professional, and reliable interpreters. The contract interpreter service had no interpreters on staff who spoke the Asian language in question and began to search for qualified individuals. The individuals who did come forward were in many cases either connected with the defendants or had strong feelings about the case. The team finally settled on an interpreter who appeared promising. She was experienced, professional in her demeanor, extremely educated, cooperative, and appeared to successfully build trust with the victims. Ultimately, this interpreter proved critical to ascertaining the facts.

Unfortunately, the interpreter appeared to be more professional than she actually was. Immediately after the lead defendant pled guilty, one of the victims came forward to alert the team that the "star" interpreter actually suggested to several of the victims that they embellish their factual accounts. The victim's revelation resulted in the team's most difficult and time-consuming challenge: a 5-year effort, ultimately successful, to preserve the conviction of a human trafficker who had admitted his guilt.

The above example illustrates that interpreter bias can take a variety of forms. Within a single case, the investigation and prosecution team dealt with interpreter bias in favor of and against the defendants. The example also shows that investigative efforts can benefit from a carefully conceived plan that lists qualified language access resources, methods for identifying competent interpreters, strategies for determining bias, and other vital information that can be readily accessed when investigators and AUSAs are confronted by language barriers. Specific

guidance on formulating such a plan is provided in section III of this article.

Pitfalls associated with picking the "most convenient" language in which to interview the witness, rather than the language he or she knows best. If a witness speaks a variety of languages, investigators and AUSAs may be tempted to pick the language that is "most convenient" from the perspective of interpreter availability. Certainly, when a witness speaks some English the investigative team may be tempted to proceed with interviews in English. If a witness is not entirely comfortable with the language he or she is using, however, the narrative may lose important details, nuances, and even key facts that affect the ability to corroborate a witness's account or otherwise impact the strength of the case. Particularly when a witness must communicate potentially sensitive information, familiarity and comfort with the mode of communication is critical.

Such a scenario presented itself when Department attorneys received allegations of human trafficking occurring in the home of a foreign military officer in the southern United States. Investigators and prosecutors laid careful plans to extract the victim from the suspect's home, but had no means of communicating with her once they secured her release since she spoke an Asian language that was relatively uncommon in the area. Local interpretation companies could not locate an interpreter who spoke the victim's primary language. Since the alleged victim had rudimentary knowledge of a Middle Eastern language spoken by her employers, the investigative team went to plan B and located a bilingual individual to communicate with the victim in her second language. Despite the interpreter's efforts, he was unable to ascertain key details of the victim's account. Not only was the victim predisposed to mistrusting the interpreter because he was from the same linguistic community as her employers, she was also insufficiently fluent in the second language to feel

comfortable relating the complex details of her employment situation.

Discouraged by the unsuccessful attempts to communicate with the victim, the investigative team finally decided to use the services of a telephonic interpretation company to debrief the victim. Such an arrangement is less than ideal in human trafficking, child abuse, rape, and similar investigations where trust is a key feature of the interview process. Luckily, the risk paid off. The victim was much more comfortable speaking her native language. In fact, she was thrilled to be on the phone with a fellow speaker of her language, albeit a faceless one. The interview flowed smoothly and efficiently and the team learned important facts that counseled against pursuing a trafficking prosecution.

While this example is not an endorsement of telephonic interpretation as a preferred approach, it does illustrate the need to "think outside the box" when attempting to overcome language barriers. Another option may have involved contacting a different USAO for recommendations on a trusted interpreter who could have flown in for the interview or participated by phone from a remote location. Again, listing interpretation options, formulating a plan, and becoming familiar with the plan in advance of an actual encounter with an LEP witness can save time and money and can further guard against haphazard or slipshod investigative approaches.

The problem with making assumptions about the witness's primary language. The fact that investigators and AUSAs routinely encounter Spanish-speaking witnesses is a reflection of the changing demographics of the United States. Many districts are well-equipped to communicate with Spanish speakers. Federal investigative agencies have hired Spanish-speaking agents and qualified Spanish interpreters are available in many parts of the country. The number of Spanish speakers in the United States has resulted in a better supply of Spanish-speaking interpreters than interpreters in any other language. However, the sheer number of Spanish speakers in the country should not result in national origin-based

assumptions about an individual's first language. In other words, a witness may not speak fluent Spanish just because he or she is from Mexico or Central America.

Such assumptions led to problematic results during interviews in a criminal immigration investigation in the southwestern United States. In that investigation, bilingual Spanish-speaking agents interviewed numerous undocumented individuals from countries where Spanish was the predominant language. Some of the individuals interviewed actually spoke very poor Spanish and the interviews yielded inconclusive information. Days of probing suggested that the individuals interviewed spoke indigenous languages with more fluency than Spanish. Lacking sufficient information to proceed on criminal charges, investigators and prosecutors were forced to release a number of individuals who may have been involved in criminal activity, thereby temporarily suspending a work-intensive, resource-intensive and personnel-intensive investigation.

As with the previous two examples, the lesson is clear: plan ahead and become familiar with strategies for ascertaining a witness's language. Moreover, investigators and AUSAs should be wary of adopting language determinations made by others who may have previously interviewed the witness. For example, federal investigators who inherit a case where local police have determined that the witnesses speak Spanish should not automatically rely on the assessment of the local law enforcement agency. Rather, the federal team should reach its own independent conclusions. Although finding inaccuracies in the local investigation can present evidentiary challenges, acquiring correct, unassailable information through the use of appropriate language assistance is ultimately best for the case.

The dialect dilemma. In many languages, and even in English, dialect differences can pose real challenges to comprehension. For example, during a 2004 forced labor prosecution in New England investigators and prosecutors used an English-language interpreter to assist their efforts

to communicate with witnesses who spoke Jamaican-accented English. The more common scenario, however, involves selecting interpreters for non-English speaking witnesses without accounting for differences in dialect. The importance of dialect is illustrated by a 2003 human trafficking investigation where the investigative team interviewed a suspected victim from the Tamil ethnic minority of northern Sri Lanka. The suspected victim fled to the Sri Lankan embassy in Washington, D.C. after her employer treated her in an abusive and unfair manner. The victim spoke only Tamil and investigators utilized the services of a Tamil interpreter who contracted with the U.S. State Department. The Tamil speaking interpreter hailed from India, not Sri Lanka, and spoke a different dialect of Tamil from the victim. As a result, important details of the victim's story were omitted. For example, the interpreter failed to convey the fact that the victim's employer actually brandished a gun in the victim's presence—a fact that served to frighten the victim and keep her in the suspected trafficker's service.

These and other real-life examples illustrate that communicating inaccurately can be as damaging as not communicating at all. Inaccurate, biased, or incompetent interpretation can negatively impact the federal effort and possibly even serve as a basis for exonerating potential wrongdoers. *See, e.g., United States v. Martinez-Gaytan*, 213 F.3d 890, 892 (5th Cir. 2000) (vacating conviction where agent's testimony of LEP drug defendant's confession was unreliable hearsay given that the government supplied the interpreter, interpreter's Spanish fluency could not be determined, and defendant refused to sign confession prepared by interpreter); *United States v. Karake*, 443 F. Supp. 2d 8, 93 (D. D.C. 2006) (finding no "knowing and intelligent" waiver of *Miranda* rights where interpreters were potentially biased and failed to interpret lengthy oral exchanges with defendants in non-English language); *United States v. Jaramillo*, 841 F. Supp. 490, 492 (E.D.N.Y. 1994) (expressing "shock" at "obviously defective and misleading" translation of federal investigative agency's

consent to search form and requesting USAO to communicate court's opinion to agency in question, but finding consensual search where defendant voluntarily opened door to agents). Such complications, which can arise in any case involving witnesses who speak languages other than English, may suggest that choosing a language interpreter or translator is fraught with potential dangers and difficulties. However, by following a carefully conceived plan for encounters with LEP witnesses AUSAs can safeguard their cases and avoid negative case outcomes.

C. Effectively addressing language barriers is a civil rights imperative

A number of legal requirements mandate appropriate language assistance in federal investigations and cases. Clearly, due process considerations and statutes such as the Court Interpreter's Act, 28 U.S.C. § 1827 (1996), apply to key aspects of a USAO's work, but do not provide guidance on bridging language barriers in all USAO activities. A language plan that applies to *all* federal cases and investigations, whether criminal or civil, is underscored both by practical needs, as well as by laws and administrative requirements directing agencies to take steps to ensure that LEP individuals can meaningfully access agency programs and activities.

Since the passage of Title VI of the Civil Rights Act of 1964, entities receiving federal financial assistance have been obligated to provide services accessible to all, regardless of race, color, or national origin. Most state and local government agencies, including police departments, correctional facilities, courts, and other government institutions, receive such federal assistance. Though Title VI does not expressly identify "language" as a protected characteristic, language often serves as a proxy for national origin. *See, e.g., Fragante v. City of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989) (finding that English language ability and accent are "intertwined" with national origin); *see also* Department Guidance, *supra*, 67 Fed. Reg. at 41,458 (June 12, 2002) (discussing case law

finding that conduct having a disproportionate effect on LEP individuals constitutes national origin discrimination under Title VI). By failing to provide appropriate language services to an LEP individual, such agencies effectively exclude that individual from accessing the same benefits, services, information, or rights as everyone else. Thus, individuals who are limited in their English ability are often protected by Title VI. Many state and local agencies receiving federal assistance find themselves facing federal civil rights investigations for national-origin discrimination when they fail to make their activities accessible to LEP individuals.

While Title VI governs the civil rights obligations of many state and local government agencies and other entities receiving federal financial assistance, it does not directly apply to the Federal Government itself. However, the LEP protections inherent in Title VI extend to the Federal Government through Executive Order 13,166, 65 Fed. Reg. 50,121 (Aug. 11, 2000), titled "Improving Access to Services for Persons with Limited English Proficiency." This order requires agencies to examine all of their encounters with LEP people, whether defendants, victims, other witnesses, or interested community members. Agencies must then respond to LEP needs by taking reasonable steps to ensure that LEP individuals can meaningfully access the agency and all it does in the same manner as non-LEP individuals. Federal agencies including USAOs, the FBI, U.S. Marshals Service, Bureau of Prisons, Immigration and Customs Enforcement, Customs and Border Protection, Main Justice components, and numerous others must all comply with the Executive Order. The Department has responded to the order by implementing an LEP plan covering its federally conducted activities. Moreover, the Department plan, available at <http://www.usdoj.gov/crt/cor/13166.htm>, has identified the aforementioned agencies, including the Executive Office for United States Attorneys (EOUSA), as entities for which enhanced language assistance measures are warranted.

III. Contents of an LEP Plan

A. Guiding principles for a plan: the four-factor analysis

Language access imperatives under Title VI and the Executive Order do not impose unreasonable expectations on covered entities. The Department guidance sets forth a realistic standard for providing language access: namely that agencies should strive to take "reasonable steps" to provide "meaningful access" to LEP people. Department Guidance, *supra*, 67 Fed. Reg. at 41,459 (June 12, 2002) (emphasis added). The Department guidance lists four factors that agencies should evaluate and balance to determine the appropriate level of language assistance to provide.

Factor 1: Consider the number or proportion of LEP people in the eligible service population. In the USAO context, each district's plan depends on its history of contacts with LEP people, which indicates the languages the district has encountered in the past. Generally, the greater the number or proportion of LEP people a district encounters, the more likely it is that language services are needed. Beyond past experiences, districts should refer to local census and school district data and consult with community organizations, religious organizations, and others to determine whether some subset of the community has been excluded from their calculations. Some ethnic or linguistic populations may be sizable, but have only infrequent contact with law enforcement or the legal system. In certain districts with multiple branches, one branch may serve a large LEP population, but others may not. In such situations, districts should consider enhanced language-assistance measures for the individual branch. Districts should also account for seasonal population shifts in the community by considering migrant laborers, tourists, and others.

Factor 2: Consider the frequency with which LEP people come into contact with your district. Certain districts may require more sophisticated plans than others. For example,

districts with frequent LEP encounters may benefit from a more regularized interpretation arrangement than that provided by occasional use of an interpretation service. Similarly, some districts may have frequent contact with speakers of certain languages (Spanish), but infrequent contact with speakers of other languages. Under such circumstances, a more regularized interpretation arrangement may be required in contacts with Spanish speakers than those used for contacts with other LEP people. Likewise, "vital documents," such as consent and complaint forms, written notices of rights, notices regarding parole and other hearings, notices advising LEP persons of language assistance, and others should be available in frequently-encountered languages.

Factor 3: Consider the importance of the different types of services, benefits, or information you provide to the LEP person. Since most LEP contacts with USAOs occur in the investigative or case setting, such contacts may have serious implications for the LEP person. Existing federal laws and guidance, including constitutional due process considerations, the Court Interpreters Act, *supra*, 28 U.S.C. § 1827 (1996), and the U.S. Department of Justice Attorney General Guidelines for Victim and Witness Assistance, available at <http://www.usdoj.gov/olp/final.pdf>, recognize the importance of language assistance for certain individuals in a range of judicial proceedings involving the United States.

However, USAOs also have critical contacts with LEP individuals in ways not contemplated by existing laws and guidance and a language plan helps to determine the need for language services during such encounters. These encounters may include LEP witness interviews, calls from LEP individuals with important information, letters or other written correspondence in non-English languages communicating key information, or the ability to access critical content on a district's Web site. All of these examples could potentially have serious implications for the LEP person. In general, the more important the contact or the greater the possible consequences for an LEP

person, the more likely it is that language services are needed. Investigative and case-related contact with a USAO is of the highest importance from an LEP perspective and is covered by the Executive Order and the standards outlined in the Department Guidance, *supra*, 67 Fed. Reg. 41,455-41,472 (June 12, 2002), regardless of the prevalence of the language that the LEP individual speaks.

Although the basic mission of each USAO is to enforce federal criminal and civil laws and to defend the United States when sued, districts may come into contact with LEP individuals in non-case-related ways. Keep in mind that such non-case-related activities and programs may impact certain LEP individuals more than others. For example, a district may consider enhanced language services at community meetings disproportionately impacting particular linguistic communities.

The potential for critical encounters with LEP individuals outside the courtroom setting also illustrates the need to train all district personnel on the key features of the district's language plan. Telephone operators, reception desk personnel, paralegals, secretaries, information technology personnel, Web content managers, and others should have a clear plan of action for LEP encounters.

Factor 4: Consider the resources you have available and the costs of providing various types of language services to LEP people. There are several types of language services that agencies may utilize:

- oral interpretation either in person or by telephone;
- written translation; and
- direct communication in the LEP individual's primary language, for example, through bilingual personnel.

Districts have a range of choices for enlisting language services including, but not limited to:

- hiring and training bilingual staff (for use outside the case or investigative setting);
- using bilingual agents in investigations;
- accessing telephonic interpretation (whether through a telephonic interpretation company or by contacting a known interpreter who is unavailable to interpret in person);
- adopting standardized translated documents from other districts;
- using in-person translators and interpreters; and
- using trained and qualified community volunteers.

Generally, this wide range of options is equally varied in terms of cost and quality. In deciding which options are most suited to a district's needs, relevant considerations can include:

- the need for highly accurate, specialized, and unbiased interpretation (a professional staff or contract interpreter for cases and high-stakes interviews);
- the need for expedited language assistance (bilingual staff members or telephonic interpreters to facilitate immediate communication with an LEP caller); and
- the cost (choosing a bilingual staff member over a professional interpreter for a one-time community meeting or for noncritical phone interactions).

Districts have substantial flexibility in determining the appropriate mix of services for their needs. A district's size, level of existing resources, level of need, and the costs involved all factor into decision-making, but not at the expense of competent and accurate language services. As some of the cautionary examples in earlier sections demonstrate, competent and unbiased communication is key to preserving arrests and judgments, avoiding lawsuits, protecting the LEP community, preserving civil rights, and safeguarding the integrity of the justice system.

Although LEP people may wish to use an interpreter of their own choosing in certain situations, such as witness interviews, districts should obviously avoid such an arrangement even though it may be cost-effective and efficient, particularly where a relatively uncommon language is involved.

The four factor analysis provides a guideline for districts as they design or reevaluate their existing language access strategies. While the Court Interpreters Act, *supra*, and victim-witness protections contemplate language access in certain situations, a language plan based on the four factor analysis addresses all aspects of the work of a USAO.

B. Making the district's plan work

According to EOUSA, the majority of USAOs have language plans. Plans should be revisited and revised as demographics change and all USAO personnel should be familiar with their district's plan. Plans should include the district's process for obtaining interpreters and translators, interpreter qualification standards, languages in which translated forms are available, location of translated forms, and contact information for the district's LEP coordinator or other resources for language-related questions and concerns.

In addition to becoming familiar with the district's overall plan, AUSAs may benefit from annotating the plan with practical information that can assist in their work. For example:

- How can an AUSA ensure that the witness and the interpreter speak the same dialect and can understand each other sufficiently?
- Does the AUSA and/or agents know the process for enlisting qualified, impartial translators to translate documents and letters in foreign languages?
- How does the AUSA verify the impartiality of a community member recruited to interpret for a witness interview in an uncommon language?

- Are the paralegals and administrative professionals with whom the AUSA works familiar with the process for accessing a telephonic interpreter or bilingual staff member in case a call is received related to a case?

Appending a list of questions or strategies to the language plan for use when working with LEP witnesses can help to ensure accurate and dependable language assistance. The following list of tips for working with LEP witnesses is by no means exhaustive. Rather, it is a suggested starting point for defining the AUSA's role in language access issues. AUSAs, their cases, and the public can only benefit from dealing with language barriers in an informed, direct, and streamlined fashion.

IV. Top ten tips for AUSAs

(1) Assemble a "language toolkit" consisting of:

- the district's language access plan;
- useful phone numbers for accessing telephonic and in-person interpreters, translators, bilingual employees, or community volunteers; and
- locations of translated forms in other languages (if not contained in your district's language plan);

(2) Avoid assumptions about an individual's LEP status. When in doubt, obtain language assistance and consider using an interpreter even with individuals who speak some English.

(3) Beware of assumptions regarding a LEP individual's first language. For example, some individuals from primarily Spanish-speaking countries may not speak Spanish.

(4) Make sure the interpreter is sufficiently fluent both in English and the native language. Be particularly alert in situations where many exchanges are needed to convey a point.

(5) In sensitive situations, or where bias is suspected, ensure that the LEP person and the interpreter do not know each other. If relevant,

confirm that the interpreter and LEP person do not come from traditionally adversarial communities. The likelihood of familiarity increases if both individuals are part of a small ethnic community. Also ensure that the interpreter does not know the subject(s).

(6) Always address the LEP person in the first person. Be sure to look at the LEP person (not the interpreter) during questioning.

(7) The concept of time and its significance can vary depending on a witness's background. "How old are you?" may not always produce a responsive or accurate answer. One approach for determining dates may involve using the ages of a witness's family members, for example, "Do you remember the day your younger sister was born? How old were you then?" Similarly, constructing a time line based on the ages of a witness's children may be useful, for example, "When was your son born? How old was he when you first started working for the defendant? How old is he now?"

(8) Ensure that nonprofessional interpreters are familiar with interpreter ethics requiring accuracy, impartiality, confidentiality, and avoidance of conflicts of interest, among other things.

(9) In criminal cases where district language resources are insufficient, encourage FBI agents to use the FBI language lab in Washington, D.C. for case-related translations and interpretation. Also consider telephonic contact with interpreters used by other districts.

(10) Log on to <http://www.lep.gov> for a variety of resources, including:

- language identification flash cards, which can assist in ascertaining the language of literate LEP witnesses;
- the Department's implementation plan for LEP access;
- a checklist for monitoring an interpreter or translator's performance at <http://www.lep.gov/leptatool.htm>. ❖

ABOUT THE AUTHOR

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Enforcing Protections Against Immigration-Related Employment Discrimination: What Every Department of Justice Employee Should Know

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Related Unfair Employment Practices*

I. Introduction

A criminal Assistant United States Attorney (AUSA) is interviewing eyewitnesses to an armed bank robbery. During a pre-grand jury interview, in response to routine questions about the witness's employment history, the witness states that he was recently fired from his job as a bank teller. Although he is a legal permanent resident, his employer told him that due to the current focus on immigration issues the company would now employ only U.S. citizens.

In the course of an investigation into a small company's compliance with immigration laws, the company president proudly states in an interview that he has avoided problems with hiring illegal immigrants by accepting applications only from holders of green cards or U.S. passports.

The Latino neighbor of an AUSA tells her about an issue he encountered during a recent job search. Upon receiving his application, the human resources director asked him for five pieces of identification because he "looks foreign." He asks the AUSA, "Is this legal?"

These examples illustrate situations that may confront Department of Justice (Department) personnel in the ordinary course of their legal

practice in civil or criminal law. These issues may arise completely outside the context of civil rights enforcement, but may implicate the jurisdiction of the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). While many people are aware that it is against the law to hire undocumented immigrants, many are unaware that U.S. immigration laws prohibit a variety of types of employment discrimination based on citizenship status or national origin. This article will provide the information that every Department employee should know about these protections and the enforcement program of the Civil Rights Division's OSC so that violations can be recognized and referred where appropriate.

II. Background of the OSC

OSC is a statutorily-mandated office, established by Congress in the Immigration Reform and Control Act of 1986, which amended the Immigration and Nationality Act (INA). By statute, the office is headed by a Senate-confirmed Presidential appointee and is organizationally located within the Civil Rights Division. OSC and the antidiscrimination provision of the INA, 8 U.S.C. § 1324b (2005), were created primarily to address discrimination against individuals who are legally entitled to work in the United States, but who are perceived to look or sound "foreign."

III. The antidiscrimination provision of the INA

The antidiscrimination provision of the INA prohibits citizenship-status discrimination with respect to hiring, firing, and recruitment or referral for a fee by employers with four or more employees (subject to certain exceptions). Protected individuals under the INA are U.S. citizens and nationals, asylees, refugees, temporary residents, and recent legal permanent residents. OSC has successfully intervened in situations where employers rejected for-hire or fired employees because they prefer to employ unauthorized workers. For example, OSC initiated an investigation into a U.S. citizen's charge that he was fired by a senior residential care facility because of his citizenship status. As a result of OSC's investigation, the parties entered into an agreement whereby the former employee received \$34,000 in back pay.

OSC also has worked with organizations representing affected workers to resolve citizenship-status discrimination charges. In this regard, OSC has vigorously sought to ensure that jobs in the Information Technology (IT) industry remain available to U.S. citizens. OSC received multiple charges from the Programmers Guild, an organization whose mission is to advance the interest of U.S. IT workers against numerous IT employers. The charges alleged that job advertisements posted by the employers stated a preference for temporary visa holders over authorized U.S. workers. As a result of OSC's investigations, these IT employers have eliminated the objectionable job postings, conformed their ads to the law, and placed equal employment opportunity statements on their Web site(s).

It is important to note, however, that there is an exception to the prohibition against citizenship-status discrimination where such discrimination is required by law, regulation, or government contract. 8 U.S.C. § 1324b(a)(2)(C) (2005). This situation occurs most frequently with military and national security contracts. Thus, where a

contractor is abiding by a contractual agreement with a federal agency to employ only U.S. citizens, citizenship-status discrimination allegations are not actionable under the INA. However, the citizenship requirement must be limited only to the specific jobs covered by this requirement in the contract.

The INA also prohibits national origin discrimination with respect to hiring, firing, and recruitment or referral for a fee by employers that are not covered by Title VII of the Civil Rights Act of 1964. Title VII covers national origin discrimination by employers that employ 15 or more employees for 20 or more weeks during the preceding or current calendar year and is enforced by the Equal Employment Opportunity Commission (EEOC). The national origin discrimination prohibition covers smaller employers—those employing between 4 and 14 employees.

Under the INA and Title VII, employers may not treat individuals differently because of their place of birth, country of origin, ancestry, native language, accent, or because they are perceived as looking or sounding "foreign." Under the INA, all work-authorized individuals are protected from national origin discrimination. 8 U.S.C. § 1324b(a)(1) (2005). For example, OSC successfully settled a charge filed by a naturalized U.S. citizen who alleged she was rejected for hire as a clerk-typist because of her accent. Similarly, OSC settled a national origin discrimination charge filed by a waiter who alleged he was fired after the employer directed ethnic slurs at him and accused him of stealing, based on a derogatory ethnic stereotype. In these cases, OSC successfully recovered full back pay for the victims and civil penalties for the government, as well as injunctive relief against the employers.

The INA also prohibits unfair documentary practices during the employment-eligibility verification process also known as "document abuse." Document abuse consists of requesting more or different documents than are required for employment-eligibility verification or refusing to honor documents that reasonably appear genuine

with the intent of discriminating on the basis of citizenship status or national origin. 8 U.S.C. § 1324b(a)(6) (2005). An employer must accept any documents that are sufficient to complete the required Employment Eligibility Verification Form I-9 as long as they appear to be reasonably genuine on their face and relate to the employee presenting them. Treating employees differently in the employment-eligibility verification process based on their national origin or citizenship status violates the document abuse provision. OSC has jurisdiction over all employers with four or more employees for document abuse claims.

In one instance, an employee who produced a Social Security card and driver's license during the employment-eligibility verification process was terminated because he did not produce a "green card," even though an employee has the right to choose which acceptable documents to produce for employment-eligibility verification purposes. After OSC investigated the employer's actions, the matter was resolved through a settlement agreement whereby the employer paid \$15,000 in back pay to the former employee. In another matter, OSC successfully helped a Temporary Protected Status (TPS) recipient remain employed after his Employment Authorization Document was automatically renewed by the U.S. Department of Homeland Security (DHS). OSC intervened on behalf of the TPS recipient after he had been terminated despite the fact that he had informed his company that he was covered by the automatic work extension. As a result of OSC's intervention, the employee was reinstated.

Finally, the INA prohibits intimidation, threats, coercion, or retaliation against persons who intend to file or have filed an OSC charge or complaint, testified, assisted, or participated in an OSC investigation or proceeding, or otherwise assert their rights under the INA's antidiscrimination provision. 8 U.S.C. § 1324b(a)(5) (2005). For example, it is illegal to retaliate against any individual who has contested actions that may constitute immigration-related unlawful employment practices under the

antidiscrimination provision. In one instance, an employee was fired after she complained that her employer was hiring undocumented workers instead of authorized workers. After OSC initiated an investigation into these allegations the employee was offered her job back and received full back pay.

As shown above, violations of the statute may result in a variety of remedies including the assessment of civil penalties, back pay, hiring or reinstatement of injured parties, education and training for employers, and cease and desist orders.

IV. Handling allegations of discrimination

OSC may receive discrimination complaints from a variety of sources including referrals from DHS or other government agencies, as well as complaints filed directly by the public. (The complaint forms are available at <http://www.usdoj.gov/crt/osc/htm/facts.htm>.) OSC may also open independent investigations when it has reason to believe the statute has been violated. 8 U.S.C. § 1324b(d)(1) (2005). Staff attorneys and equal opportunity specialists investigate charges to determine whether the employer committed unlawful discrimination under the INA's antidiscrimination provision. OSC staff travel frequently to interview witnesses and review documents and may utilize the U.S. Attorneys' offices (USAOs) to conduct depositions and interviews. OSC may coordinate with AUSAs in cases where civil or criminal immigration violations also implicate the jurisdiction of OSC. For meritorious claims, OSC attorneys are responsible for settlement discussions and litigation before administrative law judges with appeals filed directly with the federal courts of appeal. Subpoena enforcement actions are argued in federal district court in coordination with the respective USAO.

OSC often resolves complaints through a timely and cost-efficient telephone-intervention program. OSC operates toll-free hotlines to

receive inquiries about potential discrimination from workers and employers. In FY 2007, OSC directly handled approximately 8,140 calls through its worker and employer hotlines and has successfully intervened to save the jobs of many U.S. citizens and other authorized workers. Based on these calls, OSC can mediate rapid resolutions to employment disputes that might otherwise result in the filing of charges, the accumulation of back pay awards, and litigation expenses. OSC has been able to educate employers on the spot and thereby: (1) help employers correct policies and practices that violate the law; (2) permit employers to hire qualified applicants and retain qualified workers; and (3) minimize periods of unemployment. For example, OSC successfully completed a telephone intervention on behalf of a Somali national with lawful permanent resident (LPR) status, thereby saving his job and assisting the employer to reform its Employment Eligibility Verification Form (I-9) procedure to comply with federal law. When the worker's LPR card expired, the employer demanded that he present a new LPR card or face suspension. OSC contacted the employer and explained that individuals who present LPR cards (also known as Alien Registration Receipt Cards, Form I-551, resident alien cards, permanent resident cards, or "green cards") for I-9 purposes should not be reverified and that this practice may constitute document abuse. As a result, the employer indicated that it would modify its reverification process to comply with the law and let the individual continue working.

OSC has completed approximately 1,500 successful telephone interventions since the inception of this program—196 in 2007 alone. Any AUSA—or employers or workers they encounter—can direct any questions related to possible unfair immigration-related employment practices to OSC's telephone hotlines at: (202) 616-5594 or 1-800-255-7688 (toll free) (employee line); TDD 1-800-616-5525, or 1-800-255-8155 (toll free) (employer line), TDD 1-800-362-2735.

OSC emphasizes education and outreach as key tools in addressing potential immigration-

related employment discrimination. OSC has adopted a multifaceted approach to compliance assistance via its Internet site, which is available at <http://www.usdoj.gov/crt/osc>; employer and worker toll-free hotlines; training materials; compliance assistance education; media outreach; speaker's program; and grant program. OSC attorneys give presentations around the country to varied audiences including employees, worker advocates, and employer representatives. OSC conducts joint outreach with DHS and the Equal Employment Opportunity Commission to educate employers about immigration law and the laws pertaining to equal employment opportunity.

USAOs are often the first government office to learn of instances of possible citizenship-status or national origin discrimination or document abuse. USAOs have an important role in facilitating relief for injured parties (U.S. citizens and other legally authorized workers) who have become victims of immigration-related employment discrimination. Through collaborative efforts, OSC and USAOs can work together to eliminate immigration-related unfair employment practices.

A brief summary of the steps to take in order to file a charge with OSC is set forth at the end of this article.

V. Conclusion—What AUSAs and other Department employees can do

Department personnel may encounter at any time a person who has been subjected to unlawful immigration-related unfair employment practices. OSC urges anyone who may come across a potential victim of such discrimination to contact or file a charge with OSC. Additional information about the applicable legal protections and OSC's enforcement program is available at <http://www.usdoj.gov/crt/osc>.

Filing a Charge with OSC

Workers or persons filing on their behalf must file charges with OSC within 180 days of the alleged act of discrimination. Charges may be filed in a variety of languages. To file a charge, one can download a charge form at <http://www.usdoj.gov/crt/osh/htm/charge.htm>. Alternatively, individuals can telephone OSC at (202) 616-5594 or 1-800-255-7688 (toll free), TDD (202) 616-5525 or 1-800-237-2515 (toll free) to request a charge form. Charges should be mailed to:

U.S. Department of Justice
Civil Rights Division
Office of Special Counsel for Immigration-
Related Unfair Employment Practices
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or faxed to: (202) 616-5509. Once a charge is filed, OSC may investigate the claim for up to 210 days. Typically an attorney or equal opportunity specialist will interview injured parties, employers, and witnesses, as well as review documents. If, after 120 days, OSC finds reasonable cause to believe discrimination occurred, then OSC may file an administrative complaint against the employer before an administrative law judge. Alternatively, if OSC is unable to make a determination after 120 days, OSC will notify the parties. The charging party then has 90 days to file a complaint with an administrative law judge. OSC may still intervene in that case or file its own complaint within the 210-day period. ❖

ABOUT THE AUTHOR

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Handling Civil Rights Cases—An Assistant U.S. Attorney's Perspective

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Last fall, I received a letter from a victim of discrimination in a fair housing case, which I handled jointly with attorneys from the Housing and Civil Enforcement Section of the Civil Rights Division. The letter was written shortly after the victim was notified that she would be receiving a monetary settlement and said:

I live my life daily expecting to be discriminated against because it's that common. It is so refreshing to know that other people care and realize how wrong it is . . . it warms my heart to know that the people you expect to look down their nose at you become the people that show you the most love and sacrifice.

Letter dated Oct. 12, 2007 (on file with the author).

Although my work on the case was tremendously rewarding and was hardly a sacrifice, the letter provides a glimpse at how meaningful this work is to the lives of those whose rights we seek to protect.

I joined the U.S. Attorney's Office (USAO) in the Eastern District of Michigan in May of 2000 and began working on civil rights enforcement shortly thereafter. I am fond of telling my family, my colleagues, and my friends that I have the best legal job in the country. I have a varied docket—fair housing, fair lending, police misconduct, juvenile justice, and enforcement of the Americans with Disabilities Act—and I work with some of the most experienced, talented, and dedicated lawyers in the Department. Because of the knowledge I have gathered from doing this work, I am also called upon by the United States

Attorneys I have worked for to provide advice and counsel on civil rights issues that come up in unexpected ways in other areas of the work our office conducts. For instance, I have worked closely with the office's administrative staff in devising a workable evacuation policy for employees with mobility impairments—very important in an office on the upper floors of a high rise building! In addition, civil rights litigation often involves cooperation with private attorneys and nonprofit advocacy groups and building these relationships has been very rewarding. The positive working relationships I have helped to develop with the Arab American community groups in the Detroit area, as well as the NAACP, the ACLU, and other important organizations have assisted both in the civil rights program as well as in other initiatives within the office. In fact, two years ago our United States Attorney created a Cross Function Civil Rights Working Group, which he chairs, so that Assistant U.S. Attorneys (AUSAs) doing both civil and criminal enforcement of civil rights statutes could be in close communication.

There are many ways for AUSAs to develop a civil rights docket. The first is the U.S. Attorney Program for Americans with Disabilities Act (ADA) Enforcement, a program that the Disability Rights Section (DRS) of the Civil Rights Division administers to provide assistance to USAOs that are handling affirmative ADA enforcement matters. DRS provides training, legal support and assistance, monthly conference calls on the law and procedure, and a Justice Television Network training series on enforcing the ADA. DRS forwards complaints filed by individuals in the jurisdiction who allege discrimination based upon disability to participating USAOs.

The majority of the complaints forwarded allege a denial of access or service to one or two

individuals, however, the resulting investigations often expand to provide remedies that affect a far wider population. For example, through this program I received a complaint from a woman who uses a wheelchair and could not gain access to a JoAnn's fabric and craft store in the Detroit area. While I was working on the investigation, several other complaints were filed with DRS against JoAnn's and we ultimately obtained a Settlement Agreement with the chain requiring extensive barrier removal and retrofitting of their 870 stores nationwide. *Available at* <http://www.ada.gov/joannstore.htm>. Lawyers from DRS are available to provide technical and legal assistance throughout the process of investigating, litigating, and resolving ADA complaints. Without the U.S. Attorney ADA Enforcement Program the Department would be seriously limited in its ability to handle the volume of complaints filed each year.

The Department also has authority to initiate its own investigations into whether an entity is in compliance with the ADA. I have worked on several compliance reviews. One review involved the accessibility of a newly-renovated hotel and restaurant and a second involved whether an area health-care system was providing effective means of communication for individuals who are deaf or hard of hearing. Compliance review authority allows AUSAs who work on these cases to build a varied and interesting case load that is not complaint driven.

The most rewarding aspect of ADA enforcement work is the response of the complainants. These are people who are often turned away by private attorneys because their type of case provides them with little monetary relief, either by statute or due to the nature of the complaint. Complainants have voiced many times that the phone call informing them that the USAO would be investigating their complaint was the first time a public official had ever acknowledged the challenges they face in their daily effort to gain access to public life. One such case was filed by the father of a deaf son who was required by a local probate court to obtain and pay for a sign

language interpreter for a custody hearing. As a result of his complaint, the St. Clair County Probate Court in Port Huron, Michigan adopted a new policy for effective communication and the complainant received monetary damages. This complaint was resolved with a letter agreement. In another case that I recently opened, a young single mother was turned away from what she had determined would be the best daycare for her daughter with physical and developmental disabilities because the provider didn't want "kids like that" in the facility. This complaint is still pending.

Many ADA matters can be resolved without litigation. In light of the fact that many USAOs do not have the resources to devote a full-time AUSA to civil rights enforcement, it is important to know that the majority of ADA complaints are resolved presuit. In addition to the rewards of working on these cases, the community is informed that USAOs handle civil rights matters, which in turn generates more inquiries and complaints, both in this area and others.

For example, Easter Seals of Michigan contacted the USAO after they had a zoning permit for a clubhouse for individuals with chronic mental illness revoked following an outcry in the neighborhood. Easter Seals had planned to open a day center in Royal Oak, Michigan where its members could learn job skills, engage in resume writing, and obtain the support needed to progress in their effort to live independently after intensive mental health treatment.

Along with lawyers from DRS, we conducted our own investigation of Easter Seals' complaint and determined that the city of Royal Oak had violated the ADA. We then filed a successful motion to intervene in the pending lawsuit. Within a short time we were able to settle the suit with \$300,000 in damages to Easter Seals and appropriate injunctive relief, including revocation of the stop-work order that had kept Easter Seals from moving into the facility it had already leased. *Available at* <http://www.ada.gov/michigan.htm>. Some months later, a DRS attorney and I

joined officials from Easter Seals, the director of the clubhouse, and scores of its participants for a ribbon cutting ceremony to celebrate the grand opening of the clubhouse. It was an honor to stand side-by-side with the victims of discrimination—the clubhouse members—who were so proud of the fight we had waged together. In addition, my work on this case exposed me to the challenges faced by individuals with chronic mental illness—the insensitivity of the neighbors I spent time listening to in a local coffee shop and corresponded with throughout the process provided a first rate lesson in how deep harmful stereotypes about mental illness run.

Enforcement of the Fair Housing Act (FHA) is a second area of civil rights enforcement work for AUSAs. The FHA has a unique provision that directs the Department to file suit where the Department of Housing and Urban Development (HUD) has investigated a complaint of discrimination and found reasonable cause to believe that discrimination took place. If either the complainant or the respondent elect to resolve the dispute in federal court, then the Department files suit on behalf of the complainant. The Housing and Civil Enforcement Section delegates authority for handling these cases to AUSAs on a regular basis. The cases are varied and provide a wonderful opportunity to litigate on behalf of someone who has suffered discrimination. In the last few years, I have handled two HUD cases that were elected to federal court—the first by the housing provider and the second by the complainant.

In the first case, *United States and Joyce Grad v. Royalwood Cooperative Apartments*, No. 03-73034, 2005 WL 5985121 (E.D. Mich. Feb. 7, 2005), a woman with a mental illness alleged that her housing cooperative violated the FHA when it denied her request for a reasonable accommodation. Joyce Grad, the complainant and intervening plaintiff, requested an exception to the cooperative's "No Pets Policy" so that she could have a small, emotional-assistance dog in her unit. Despite the fact that Ms. Grad had written support for her request from her treating psychiatrist and

psychologist, the cooperative denied her request. Settlement efforts were unsuccessful and after a 9-day trial the jury awarded Ms. Grad \$314,209 in damages. Although the trial was 2 years ago, I continue to get regular calls from civil rights lawyers around the country requesting copies of the *Royalwood* jury instructions, summary judgment response briefs, and names of experts to assist them in handling reasonable accommodation cases. The work of AUSAs, even on cases that initially appear to affect only a few individuals, often has far-reaching impact on the development of new arguments and interpretations of the law.

I also worked on *United States v. Edward Rose and Sons*, 246 F. Supp. 2d 744 (E.D. Mich. 2003). The USAO in the Eastern District of Michigan worked on this matter with a team of lawyers from the Housing and Civil Enforcement Section. It was alleged that one of the nation's largest developers of apartment complexes had violated the design and construction accessibility requirements in the FHA. The defendants were headquartered in the Eastern District of Michigan. Throughout the litigation, I worked as a full member of the Department's litigation team, handling depositions, witness interviews, and court hearings. I learned a tremendous amount about complex litigation as the case involved a successful appeal to the Sixth Circuit, a mandamus petition in the Seventh Circuit, more than 100 depositions, and a brisk motion practice. After approximately 2 years of litigation, a consent decree that required the defendants to retrofit over 5,400 apartment units in 49 complexes, located in 7 different states was negotiated. A \$950,000 victim fund was also obtained. The victim-fund was recently distributed to 37 individuals with disabilities who were living in previously inaccessible units.

Over the years, the Housing and Civil Enforcement Section and the USAO in the Eastern District of Michigan have developed a cooperative and positive relationship with the area's private, nonprofit fair-housing centers. As a result, several important cases were developed

that would not otherwise have been handled. For example, in *United States v. General Properties and Elliott Schubiner*, No. 2:06-CV-11976 (E.D. Mich., consent decree filed Aug. 29, 2007), the Fair Housing Center of Metropolitan Detroit (FHC) received information that the owners and managers of an apartment complex in Livonia, Michigan were discriminating on the basis of race. The FHC sent a series of paired fair-housing testers to the property. When the tests showed race discrimination, the FHC provided me with a copy of the testing materials and, along with attorneys from the Housing and Civil Enforcement Section, we opened an investigation. FHC filed suit in April 2005 and a year later we filed a separate suit which was combined for purposes of discovery and trial.

In the course of the presuit investigation and in discovery, additional evidence of egregious race discrimination at this apartment complex was uncovered. After some contentious litigation, a consent decree was negotiated that enjoined the defendants from further discrimination and prohibited them from engaging in the leasing process at the apartment complex. It also required the defendants to pay damages of \$720,000, which is the largest settlement in a race-discrimination fair-housing case in Michigan. Of that amount, \$330,000 went to 21 victims of discrimination at the complex.

In addition to the personal satisfaction and intellectual challenge that I gain from civil rights enforcement, I believe the cases are often strengthened by partnerships between attorneys in the Civil Rights Division and AUSAs in the district where the cases are brought. A good example of this is the investigation and handling of the lawsuit and consent decree in *United States v. City of Detroit*, No. 03-CV-72258 (July 18, 2003). This is a case I have worked on since 2000 when information first came to the Department's attention that led to opening this investigation of the Detroit Police Department (DPD).

Pursuant to 42 U.S.C. § 14141 (1994), the Attorney General has authority to open an investigation of a state or local law enforcement

agency where there is reason to believe that a pattern or practice of unconstitutional conduct may be taking place. Enforcement of this statute is delegated to the Special Litigation Section (SPL) of the Civil Rights Division. As a result, attorneys in SPL have developed a great deal of expertise in handling these sensitive investigations.

In this case, there were allegations that the DPD was engaging in a pattern or practice of excessive use of force, unconstitutional conditions of confinement in its holding cells, and arrests of witnesses and suspects without probable cause. The investigation, which lasted almost 2 years, showed that these practices were indeed occurring with alarming frequency. As a result, a comprehensive set of consent judgments that mandate systemic reform throughout the DPD was obtained. Hardly a day goes by that I am not working on some aspect of this case, evaluating whether the city and the DPD are in compliance with the consent judgments, and where they are not, what it will take to move the case forward.

This is a case where the partnership between lawyers in the USAO and the trial attorneys from SPL proved to be very valuable to the outcome. As AUSAs in Detroit, we had contacts with the defense bar, local civil rights groups, and others who are able to assist in interviewing victims and pursuing the evidence that ultimately supported the determination that the DPD was in violation of the statute and that a court-enforceable remedy was warranted. Although these cases can proceed without the assistance of local counsel such assistance is very beneficial. These are not easy cases for AUSAs. USAOs rely heavily on positive relationships with local and state law enforcement entities to cooperatively carry out criminal investigations. It is not easy to have one arm of the USAO investigating the local police department while another is relying on officers of that department to serve on joint task forces or to serve as witnesses in cases. But when it can be done the outcome is favorable for all involved. The DPD case is what is often thought of as a classical civil rights case in that real systemic reform is being sought that will prevent future

violations of citizens' constitutional and statutory rights. The *United States v. City of Detroit*, No: 03-CV-72258 (July 18, 2003) is the most challenging and the most rewarding case I have had the opportunity to work on.

Civil rights practice in the USAOs has many benefits. The United States Attorneys I have worked for over the last 8 years have consistently supported civil rights enforcement and have derived a substantial measure of positive media exposure for the office as a result of this work. On a more personal level, working on civil rights matters provides AUSAs with the opportunity to assist individuals who have been denied the rights and privileges that our civil rights laws seek to protect and to work with others to bring about systemic reforms in public and private entities to prevent future incidents of discrimination.❖

ABOUT THE AUTHOR

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NOTES





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