

# Rescinding Employment Benefit Extended Only to Employees With Military Obligations Does Not Violate the USERRA

June 8, 2009

By [Maria Greco Danaher](#)

The Uniformed Services Employment and Reemployment Rights Act (USERRA) protects members of the armed services against employment discrimination related to the benefits of their employment. The 7th U.S. Circuit Court of Appeals has held that such protection refers to employment benefits that are “extended generally to military and non-military employees alike,” and that discontinuing a benefit that had been extended only to employees with military obligations does not violate the USERRA.

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Ryan Crews, an officer of the Police Department in Mt. Vernon, Illinois, has been a member of the Army National Guard since 1988. As a Guard member, Crews is required to attend certain weekend training and preparedness exercises on a monthly basis. Under the collective bargaining agreement between the City and the police employees, the City has the discretion to establish work schedules to meet operational needs. Police officers’ weekly schedules typically consist of five 8-hour shifts and two days off. Crews’ military obligations frequently conflict with his work schedule. In these instances, the City has grants time-off to Crews (and other Guard member/employees) to attend drills. While the leave is unpaid, the City has allowed Guard member/employees to turn in their military pay in exchange for their regular City pay, so as not to

incur any net loss in weekly wages. Guard member/employees also may allocate paid time off to days missed for military drill, thereby collecting both City pay and military pay for those days.

For several years, the City maintained a policy under which Crews was permitted to reschedule work shifts that fell on drill weekend, allowing him to use weekend-drill shifts as his weekly days off. This allowed Crews to collect military pay for the drill weekends, while also collecting his full weekly City pay. Three other Guard member/employees were granted this scheduling benefit between 2000 and 2003.

In 2006, the City hired two additional Guard member/employees. At that point, it was determined by the City that extending the policy to an increasing number of individuals would result in numerous and costly scheduling conflicts, because the policy allowed Guard member/employees to work weekday shifts that already were fully staffed. Following the policy's rescission, Crews no longer can collect a full week's pay during his drill weeks, unless he uses his limited paid time off. This problem is especially acute for Crews because, as a corporal, his regular work schedule is Wednesday through Sunday; he has no ability to bid for preferred days off like lower-ranking officers do.

In 2006, Crews filed a complaint against the City, alleging that the rescission of the work scheduling policy denied to him a "benefit of employment" based on his military status, in violation of the USERRA. The lower court denied Crews' motion for summary judgment, and found in favor of the City. Crews appealed to the Seventh Circuit, which upheld that decision. According to the appellate court, the "benefit of employment" referenced in the USERRA is one that is provided to both military and non-military employees and, therefore, that law "reaches only discriminatory employment actions that provide military employees with fewer benefits." Rescinding a preferential work schedule, thereby placing Crews on equal footing with other police department employees who required days off for non-military reasons, was not a violation of the USERRA.

The City's ability, as set forth in the relevant collective bargaining agreement, to "establish work schedules to meet operational needs," is likely to have been a factor in the Court's analysis of this issue. Employers who plan to modify or eliminate preferential schedules previously granted to service member/employees should base such modification or elimination on a documented business reason. To do otherwise may support a claim of discriminatory treatment or retaliation under the USERRA.

USERRA does more than prevent discrimination and, according to the Department of Labor, "establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects." Therefore, nothing in the Seventh Circuit's decision suggests that employers should not continue to provide greater benefits to military service members. Also, if such increased benefits are made part of a negotiated agreement, employers may be legally obligated to continue their implementation. In situations similar to this case, however, in which a more favorable work schedule was instituted solely for the convenience and benefit of military service members, it is likely that employers can modify or eliminate such benefit for business-related reasons without violating the USERRA.

AUTHOR



Maria Greco Danaher  
Shareholder, [Pittsburgh](#)