EMPLOYMENT DISCRIMINATION

ON THE BASIS OF

NATIONAL ORIGIN AND RELIGION

IN THE POST-9/11 ERA

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INTRODUCTION

The period after September 11, 2001, was a time of great social tension in the United States. Prominent ethnic and religious lines were drawn, particularly to the detriment of people from a Middle Eastern or Arabic background. These ethnic and religious lines are clear when one compares the trends in employment discrimination claims based on national origin and religion in the years before and after 9/11. Since the attack on the World Trade Center in September 2001, the number of claims alleging national origin and religious discrimination received by the Equal Employment Opportunity Commission (EEOC) have increased by 17%\(^1\) and 35%,\(^2\) respectively. Lema Bashir, staff attorney for the American-Arab Anti-Discrimination Committee,\(^3\) believes that these numbers are just the tip of the iceberg because, “Lots of people are too nervous to file with the EEOC, or afraid to rock the boat.”\(^4\)

This paper addresses some of the recent trends occurring in the law applicable to employment discrimination on the basis of national origin and religion; summarizes key appellate decisions issued since September 11, 2001; and provides suggestions on best practices for employers to ensure Title VII compliance in the post-9/11 era.

TRENDS IN NATIONAL ORIGIN AND RELIGIOUS DISCRIMINATION CLAIMS

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on, “race, color, religion, sex or national origin”\(^5\) by employers of more than fifteen employees.\(^6\) Employees or applicants who believe that they have been victims of national origin or religious discrimination may file a charge with the United States Equal Employment Opportunity Commission which enforces Title VII.
Statistical Overview

Because the filing of a charge with the EEOC is a legal prerequisite to the filing of a lawsuit in a United States District Court claiming discrimination under federal law, EEOC statistics are the best means of analyzing any trends in the number of claims of national origin and religious discrimination and the validity of those claims. In 2000, before the September 11th attacks, the EEOC received 7,792 cases alleging discrimination on the basis of national origin. In 2007, this number increased to 9,396 cases. Likewise, the EEOC received 1,939 cases of religious discrimination in 2000 and 2,880 cases in 2007.

Reported EEOC figures provide information only on those claims which are actually filed and not on any overall increase in the occurrence of national origin and religious discrimination in the workplace. According to The Lawyers’ Committee for Civil Rights of the San Francisco Bay Area (LCCR), these numbers likely under-represent the extent of discrimination by a significant degree, given the reluctance of many people in the Muslim, Middle Eastern, South Asian, and Sikh communities to report discrimination. Similarly, Harpreet Singh, the legal director of United Sikhs, believes that, despite the increase in charges of discrimination against Sikh Americans reported by the EEOC, the figures do not reveal the true extent of the problem because many cases go unreported.

In addition, in some states and localities, the procedural mechanisms, applicable law, and available damages are more favorable to employees than federal law. In California, for example, most plaintiffs’ attorneys advise their clients to file discrimination claims with the California Department of Fair Employment and Housing under the California Fair Employment and Housing Act, which, unlike Title VII, contains no cap on emotional distress and punitive
damages. Therefore, while the EEOC figures are illustrative of the upward trend in national origin and religious discrimination claims, they represent only “the tip of the iceberg.”

**Modes of National Origin and Religious Discrimination**

The Lawyers’ Committee for Civil Rights has published a report entitled *Trends in Post-9/11 Backlash Employment Discrimination* that identifies five areas of employer practices that have generated claims and controversies since the events of September 11, 2001.

1. **Headscarves, Turbans, and Beards**

The report indicates that employees who wear headscarves, turbans, or beards for religious reasons are vulnerable to discrimination because these features identify them, whether accurately or not, as Muslim or Middle Eastern. The report also states that employers have objected to such clothing by claiming that it will hurt the company’s public image or customer relations and that government employers have claimed that wearing turbans or beards will compromise professionalism and the public’s ability to recognize uniformed officers.

Cases deciding the presence of employment discrimination based on physical appearance have varied by jurisdiction. In *Cloutier v. Costco Wholesale Corp.*, the plaintiff asserted that Costco failed to reasonably accommodate her religious beliefs by forbidding her to wear facial jewelry. The First Circuit disagreed, stating that Costco had a legitimate business interest in presenting a professional appearance to its customers. According to the Court, Cloutier’s insistence in exemption to the dress code and “her refusal to consider anything less mean[t] that Costco could not offer a reasonable accommodation without incurring an undue hardship.”

The Western District of Washington reached the opposite conclusion in *EEOC v. Red Robin Gourmet Burgers, Inc.*, concluding that the plaintiff’s display of tattoos on his wrists in
accordance with his religion did not pose an undue burden upon the employer. In that case the court determined that Red Robin had failed to offer any evidence to show that the plaintiff’s tattoo had hurt its company image.

A similarly favorable ruling for the employee was reached in a jury trial in Phoenix during which a woman alleged that Alamo Rent-A-Car had fired her for wearing her head scarf during the Muslim holy month of Ramadan. The court granted the EEOC’s partial motion for summary judgment because Alamo had failed to demonstrate that it had reasonably accommodated the plaintiff’s religious beliefs or that her wearing of the head scarf would have posed an undue burden.

2. Scheduling Accommodations: Praying and Fasting at Work

Muslim employees have reported being denied breaks during the day to pray or to break their daily fast in the evening during Ramadan. For example, the EEOC reached a settlement in 2005 with Oberto Sausage Co. in which Oberto Sausage paid $362,000 in relief to six claimants who had been denied a break at sunset to break their fast. In another 2005 dispute, Celestica, an electronic manufacturer, suspended or fired Muslim workers for re-scheduling their lunches to the evening so that they could break their fasts and pray at that time. This case appears to be still unresolved.

3. Ethnic Names

From 1998 to 2007, the Discrimination Research Center (DRC) conducted social science research examining the extent and nature of discrimination in employment, public contracting, and access to public services. In December 2003, the DRC conducted a study to determine the impact of ethnic names on hiring decisions. The Center sent out 6,000 fake resumes to
temporary agencies throughout California. The applicants all had comparable qualifications but some had ethnically identifiable names. The study found that the resumes with South Asian or Arab-sounding names received the lowest response in five of seven California regions.28

Employees with ethnically identifiable names have also suffered discrimination from co-workers and supervisors. In *El-Hakem v. BJY, Inc.*, the plaintiff sued his employer after his supervisor created a hostile work environment by repeatedly calling him “Manny” instead of his real name, Mamdouh Al-Hakem.29 The employer told Al-Hakem that the name “Manny”, “would increase El-Hakem's chances for success and would be more acceptable to BJY's clientele.”30 The Ninth Circuit affirmed the jury’s verdict for the plaintiff, ruling that the employer’s insistence for an entire year that the plaintiff Westernize his name constituted unlawful employment discrimination.31

### 4. Denial of Security Clearances For Work

Some individuals from a Middle Eastern or Muslim background have been denied security clearances for work in positions with access to sensitive information. For example, the New York Times has written a story about Aliakbar and Shahla Afshari, an Iranian-American couple, being fired from the National Institute for Occupational Safety for failing a security clearance.32 No explanation was given for the dismissal even though they had previously worked at the Institute for seven years without issue.33 The couple reasoned that they came under scrutiny for attending a Persian student conference five years prior that had since come under F.B.I. scrutiny.34

There are substantial legal barriers to the challenge of a denial of security clearances necessary for a particular position. Title VII contains an explicit exception for employers to
deny employment based on the failure to obtain a security clearance, stating that, “it shall not be unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position . . . if the occupancy of such position . . . is subject to any requirement imposed in the interest of national security of the United States.” As such, the EEOC has no authority to review the substance of a security clearance determination, even if it is allegedly based on national origin discrimination, because the Commission is bound by Title VII.

For government employees, § 154.7 of the Code of Federal Regulations, which regulates the grant of security clearances required for employment in the Department of Defense, permits the government to deny a security clearance if the employee or applicant has “immediate family members or other persons to whom the applicant is bonded by affection or obligation in a nation . . . whose interests may be inimical to those of the United States.” Courts have also concluded that denying a security clearance for employment in the Department of Defense due to the presence of family members in a hostile foreign country does not constitute discrimination. In Molerio v. FBI, the Court of Appeals for the District of Columbia dismissed a Title VII suit by an FBI employee who had been discharged because he had a father in Cuba. The Court held that the act of denying a security clearance based on family membership is not discriminatory because it applied equally to “any person, of any race or nationality, with relatives in the pertinent country.” Courts may also be hesitant to review denials of security clearances because such a determination is primarily a duty of the Executive branch of government. Therefore, legal redress is very limited, if available at all, for those who have been denied employment because of their inability to obtain a security clearance.
5. Employee Screening Against Terrorist Watch-lists

The LCCR also reports that some employers are beginning to screen job applicants against a terrorist watch-list maintained by the Treasury Department Office of Foreign Assets Control. The list of “Specially Designated Nationals and Blocked Persons” lists thousands of individuals who are suspected of posing a national security threat to the United States. Although no law requires employers to screen its current or potential employees against the names on the list, the LCCR states that some companies may doing so as part of a broader background check.

Although it is unlikely that many job applicants or employees will be on this select list, the LCCR warns that danger exists for employees and applicants whose names are similar to those of others on the list. Such a similarity could compel an employers to exclude an applicant or discharge an employee based on the employer’s wrongful belief that the person is affiliated with, or suspected of being affiliated with, terrorist activities.

EEOC’s Response to the Increase in Employment Discrimination Claims on the Basis of National Origin and Religion

The EEOC has taken numerous measures to counter any threat to the equal treatment of employees on the basis of national origin or religion in response to the events of September 11. The Commission issued a statement after the September 11th attacks reminding employers that, “Anger at those responsible for the tragic events of September 11th should not be misdirected against innocent individuals because of their religion, ethnicity, or country of origin.” To assist employers in their compliance with Title VII’s requirements in the post 9/11 era, the EEOC drafted a new chapter in its Compliance Manual applying Title VII’s prohibition of
discrimination based on national origin to new situations that may arise in the workplace. 47

Below is a summary of these revisions:

**Overview**

National origin discrimination means, “treating someone less favorably because that individual (or his or her ancestors) is from a certain place or belongs to a particular national group.” 48 Aside from an individual’s ethnic origin, employers may also not discriminate against an employee or a job applicant based on any

1) **Association** with a person or organization of a particular religion or ethnicity. For example, harassing an employee whose husband is from Afghanistan is not allowed. 49

2) **Physical, linguistic, or cultural traits.** For example, employers may not discriminate against someone based on her traditional African style of dress. 50

3) **Perception** that the person belongs to a particular religion or ethnicity, whether correct or not. For example, a person who resembles an Arab in speech, mannerisms, or appearance may not be discriminated against, even if he is not of an Arab background. 51

4) **Religion.** Although both religion and national origin discrimination are prohibited by Title VII, a significant difference between the two is Title VII’s requirement that employers reasonably accommodate an employee’s religious practices, unless doing so would result in an undue hardship to the operation of the employer’s business. For example, an employer would be required to provide an exception to a dress code to accommodate an employee’s religious attire unless doing so would result in undue hardship. Minor financial or administrative burdens are not undue hardships. While accommodation requirements do not apply to the treatment of employees and applicants on the basis of national origin, Title VII prevents employers from
imposing more restrictive workplace policies on any person from a particular national origin group.\textsuperscript{52}

**Language Requirements**

An employer may not discriminate based on an employee’s foreign accent unless the accent materially interferes with job performance. For example, a concierge with a heavy foreign accent cannot demand to remain in his position when numerous customers cannot understand him when he discusses travel arrangements.\textsuperscript{53}

Likewise, requiring English fluency for a job is only permissible if it is required for the effective performance of a position. The Compliance Manual offers the example of Jorge, a Dominican national, whose spoken English is not good enough to sell home appliances in a predominantly English speaking community. If Jorge applies for a job, the company should allow him to seek employment in its stock room because job performance in that location does not require English fluency. Similarly, requirements that employees speak English only at work may only be adopted for the safe and efficient operation of the employer’s business. An employer cannot ban all languages except English for the purpose of generally promoting good employee relations unless there was evidence that poor relations existed before.\textsuperscript{54}

**Security**

Title VII permits employers to terminate an existing employee or to refuse to hire a candidate in the interests of national security, and the EEOC does not have the power to review the substance of a security clearance determination, even if it is based on national origin. However, the Commission can review the procedural fairness of security requirements. For
example, an employer cannot impose stricter requirements for obtaining a clearance on employees of Arab descent.  

**Harassment**

About one third of all national origin claims include charges of harassment, such as ethnic slurs, workplace graffiti, or other conduct creating a hostile environment based on an individual’s birthplace, ethnicity, culture, or foreign accent. Such conduct violates Title VII if it becomes severe and pervasive and affects the victim’s performance. An employer who knows or should know of harassing behavior by coworkers, supervisors, or even non-employees and fails to take corrective measures may be liable under Title VII.  

The Compliance Manual offers the example of Muhammad, an Arab-American car salesman whose coworkers frequently call him “camel jockey,” “the ayatollah,” and “the local terrorist” in front of customers. Muhammad reports the conduct to upper management and gets no response. Because such conduct greatly reduces his job performance, the employer has violated Title VII.  

**Citizenship**

Although employers are not prevented from requiring employees to be U.S. citizens, using citizenship as a pretext for national origin discrimination is a violation of Title VII. For example, a company cannot hire non-citizens from European countries while rejecting non-citizens from Mexico. Employers should also be aware that decisions based on citizenship may be governed by other applicable Federal law, including the Immigration Reform and Control Act of 1986.
Retaliation

An employer may not discriminate against an employee who files a charge of discrimination or cooperates in the investigation of a coworker’s charge. For example, an employee who gives testimony supporting a coworker’s charge of discrimination cannot be deprived of overtime work assignments in favor of others who did not give such testimony.59

APPELLATE CASES

Although many cases alleging national origin and religious discrimination have been decided at the district court level since 9/11, far fewer cases have reached the appellate level. Discussed below are several of the most pertinent issues decided by the Courts of Appeal.

Direct Evidence of Discrimination

In Rodriguez v. FedEx Freight E., Inc., the plaintiff alleged that his employer failed to consider him for a supervisory position because of his accent.60 He presented evidence that the managers made disparaging remarks about his “language,” “how he [spoke],” and the adverse impact of his English upon his ability to rise through the company ranks.61 He also stated that his complaints to FedEx managers resulted in no corrective action.62

The Sixth Circuit held that management’s disparaging comments constituted direct evidence of national origin discrimination that satisfied the plaintiff’s prima facie case of employment discrimination.63 In making its determination, the Court referenced the EEOC’s recognition of linguistic discrimination as a form of national origin discrimination.64 Hence, the court ruled that the plaintiff’s allegation regarding his employer’s discrimination of his accent was enough to overcome FedEx’s motion for summary judgment.65
Timeliness of Complaint

In *EEOC v. WC&M Enterprises, Inc.*, the Fifth Circuit held that a hostile work environment claim may not begin to expire until the period of employment ends. The plaintiff alleged that after the September 11th attacks, his coworkers and supervisors often called him disparaging names like “Taliban” or “Arab” even though he was from India. They also made fun of his dietary habits and told him to “go back to where he came from.” He further claimed that his manager issued him a written warning stating that he “was acting like a Muslim extremist.” After his employer fired him, he filed a charge of discrimination with the EEOC. The district court held that his claim was untimely because it was filed 306 days after the last “objective” incident of harassment (the written warning) and that the EEOC requires a claimant to file within 300 days of the harassing incident.

The Fifth Circuit disagreed, stating that a, “hostile work environment generally consists of multiple acts over a period of time” and that the, “EEOC charge must be filed within 300 days of any action that contributed to the hostile work environment.” The court determined that, “a factfinder could easily conclude that [the plaintiff’s coworkers] continued to call [him] ‘Taliban’ . . . up to the date of termination and . . . that some acts of harassment took place within 300 days of the date on which [the plaintiff] filed his EEOC charge.” The court further held it was immaterial that the plaintiff came from India and not the Middle East, noting that, “Nothing in the [EEOC] guidelines requires that the discrimination be based on the victim’s actual national origin.”
Severity and Pervasiveness of Discrimination

In *EEOC v. Sunbelt Rentals, Inc.*, the Fourth Circuit decided whether the harassment suffered by the plaintiff rose to the level of severity and pervasiveness required for relief under Title VII.74 The plaintiff alleged that his employer subjected him to a hostile work environment by refusing to take action after coworkers and supervisors repeatedly referred to him as “Taliban” or “towel-head.”75 He also claimed that his coworkers would also hold metal detectors to his head, post incendiary cartoons in the workplace, and steal his timecards when he left for congregational prayer.76 The district court had granted summary judgment for the employer, noting that the activity of which the plaintiff complained was normal “coarse workplace” behavior and that some of the allegedly discriminatory events lacked a “direct nexus with religion.”77

The Fourth Circuit ruled that, although “plaintiffs must clear a high bar in order to satisfy the severe or pervasive test,” the evidence indicated that the plaintiff suffered “religious harassment that was persistent, demeaning, unrelenting, and widespread.”78 The Court held that any of the incidents suffered by the plaintiff would not have created a hostile work environment on their own but that their cumulative effect must also be taken into consideration.79 Thus, the court reversed the district court’s grant of summary judgment and remanded the case for further consideration.80

BEST PRACTICES

Good human resources practices should be implemented and maintained to ensure equal treatment of ethnic and religious minorities and to avoid national origin and religion
discrimination claims in the post-September 11 workplace. Some recommendations for such practices follow:

1. Provide training to supervisors in how to avoid discrimination, harassment, and retaliation in the workplace, including discrimination, harassment, and retaliation against ethnic and religious minorities.

2. Use hiring sources which will provide applicants from a broad range of ethnic and religious groups. Avoid word of mouth hiring which favors those groups already well represented in the workforce.

3. Advertise the company’s status as an equal employment opportunity employer in all recruitment media and to all other entities used in the recruitment process.

4. Use clearly defined criteria tied to business needs in deciding which applicants to hire and which employees to promote. Apply those criteria consistently to all applicants for employment and for promotional positions.

5. Ask the same questions / use the same processes for all applicants for employment and for promotional positions.

6. Respond to any questions from an applicant denied employment or a promotion with the objective reasons for the selection of another candidate.

6. Maintain an at will policy of employment but use progressive discipline when dealing with employee work performance problems. Provide direct, objective, and specific details to the employee about how his or her performance is not meeting job requirements and what the employee must do to avoid further discipline or termination.
7. Respond to employee misconduct as quickly as possible and consistently with the level of the misconduct. Delayed response invites a preemptive discrimination claim and a later retaliation claim when discipline is eventually imposed.

8. Do not allow any harassment in the workplace. Act at the first sign of any discriminatory statements, conduct, or unfair treatment to an ethnic or religious minority to stop the statements, conduct, or unfair treatment and to prevent any recurrence.

9. Conduct an assessment of adverse impact upon ethnic and religious minorities before implementing a reduction in force and ensure that layoff decisions are made on the basis of objective criteria.

10. Respond to any request for religious accommodation with sensitivity, and be sure that undue hardship truly exists before denying any such request for accommodation.

CONCLUSION

The aftermath of the events of September 11, 2001, has highlighted the importance of workplace respect for the different cultural backgrounds represented in our diverse American society. Such respect is not only a moral imperative but vital to ensuring a well functioning work environment. While the EEOC has taken steps to promote equality in the post-9/11 workplace, the responsibility for such equality primarily rests with each and every employer. In addition to the desire to avoid liability under Title VII and companion state and local laws prohibiting discrimination in the workplace, employers should be motivated to promote equal employment for their own business reasons.
3 The American-Arab Anti-Discrimination Committee is a grassroots organization dedicated to defending the rights of people of Arab descent and promoting Arab culture through advocacy efforts, community outreach, and legal representation. Their website is at http://www.adc.org/.
7 National Origin-Based Charges, supra note 1.
8 Id.
9 Religion-Based Charges, supra note 2.
10 The Lawyers’ Committee for Civil Rights is a San Francisco Bay Area organization dedicated to protecting the legal rights of people of color, poor people, immigrants and refugees, with a special commitment to African-Americans. Their website is at http://www.lccr.com.
12 United Sikhs is a UN-affiliated, international non-profit, non-governmental, humanitarian relief, human development and advocacy organization, aimed at empowering those in need, especially disadvantaged and minority communities across the world. Their website is at http://www.unitedsikhs.org/.
14 Sinnar, supra note 9, Sec. II.
15 Id.
16 390 F.3d 126 (1st Cir. 2004).
17 Id. at 136.
18 Id. at 138.
20 Id. at 18-19.
22 Id. at 1017.
25 No resolution is mentioned on the EEOC’s website.
The DRC was a project headed by the Impact Fund, an organization dedicated to enhancing the ability of lawyers to pursue public interest litigation in civil rights, poverty and environmental justice. The DRC is now a part of the Thelton E. Henderson Center for Social Justice at the UC Berkeley School of Law (see http://www.impactfund.org/New/pages/drc.htm).

Sinnar, supra note 9, Sec. IV, citing Names Make a Difference: The Screening of Resumes by Temporary Employment Agencies In California (Oct. 2004), a study conducted by the Discrimination Research Center.

415 F.3d 1068 (9th Cir. 2005).


32 C.F.R. § 154.7.

749 F.2d 815 (D.C. Cir. 1984).

See Dep’t of the Navy v. Egan, 484 U.S. 518, 529-530 (U.S. 1988).

Sinnar, supra note 9, Sec. V.


Sinnar, supra note 9, Sec. V.

13 EEOC Compliance Manual, § II.

Employment Discrimination, supra note 43.

13 EEOC Compliance Manual, § II(B).


13 EEOC Compliance Manual, § III(B)(1).


13 EEOC Compliance Manual, § VI(A).


487 F.3d 1001 (6th Cir. 2007).

Id. at 1005.

Id.

Id. at 1009.

Id. at 1008.
Id. at 1010.

496 F.3d 393 (5th Cir. 2007).

Id. at 396.

Id. at 397.

Id.

Id. at 398.

Id. (emphasis added)

Id.

Id. at 401.

521 F.3d 306 (4th Cir. 2008).

Id. at 311.

Id.

Id. at 313.

Id. at 315-16.

Id. at 318.

Id. at 318.

Id. at 321.