Chapter 6

# National Origin Discrimination

## Learning Objectives

By the time you finish studying this chapter, you should be able to:

- **LO1** Describe the impact and implications of the changing demographics within America on the American workforce.
- **LO2** Define the prima facie case for national origin discrimination under Title VII.
- **LO3** Explain the legal status surrounding "English-only policies" in the workplace.
- **LO4** Describe a claim for harassment based on national origin and discuss how it might be different from one based on other protected classes.
- **LO5** Identify the difference between citizenship and national origin.
- **LO6** Explain the extent of protection under IRCA.

# Opening Scenarios

### SCENARIO 1

1 Scenario

Kayla, a supervisor, recently hired a new manager, Alex, but has received complaints from customers that they cannot understand him when they speak to him on the telephone. Alex is a Romanian employee visiting from the company's Romanian office and is scheduled to remain with the firm for two years. Kayla is concerned that if she allows Alex to perform duties similar to other managers, the firm will lose customers; however, she is unsure about the firm's liability for decreasing Alex's responsibilities as a result of his foreign accent.

### SCENARIO 2

2 Scenario

Muhammad, an Arab-American Muslim high school student, had a job after school at a fast-food restaurant. A few co-workers started asking him why his "cousins" bombed the World Trade Center. Muhammad ignored their taunts. Then a manager began to add comments such as, "Hey, Muhammed, we're going to have to check you for bombs." Muhammed felt humiliated and angry. Soon after, he was terminated for accidentally throwing away a paper cup that the manager was using. Muhammed suspects that his religious and ethnic background was the reason he was fired.

## Statutory Basis

The statutory basis for protection against national origin discrimination is presented in Exhibit 6.1, "Legislation Prohibiting National Origin Discrimination." These statutes include section 703(a) of Title VII of the Civil Rights Act of 1964 and the Immigration Reform and Control Act of 1986.

## Chez/Casa/Fala/Wunderbar Uncle Sam

America has always considered itself to be a melting pot. Under this theory, different ethnic, cultural, and racial groups came together in America, but differences were melted into one homogeneous mass composed of all cultures. Recently, this characterization has been revisited and other, more accurate terms have been proposed. They include such terms as a *salad bowl,* in which all the ingredients come together to make an appetizing, nutritious whole but each ingredient maintains its own identity, or a *stew,* in which the ingredients are blended together but maintain their distinct identity, with the common thread of living in America acting as the stew base that binds the stew's ingredients together.

While the words on the Statue of Liberty—"Give me your tired, your poor, your huddled masses yearning to breathe free"—have always acted as a beacon to those of other countries to find solace on our shores, the reality once they get here, even sometimes after being here for generations, is that they are often discriminated against, rather than consoled. National origin was included in Title VII's list of protected classes to ensure that employers did not base employment decisions on preconceived notions about employees or applications based on their country of origin. Note that section 1981 of the Civil Rights Act of 1866 also may apply in those circumstances where national origin is a proxy for or equivalent to race (discussed later in this chapter).[1]

## Exhibit 6.1 *Legislation Prohibiting National Origin Discrimination*

### TITLE VII, CIVIL RIGHTS ACT OF 1964

**Sec. 703(a)**

It shall be an unlawful employment practice for an employer—

(1) to fail or to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's. . .national origin.

### IMMIGRATION REFORM AND CONTROL ACT OF 1986

**Sec. 274A(a)**

(1) It is unlawful for a person or other entity:
  (A) to hire or to recruit or refer for a fee for employment in the United States an alien knowing the alien is an unauthorized alien with respect to such employment, or
  (B) to hire for employment in the United States an individual without [verification of employment eligibility].

(2) It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or had become) an unauthorized alien with respect to such employment.

(3) A person or entity that establishes that it has complied in good faith with the [verification of employment eligibility] with respect to hiring, recruiting or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A).

**Sec. 274(B)(a)**

(1) It is an unfair immigration-related practice for a person or other entity to discriminate against any individual (other than an unauthorized alien) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment—
  (A) because of such individual's national origin, or
  (B) in the case of a protected individual [a citizen or authorized alien], because of such individual's citizenship status.

Speaking of race, as was mentioned in the introduction to the chapter on race discrimination, recently there has been a sort of blending of the race and national origin categories, with employees bringing as race discrimination cases those that had traditionally been brought as national origin claims. The traditional distinctions in the law are becoming blurred; but the significant thing is that, for instance, whether being Hispanic is considered race discrimination or national origin discrimination, it is, in fact, illegal to make workplace decisions on the basis of this attribute. What is critical to understand is that a decision based on either attribute is illegal; and national origin is a distinct category in this textbook because it is the way that such claims are traditionally handled, and because we are reluctant to blend completely the two areas when they have quite different histories, implications, and analyses for today's employment arena.

## The Changing Workforce

LO1

The 1990s saw a dramatic increase in the number of immigrants to the United States, particularly from Latino and Asian countries. By 2006, the United States

**Exhibit 6.2** *MYTHS about National Origin Discrimination*

1. "Citizenship" and "national origin" are synonymous.
2. A restaurant may hire whomever it wishes to represent the national origin of the restaurant.
3. It is not illegal discrimination for an employer to require that employees speak only English at work.

was growing by one person every 11 seconds, about the amount of time it takes to read the beginning of this paragraph.[2] Census figures released in 2001 show that the number of Latinos has risen 60 percent since 1990, to 35.3 million people, representing 15.2 percent of the workforce employed by private employers with over 100 employees, creating a virtual tie between Latinos and African Americans as the nation's largest minority group.[3] In 2006, foreign-born workers represented more than 15 percent of U.S. workers, on the rise since 2005, and their unemployment fell during the same period.[4]

In 2004, African Americans made up 11.3 percent of the workforce; Latinos made up 13.1 percent (the first time Latinos comprised a higher percentage than African Americans); and Asians, Pacific Islanders, Native Americans, and Alaska Natives made up 4 percent.[5] By 2006, Latinos, the largest minority group, numbered 44.3 million and accounted for almost half the nation's growth of 2.9 million over that past year.[6] The number of African Americans in the workforce by 2008 was expected to increase by 19.5 percent; Asians, Pacific Islanders, Native Americans, and Alaska Natives by 40.3 percent; and Latinos by 36.8 percent.[7]

However, during this same time period, the median weekly earnings of foreign-born full-time workers was significantly less than for non-foreign-born workers, $532 compared with $698 for other groups (among men only, the difference between $563 and $782!).[8]

On its face, national origin discrimination appears to be relatively simple to determine; however, it has surprising complexities. Employers have always been uncertain of the scope of Title VII's coverage in this area and what could be used as a defense to decisions based on national origin. (See Exhibit 6.2, "Myths about National Origin Discrimination.") Notwithstanding its complexity, however, complaints to the EEOC based on alleged national origin discrimination have been on the rise since 1999 and represent the fastest-growing source of complaints submitted to the EEOC,[9] which received 9,369 charges of national origin discrimination in 2007, 12% more than received in 2006.[10]

## Regulatory Overview

LO2

The **protection** offered by Title VII in connection with national origin is similar to that of gender or race and is used somewhat synonymously with "ethnicity," though they are distinguishable. That is, it is an unlawful employment

**national origin discrimination protection**
It is unlawful for an employer to limit, segregate, or classify employees in any way on the basis of national origin that would deprive them of the privileges, benefits, or opportunities of employment.

practice for an employer to limit, segregate, or classify employees in any way that would deprive them of employment opportunities because of national origin. An employer may not group its employees on the basis of national origin, make employment decisions on that basis, or implement policies or programs that, though they appear not to be based on an employee's or applicant's country of origin, actually affect those with one national origin differently than those of a different group.

An employee may successfully claim discrimination on the basis of national origin if it is shown that

1. He or she is a member of a protected class (i.e., articulate the employee's national origin).
2. He or she was qualified for the position for which he or she applied or in which he or she was employed.
3. The employer made an employment decision against this employee or applicant.
4. The position was filled by someone who was not a member of the protected class.

Each of the above will be discussed in turn.

## Member of the Protected Class

In connection with the first requirement, what is meant by "national origin"? While the term is not defined in Title VII, the EEOC guidelines on discrimination define **national origin** discrimination as "including, but not limited to, the denial of equal employment opportunity because of [an applicant's or employee's] or his or her ancestor's place of origin; or because an applicant has the physical, cultural, or linguistic characteristics of a national origin group."

**national origin**
Individual's, or her or his ancestor's, place of origin (as opposed to citizenship), or physical, cultural, or linguistic characteristics of an origin group.

Note that the term includes protection against discrimination based only on country of origin, not on country of *citizenship*. Title VII protects employees who are not U.S. citizens from employment discrimination based on the categories of the act, but it does not protect them from discrimination based on their status as aliens, rather than as U.S. citizens. That is, it protects a Somali woman from gender discrimination, but not from discrimination on the basis of the fact that she is a Somali citizen, rather than an American citizen. The issue of citizenship as it relates to national origin is discussed later in this chapter.

Many national origin cases under Title VII involve claims of discrimination by those who were not born in America; however, American-born employees also are protected against discrimination on the basis of their *American* origin. For example, the court has held that the employer's conscious decision to decide whom to dismiss on the basis of the national origin of its employees (in an effort toward "affirmative action") was not acceptable because that method tended to disfavor Americans, in favor of other nationalities.

In addition to national origin encompassing the employee's place of birth, it also includes ethnic characteristics or origins, as well as physical, linguistic, or

cultural traits closely associated with a national origin group. For instance, it has been held that Cajuns, Gypsies, and Ukrainians are protected under Title VII. It also may serve as the basis for a national origin discrimination claim if the employee

- Is identified with or connected to a person of a specific national origin, such as where someone suffers discrimination because he or she is married to a person of a certain ethnic heritage.
- Is a member of an organization that is identified with a national group.
- Is a participant in a school or religious organization that is affiliated with a national origin group.
- Has a surname that is generally associated with a national origin group.
- Is perceived by an employer as a member of a particular national origin group, whether or not the individual is in fact of that origin.

## Qualification/BFOQs

The second factor that must be shown for an employee to claim national origin discrimination is that the applicant or employee is *qualified* for the position. That is, the claimant must show that he or she meets the job's requirements.

Contrary to situations involving disability or religion, the employee in a national origin case must show that she or he is qualified for the position without the benefit of accommodation. No accommodation of one's national origin is required of employers. For example, while an employer would be required to reasonably accommodate an employee's religious attire, there is no similar responsibility to accommodate an employee's attire of national origin, such as traditional African dress, unless it can be shown to overlap with one's religion.

**BFOQ**
Bona fide occupational qualification, discussed more thoroughly in Chapter 2's discussion of the prima facie case of disparate treatment.

The employer may counter the employee's claim that she or he is otherwise qualified by showing that national origin is actually a **bona fide occupational qualification (BFOQ)** for the job. That is, the employer may explain why a specific national origin is necessary for the position applied for, why it is a legitimate job requirement that is reasonably necessary for the employer's particular business. However, it is important to note that customer, client, or co-worker *discomfort or preference may not be relied upon by the employer.* However, consider the following example. In one case, national origin was allowed as a BFOQ involving a subsidiary of a Japanese company. The court found that the firm could impose a preference for Japanese nationals based on the unique requirements of international trade.[11] In addition, where the provisions of an international treaty apply and the BFOQ is *citizenship* rather than national origin, a foreign-based multinational may be allowed to express a preference for its own citizens.[12]

### *English Fluency and Speaking Native Languages in the Workplace*

LO3

Some employers choose to maintain policies requiring all employees either to be fluent in English or to speak only English while in the workplace, even when employees are speaking only among themselves. "English-only" policies have

become increasingly relevant. In 2005, 19.4 percent of the U.S. population five years and older spoke a language other than English in the home, with 8.6 percent of these same people speaking English less than "very well."[13] While these policies may raise challenges related to national origin discrimination, those employers who maintain the policies contend that fluency in English is a BFOQ and, therefore, they should not be required to hire someone who is not fluent in English because of his or her national origin.

Diversity in the workplace brings many benefits, including a greater breadth of skills and life experiences among the workforce. It also may present unique challenges to employers, particularly in the form of poor communication among those who may prefer to speak in their native tongue, which might be not English but Spanish, Hindi, or Tagalog. While such communication problems may cause confusion, severe English-only restrictions may create frustration and resentment among employees for whom English is a second language. To avoid alienating these employees, to ensure realistic and reasonable job qualifications, and to decrease the risk of litigation, employers should not permit managers to arbitrarily impose language restrictions.[14]

To best be protected from possible Title VII liability, the employer must be able to show that English fluency is required for the job, and that the requirement is necessary to maintain supervisory control of the workplace. Perhaps it may be required of an employee who has significant communication with clients, or it may be justified as a BFOQ where the employee could not speak or understand English sufficiently to perform required duties.

For example, where a teacher was fluent in English but spoke with such a thick accent that her students had a difficult time understanding her, her discharge was upheld. On the other hand, if the employee is in a job requiring little speaking and the employee can understand English, the requirement may be more difficult to defend—for instance, requiring English fluency for a janitor who talks little, has little reason to speak to carry out the duties of the job, and who understands what is said to him or her. In fact, in *In re Rodriguez,*[15] the court found that an employment decision based on an employee's accent and speech characteristics (where due to the employee's national origin) was *direct evidence* of employment discrimination sufficient to shift the burden of proof to the defendant to articulate a legitimate nondiscriminatory reason for the decision that the employer "would have terminated the [employee] had it not been motivated by discrimination." The court noted that "accent and national origin are inextricably intertwined."


Unlike the teacher above, in scenario 1, Kayla is considering *decreasing* Alex's responsibilities due to his foreign accent, not terminating him. However, like the teacher, it is quite possible in this scenario to show that speaking clear English is a BFOQ, especially if it can be shown that customers have been complaining that they cannot understand him.

As mentioned above, closely related is the employer's policy requiring employees capable of speaking English to speak only English in the workplace. These policies may be based in well-intentioned employer efforts aimed at decreasing workplace tension where multiple languages have segregated a workplace,

improving employees' English, or promoting a safe and efficient workplace. Courts have gone both ways on this issue. Some have held the policy to be discriminatory, excessively prohibitive, and a violation of Title VII. Others have held that it is not national origin discrimination if all employees, regardless of ancestry, were prohibited from speaking anything but English on the job and that there is no statutory right to speak other languages at work. It has been held that the right to speak one's native language when the employee is bilingual is not an immutable characteristic that Title VII protects.

In general, though, English-only rules have been upheld (see *Garcia,* discussed below and included at the end of the chapter). In *EEOC v. Sephora USA, L.L.C.,*[16] the court specifically held that a policy at a cosmetics store that required sales people to speak English when customers were present served a legitimate business necessity. The court did not find that the policy had a disparate impact on the Latino employees who worked there. However, challenges to these rules have increased fivefold between 1996 and 2006 and some have resulted in large awards and settlements to affected employees.[17]

The EEOC takes the position that English-only rules *applied at all times* or only applied to certain foreign speakers are presumptively discriminatory, although the courts have not always agreed with that approach.[18] When a rule is applied only at certain times, the EEOC recommends that it must be justified by a business purpose in order to avoid discrimination claims. Rules applied during work time *only* are less likely to be considered harassment and more likely to show a business purpose. When an employer is considering an English-only rule, it should take into consideration the legal considerations as well as the fact that such a rule can create an atmosphere of inferiority, isolation, and intimidation that may result in a discriminatory work environment.

According to the EEOC, an employer may justify the business necessity of an English-only rule

- For communications with customers, co-workers, or supervisors who only speak English.
- In emergencies or other situations in which workers must speak a common language to promote safety.
- For cooperative work assignments in which the English-only rule is needed to promote efficiency. For example, a taxi company was permitted to maintain an English-only policy for main office employees to prevent miscommunications during dispatch.[19]
- To enable a supervisor who only speaks English to monitor the performance of an employee whose job duties require communication with co-workers or customers.

Case 1

*Garcia v. Spun Steak Co.,* given at the conclusion of the chapter, is one of the seminal cases on the subject. In that case, the court ruled against the EEOC's guidelines but mentioned that an English-only policy may be discriminatory if it "exacerbate[s] existing tensions, combine[s] with other discriminatory behavior to contribute to discrimination, [or is] enforced in a 'draconian manner' [such]

that the enforcement itself amounts to harassment." In 2006, however, the EEOC's position was supported in *Maldonado v. City of Altus,*[20] where the court held a hostile work environment might exist based solely on the employer's adoption of an English-only policy in the workplace.

An employer, therefore, may properly enforce a limited, reasonable, and business-related English-only rule against an employee who can readily comply. However, if the practice of requiring only English on the job is mere pretext for discrimination on the basis of national origin (i.e., the employer imposes the rule *in order to* discriminate, or the rule produces an atmosphere of ethnic oppression), such a policy would be illegal. This might be the case where an employer requires English to be spoken in all areas of the workplace, even on breaks or in discussions between employees during free time.

## Adverse Employment Action and Dissimilar Treatment

**adverse employment action**
Any action or omission that takes away a benefit, opportunity, or privilege of employment from an employee.

The third and fourth requirements will be addressed together because they often arise together. The third element of the prima facie case for national origin discrimination is that the employee is **adversely affected** by the employer's employment decision. This may include a demotion, termination, or removal of privileges afforded to other employees. The adverse effect may arise either because employees of different national origin are treated differently (disparate treatment) or because the policy, though neutral, adversely impacts those of a given national origin (disparate impact).

The fourth element requires that the employee show that her position was filled by someone who is not a member of her protected class or, under other circumstances, that those who are not members of her protected class are treated differently than she. For example, assume an Asian employee is terminated after the third time he is late for work. There is a rule that employees will be terminated if they are late for work more than twice. However, the employer does not enforce the rule against the other employees, only against Asian employees. This would be a case of disparate treatment because the employee could show that he was treated differently from other employees who were similarly situated but not members of his protected class.

Alternatively, disparate impact has been found, for example, with physical requirements such as minimum height and weight. Such requirements may have a disparate impact on certain national origin groups as a result of genetic differences among populations and these requirements disproportionately precluded the groups from qualifying for certain jobs. These requirements violate Title VII and must be justified by business necessity. For instance, a requirement that a firefighter be at least 5 feet 7 inches tall was found to be unlawful where the average height of an Anglo man in the United States is 5 feet 8 inches, Spanish-surnamed American men average 5 feet 4½ inches, and females average 5 feet 3 inches. On the other hand, if the rule can be shown to be a business necessity, it may be allowed (such as some English fluency requirements, as discussed earlier).


Once the employee has articulated a prima facie case of discrimination based on national origin, the burden falls to the employer to identify either a BFOQ or a legitimate nondiscriminatory reason (LNDR) for the adverse employment action. In the *Prudencio v. Runyon, Postmaster General, United States Postal Service* case,

included at the end of the chapter, the employer offers two such LNDRs but, to its detriment in the case, cannot explain on which of them the decision was based.

## Harassment on the Basis of National Origin

LO4

In addition to traditional claims of discrimination under Title VII, employees also are protected under Title VII against harassment on the basis of national origin. Unfortunately, claims of national origin harassment have been on a sharp increase, rising from 1,383 charges filed with the EEOC in 1993 to practically double that amount (2,719) in 2002. In fact, in 2002, 30 percent of all national origin charges filed with the EEOC included a claim of harassment.

Not all harassment is prohibited under Title VII. Similar to claims of sexual harassment, claims of national origin harassment are only actionable if the harassment was so severe or pervasive that the employee reasonably finds the workplace to be hostile or abusive. Common concerns include ethnic slurs, workplace graffiti, or other offenses based on traits such as an employee's birthplace, culture, accent, or skin color. In considering employer liability, the court will look to whether the conduct was physically threatening or intimidating, its severity, pervasiveness throughout the working environment, whether a reasonable person would find the conduct offensive and/or hostile, and how the employer responded. The EEOC offers the following examples of conduct that do and do not satisfy this review:[21]

**Offensive Conduct Based on National Origin That Violates Title VII**

Muhammad, an Arab-American, works for XYZ Motors, a large automobile dealership. His coworkers regularly call him names like "camel jockey," "the local terrorist," and "the ayatollah," and intentionally embarrass him in front of customers by claiming that he is incompetent. Muhammad reports this conduct to higher management, but XYZ does not respond. The constant ridicule has made it difficult for Muhammad to do his job. The frequent, severe, and offensive conduct linked to Muhammad's national origin has created a hostile work environment in violation of Title VII.[22]

**Offensive Conduct Based on National Origin That Does Not Violate Title VII**

Henry, a Romanian emigrant, was hired by XYZ Shipping as a dockworker. On his first day, Henry dropped a carton, prompting Bill, the foreman, to yell at him. The same day, Henry overheard Bill telling a coworker that foreigners were stealing jobs from Americans. Two months later, Bill confronted Henry about an argument with a coworker, called him a "lazy jerk," and mocked his accent. Although Bill's conduct was offensive, it was not sufficiently severe or pervasive for the work environment to be reasonably considered sufficiently hostile or abusive to violate Title VII.

Employers have the responsibility to prevent and correct any national origin harassment that may take place within its working environment. However, that responsibility is limited to occurrences of harassment of which the employer knows or should have known. Consequently, if an employee is consistently subject to abuse but never informs the employer and the supervisors at her or his workplace have no other way of knowing the abuse is taking place, the employer may not be liable. In addition, if the employer is aware of or is made aware of


the harassment and takes reasonable steps to prevent and correct it, the employer may likewise be relieved of any liability. Refer to *Kang v. U. Lim America, Inc.,* which is included at the end of the chapter, and which presents an interesting situation involving harassment on the basis of national origin where the harasser and individual harassed are of the same national origin. In that case, the harassment stemmed from the fact that the individual being harassed did not live up to the harasser's image of what a person of that national origin *should* represent.

## Guidelines on Discrimination Because of Religion or National Origin

**Guidelines on Discrimination Because of Religion or National Origin**
Federal guidelines that apply only to federal contractors or agencies and that impose on these employers an affirmative duty to prevent discrimination.

Federal agencies or employers who enter into contracts with a government agency are required by the **Guidelines on Discrimination Because of Religion or National Origin** to ensure that individuals are hired and retained without regard to their religion or national origin. These guidelines impose on the federal contractor an affirmative obligation to prevent discrimination. The provisions include the following ethnic groups: Eastern, Middle, and Southern European ancestry, including Jews, Catholics, Italians, Greeks, and Slavs. Blacks, Spanish-surnamed Americans, Asians, and Native Americans are specifically excluded from the guidelines' coverage because of their protection elsewhere in Office of Federal Contract Compliance Rules.

The guidelines provide that, subsequent to a review of the employer's policies, the employer should engage in appropriate outreach and positive recruitment activities to remedy existing deficiencies (i.e., affirmative action). Various approaches to this outreach requirement include the following:

1. Internal communication of the obligation to provide equal employment opportunity without regard to religion or national origin.
2. Development of reasonable internal procedures to ensure that the equal employment policy is fully implemented.
3. Periodic informing of all employees of the employer's commitment to equal employment opportunity for all persons, without regard to religion or national origin.
4. Enlistment of the support and assistance of all recruitment sources.
5. Review of employment records to determine the availability of promotable and transferable members of various religious and ethnic groups.
6. Establishment of meaningful contacts with religious and ethnic organizations and leaders for such purposes as advice, education, technical assistance, and referral of potential employees (many organizations send job announcements to these community groups when recruiting for positions).
7. Significant recruitment activities at educational institutions with substantial enrollments of students from various religious and ethnic groups.
8. Use of the religious and ethnic media for institutional and employment advertising.

## Middle Eastern Discrimination after September 11, 2001

In the aftermath of September 11, hate crimes against individuals of Middle Eastern descent dramatically increased. Workplace discrimination complaints brought by Muslims and those of Middle Eastern descent also rose sharply. From September 11, 2001, to February 2002, the EEOC received 260 such claims, an increase of 168 percent over the same period a year earlier. The EEOC even created a special classification, "Code Z," to designate complaints tied to September 11.[23]

2 Scenario

Opening scenario 2 exhibits one post–September 11 incident. Further examples include a California employee who was allegedly fired without explanation after being told by her boss not to reveal to anyone that her husband is Palestinian and a New York City nurse who was ordered to take some time off and then was given a lesser position "for her own safety" after she reported that a co-worker threatened to "kill Muslims."[24]

The U.S. Department of Justice (DoJ), through its National Origin Working Group, is working proactively to combat civil rights violations against Arab, Sikh, and South-Asian Americans, as well as those who are perceived to be members of those groups. The initiative is striving to battle against these crimes and discrimination by identifying cases involving bias crimes, conducting outreach, and working with other DoJ offices. As of February 2004, the initiative had helped to respond to 546 incidents of bias crime alone, resulting in federal charges in 13 cases with 18 defendants and a 100 percent conviction rate. In one case, *EEOC v. Fairfield Toyota,*[25] two auto dealerships agreed to pay seven former workers $550,000. The suit was filed by workers of Afghani national origin and Muslim faith as a result of harassment they suffered on the job. One worker claimed constructive discharge and others suffered retaliation after complaining about the harassment.

Issues of concern and questions that have arisen from these cases have centered on a few key issues. Employers may not treat workers differently because of their religious attire, such as a Muslim *hijab* (head scarf). Employers also need to be sensitive to possible instances of ethnic harassment, especially that which may unfairly relate to security concerns. Finally, employers may not require individuals of one ethnic background to undergo more significant security checks or other preemployment requirements unless all applicants for that position are required to do so.

In the post–September 11 era, employers actually have a unique opportunity to raise awareness of and sensitivity to cultural diversity in the workplace. Elmer Johnson, head of the Aspen Institute, which seeks to improve corporate leadership, has stated that corporate leaders should inspire employees and inculcate a sense of shared values.[26] Perhaps this can be achieved by reaching out to employees of Middle Eastern descent who may be experiencing fear of discrimination. Jaffe Dickerson, a partner of the Littler, Mendelson law firm, had a client's Middle Eastern employee confide that he no longer wants to travel by air or go out to clubs after work out of fear of being victimized by bias.[27] Remaining sensitive to such employees' concerns in job assignments and work-related activities is key to their effective resolution. "Quick fixes," such as compulsory transfer to

another position, must be avoided. To further promote a healthy environment at work, employers also should consider the post–September 11 issues in diversity training.

It should be noted that, under certain limited circumstances, employers may reach decisions on the basis of national origin by relying on security requirements, where the security requirements are imposed "in the interest of national security under any security program in effect pursuant to federal statute or executive order."[28]

## Citizenship and the Immigration Reform and Control Act

LO5

As mentioned earlier in this chapter, Title VII's prohibition against discrimination on the basis of national origin does not necessarily prohibit discrimination on the basis of citizenship; this only occurs where citizenship discrimination "has the purpose or effect" of national origin discrimination or where it is pretext for national origin discrimination. In fact, legal aliens (noncitizens residing in the United States) are often restricted from access to certain government or other positions by statute. For instance, in *Foley v. Connelie,*[29] the Supreme Court held that a rule requiring citizenship was valid in connection with certain nonelected positions held by officers who participate directly in the formulation, execution, or review of broad public policy. This is called the "political function" exception for positions that are intimately related to the process of self-government. In cases where the restricted position satisfies this exception, discrimination against legal aliens is permitted. *Espinoza v. Farah Manufacturing Co.,* included for your review, is the seminal case by the U.S. Supreme Court in the area of discrimination on the basis of citizenship.

Case 4

LO6

The Immigration Reform and Control Act (IRCA), *in contrast to Title VII,* does prohibit employers in certain circumstances from discriminating against employees on the basis of their citizenship or intended citizenship, and from hiring those not legally authorized for employment in the United States. However, IRCA does allow discrimination in favor of U.S. citizens as against legal aliens. While aliens are guaranteed various rights pursuant to the Constitution, citizenship confers certain benefits only to those who are citizens and not to those who are legal aliens in the United States. For instance, while rights pursuant to the National Labor Relations Act and Fair Labor Standards Act are provided to citizens and aliens alike, some government-provided benefits are limited to citizens. Also, the IRCA allows employers to enact a preference for U.S. citizens if the applicants are all equally qualified. Employers may not act on this preference if the foreign national is more qualified for the position than the U.S. citizen.

Employers not subject to Title VII's prohibitions because of their small size may still be sufficiently large to be covered by IRCA's antidiscrimination provisions; those employers with 4 through 14 employees are prohibited from discriminating on the basis of national origin; and employers with 4 or more employees may not discriminate on the basis of citizenship.

Two acceptable BFOQs are statutorily allowed under IRCA:

1. English-language skill requirements that are reasonably necessary to the normal operation of the particular business or enterprise.
2. Citizenship requirements specified by law, regulation, executive order, or government contracts, along with citizenship requirements that the U.S. attorney general determines to be essential for doing business with the government.

The main difference between a proof of discrimination under Title VII and IRCA is that, in proving a case of disparate impact, Title VII does not require proof of discriminatory intent, while IRCA requires that the adverse action be knowingly and intentionally discriminatory. Therefore, innocent or negligent discrimination is a complete defense to a claim of discrimination under IRCA.

For example, consider a hypothetical firm that is interviewing for customer service representatives in their large order-processing department. They require all applicants to speak fluent English. Ching Lee applied and was denied employment due to his accent, which some thought was heavy. It turns out that only 3 applicants out of 20 of Asian descent obtained jobs at the firm. The employer explained to Lee that not many Chinese applicants apply and those who do have had strong accents. It claims that customers have complained of not understanding these individuals. Does Lee have a claim under Title VII? Under IRCA? Without the showing of knowing and intentional discrimination, the employer could survive the IRCA claim if Lee could not prove that it discriminated against him intentionally; however, such knowledge and intention are not required under Title VII and Lee might prevail in that case.

## "Undocumented Workers"

Approximately 12 million undocumented workers make up about 5 percent of the U.S. workforce.[30] A section of the IRCA was established to correct an unfair double standard that prohibited these individuals from working in the United States but permitted employers to hire them. In other words, originally, the unauthorized worker had committed a legal wrong, but the employer who hired the worker had not! Among other things, IRCA now makes it unlawful for any person knowingly to hire, recruit, or refer for a fee any alien not authorized to work. "Knowingly" includes that which "may be fairly inferred through notice of certain facts and circumstances which would lead a person . . . to know about a certain condition."[31] Employers are thereby denied the "ostrich" defense where they simply ignore obvious evidence to a violation. Employers are instead required to verify all newly hired employees by examining documents that identify the individual and show his or her authority to work in the United States using a Form I-9. (See Exhibit 6.3, "INS Employment Form and Document List.") Further, employers, recruiters, and those who refer individuals for employment are required to keep records pertaining to IRCA requirements. (For a list of employer responsibilities under IRCA, see Exhibit 6.4, "Employer Responsibilities under IRCA.") A violation

of this provision can mean *personal liability* for corporate officers so it is not a requirement to be taken lightly.

In 2007, in an effort to further implement these provisions, the Department of Homeland Security announced that employers would be required to terminate all workers who used false social security numbers, otherwise known as a "no-match" (based on the 140,000 no-match letters received annually by employers from the Social Security Administration notifying them that the names and social security numbers of employees do not match the agency's records). Employers were to have 90 days in which to reconcile the no-match letters; if they could not, they were going to be forced to fire the worker or to face fines of up to $10,000. With an estimated 6 million unauthorized aliens currently employed, the impact on both the workforce and the economy would have been monumental, notwithstanding the claim by the Social Security Administration that 12.7 million of its records contained errors that could lead to terminations.[32] The impact in the agricultural industry alone would have been overwhelming, where estimates by the growers' associations place undocumented workers at about 70 percent.[33] However, only five days before its implementation, a California federal judge issued an order blocking the implementation of the no-match letters based on a suit filed jointly by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the American Civil Liberties Union, and the National Immigration Law Center. In late 2007, the Bush administration suspended its defense of the rule, preferring to go back to the drawing board in order to respond to the judicial concerns. The implications of this battle will be interesting to explore as they play out.

IRCA also established civil and criminal penalties for hiring illegal aliens. Employers are selected at random for compliance inspections under the General Administrative Plan (GAP) developed by the Immigration and Naturalization Services (INS), the administrative agency charged with some elements of oversight of IRCA, along with the Immigration and Customs Enforcement (ICE) Division of the Department of Homeland Security. Generally, fines are not imposed for paperwork violations alone or for employment of aliens whose illegal status was unknown, unless the employer refused to comply or other egregious factors existed. However, employers who knowingly employed illegal aliens after receiving education regarding IRCA, visits, or GAP inspections will receive a Notice of Intent to Fine.[34]

However, in its October 1999 "Enforcement Guidance on Remedies Available to Undocumented Workers," the EEOC emphasized that workers' undocumented status does not justify workplace discrimination. The EEOC also set forth that employers' liability for monetary remedies irrespective of a worker's unauthorized status promotes the goal of deterring unlawful discrimination without undermining the purposes of IRCA. The EEOC's position on available remedies is that unauthorized workers are entitled to the same remedies as any other worker, including back pay and reinstatement. In fact, a U.S. district court held in a 2006 ruling that discovery regarding the immigration status of plaintiffs in civil rights cases would be generally prohibited since it would otherwise have

# Exhibit 6.3 *INS Employment Form and Document List*

OMB No. 1615-0047; Expires 06/30/08

**Department of Homeland Security**
U.S. Citizenship and Immigration Services

## Form I-9, Employment Eligibility Verification

**Please read instructions carefully before completing this form. The instructions must be available during completion of this form.**

**ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work eligible individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents have a future expiration date may also constitute illegal discrimination.**

**Section 1. Employee Information and Verification.** To be completed and signed by employee at the time employment begins.

| Print Name: Last | First | Middle Initial | Maiden Name |
|---|---|---|---|
| | | | |
| Address *(Street Name and Number)* | | Apt. # | Date of Birth *(month/day/year)* |
| | | | |
| City | State | Zip Code | Social Security # |
| | | | |

**I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.**

I attest, under penalty of perjury, that I am (check one of the following):
- ☐ A citizen or national of the United States
- ☐ A lawful permanent resident (Alien #) A _____
- ☐ An alien authorized to work until _____
  (Alien # or Admission #) _____

| Employee's Signature | Date *(month/day/year)* |
|---|---|
| | |

**Preparer and/or Translator Certification.** *(To be completed and signed if Section 1 is prepared by a person other than the employee.) I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.*

| Preparer's/Translator's Signature | Print Name |
|---|---|
| | |
| Address *(Street Name and Number, City, State, Zip Code)* | Date *(month/day/year)* |
| | |

**Section 2. Employer Review and Verification.** To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C, as listed on the reverse of this form, and record the title, number and expiration date, if any, of the document(s).

| List A | OR | List B | AND | List C |
|---|---|---|---|---|
| Document title: | | | | |
| Issuing authority: | | | | |
| Document #: | | | | |
| Expiration Date *(if any)*: | | | | |
| Document #: | | | | |
| Expiration Date *(if any)*: | | | | |

**CERTIFICATION - I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on** *(month/day/year)* _____ **and that to the best of my knowledge the employee is eligible to work in the United States. (State employment agencies may omit the date the employee began employment.)**

| Signature of Employer or Authorized Representative | Print Name | Title |
|---|---|---|
| | | |
| Business or Organization Name and Address *(Street Name and Number, City, State, Zip Code)* | | Date *(month/day/year)* |
| | | |

**Section 3. Updating and Reverification**. To be completed and signed by employer.

| A. New Name *(if applicable)* | B. Date of Rehire *(month/day/year) (if applicable)* |
|---|---|
| | |

C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment eligibility.

Document Title: _____ Document #: _____ Expiration Date (if any): _____

**I attest, under penalty of perjury, that to the best of my knowledge, this employee is eligible to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.**

| Signature of Employer or Authorized Representative | Date *(month/day/year)* |
|---|---|
| | |

Form I-9 (Rev. 06/05/07) N

## LISTS OF ACCEPTABLE DOCUMENTS

| LIST A<br>Documents that Establish Both Identity and Employment Eligibility | OR | LIST B<br>Documents that Establish Identity | AND | LIST C<br>Documents that Establish Employment Eligibility |
|---|---|---|---|---|
| **1.** U.S. Passport (unexpired or expired) | | **1.** Driver's license or ID card issued by a state or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address | | **1.** U.S. Social Security card issued by the Social Security Administration *(other than a card stating it is not valid for employment)* |
| **2.** Permanent Resident Card or Alien Registration Receipt Card (Form I-551) | | **2.** ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address | | **2.** Certification of Birth Abroad issued by the Department of State *(Form FS-545 or Form DS-1350)* |
| **3.** An unexpired foreign passport with a temporary I-551 stamp | | **3.** School ID card with a photograph | | **3.** Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal |
| **4.** An unexpired Employment Authorization Document that contains a photograph (Form I-766, I-688, I-688A, I-688B) | | **4.** Voter's registration card | | **4.** Native American tribal document |
| | | **5.** U.S. Military card or draft record | | **5.** U.S. Citizen ID Card *(Form I-197)* |
| **5.** An unexpired foreign passport with an unexpired Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, if that status authorizes the alien to work for the employer | | **6.** Military dependent's ID card | | **6.** ID Card for use of Resident Citizen in the United States *(Form I-179)* |
| | | **7.** U.S. Coast Guard Merchant Mariner Card | | |
| | | **8.** Native American tribal document | | **7.** Unexpired employment authorization document issued by DHS *(other than those listed under List A)* |
| | | **9.** Driver's license issued by a Canadian government authority | | |
| | | **For persons under age 18 who are unable to present a document listed above:** | | |
| | | **10.** School record or report card | | |
| | | **11.** Clinic, doctor or hospital record | | |
| | | **12.** Day-care or nursery school record | | |

**Illustrations of many of these documents appear in Part 8 of the Handbook for Employers (M-274)**

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**Note:** The INS provides document M-274, "A Handbook for Employers," which can be found at http://www.uscis.gov/files/nativedocuments/m-274.pdf.

## Exhibit 6.4 *Employer Responsibilities under IRCA: Do's and Don'ts*

| Subject | Do | Don't |
|---|---|---|
| Completion of Form I-9, Section 1 | New employees must complete Section 1 in full before the end of their first day of work if expected to work fewer than three days; otherwise they have until the end of their third day of work. Applies to all workers hired to perform labor or services in return for wages or other remuneration. | Do not require only certain employees to comply before the end of their first day of work. |
| Completion of Form I-9, Section 2 | Employer must examine proper documentation (one from List A or one each from Lists B and C). Employer must accept the documents if they reasonably appear to be genuine. This must be completed by the end of the new employee's third day of work.<br>Employer must refuse acceptance of documents that do not reasonably appear to be genuine. | Do not accept copies or faxes of documents. (Note: The only exception is for a certified copy of a birth certificate.)<br>Do not require more or different documentation than the minimum necessary to avoid an unfair immigration-related employment practice.<br>Do not require completion of the I-9 in the preoffer stage. |
| Genuineness of documents and reporting | If a document does not reasonably appear to be genuine, employer may ask for assistance from INS. | [If a document that reasonably appeared to be genuine is in fact not genuine, the employer will not be held responsible by the INS.] |
| Discovering unauthorized employees | Employer should question the employee and provide another opportunity for review of proper I-9 documentation. | If the employee is not able to provide satisfactory documentation after an opportunity to do so, the employer should not retain the employee.<br>Do not make threats of reporting the employee to the INS in retaliation for discrimination complaints or other protected activity. |
| Discovering false documentation | If an employee gains employment with false documentation but then later obtains and presents proper work authorization, the employer should correct the relevant information on Form I-9. | Employers do not have to terminate an employee who presents subsequent work authorization. |

*continued*

| Subject | Do | Don't |
|---|---|---|
| | Personnel policies regarding provision of false information to the employer may apply. | |
| "Green cards" | Resident Alien card, Permanent Resident card, Alien Registration Receipt card, and Form I-551 grant permanent residence in the United States. Proof of this status may expire. Alien cardholders must obtain new cards.<br>Employers should check that unexpired "green cards" used for Form I-9 appear genuine and establish identity of the cardholder. | Employers should not accept an expired card for purposes of Form I-9.<br>Employers are neither required nor permitted to reverify the employment authorization of aliens who have presented one of these cards to satisfy I-9 requirements. |
| Social Security cards | For purposes of payroll, employers may accept SSA cards that bear the restriction "Not Valid for Employment" from employees who satisfy I-9 requirements. Often those who initially got such a restricted SSA card proceed to permanent residence or U.S. citizenship. | Employers must not accept restricted SSA cards for purposes of I-9 requirements.<br>Employers must not accept Individual Taxpayer Identification numbers for purposes of I-9 requirements. |
| Retention of I-9 forms | Generally, retain during an employee's employment and the longer of either three years past the hire date or one year past the termination date. | While not prohibited from doing so, private employers should not store I-9 records in employee personnel files. |
| Official inspection of I-9 records | Generally, all I-9 forms of current employees must be made available in their original form or on microfilm or microfiche to an authorized official upon request.<br>The official will give employers at least three days' advance notice before the inspection. | Employers should not leave preparation for such an inspection to the last minute! Storing I-9 records in employee personnel files makes this task unduly difficult. |

**Sources:** INS, "IRCA and Employer Sanctions," http://www.uscis.gov/graphics/aboutins/history/sanctions.htm, last modified February 28, 2003; INS, "About Form I-9, Employment Eligibility Verification," http://www.uscis.gov/graphics/howdoi/faqeev.htm, last modified February 9, 2004; INS, "Frequently Asked Questions about Employment Eligibility," http://www.uscis.gov/graphics/howdoi/EEV.htm, last modified February 19, 2003.

a chilling effect on filings and it could result in "countless acts of illegal and reprehensible conduct" being unreported.[35] The National Labor Relations Board took a similar position with respect to discrimination based on union activity.

However, in *Hoffman Plastic Compounds Inc. v. NLRB,*[36] the U.S. Supreme Court held that the NLRB could not award back pay to unauthorized workers who had been unlawfully discriminated against for engaging in union-organizing activities. According to the Court, to do so would contravene federal immigration policy embodied in IRCA. *Hoffman* opens the possibility that back pay will not be available to unauthorized workers who have been illegally discriminated against under Title VII, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA).[37] The court reviews the pre-*Hoffman* history and implications in the *Singh v. Jutla & C.D. & R's Oil, Inc.* case at the end of this chapter.


Unauthorized workers are particularly vulnerable to threats to report them to the INS. In every case in which the employer asserts that the worker is unauthorized and the employer appears to have acquired that information *after* the worker complained of discrimination, The EEOC will determine whether the information was acquired through a retaliatory investigation. If the investigation is retaliatory, the employer will be liable for equitable relief as well as monetary damages without regard to the worker's actual work status. However, a worker's unauthorized status may serve as a legitimate reason for an adverse employment action, although employers who knowingly employ unauthorized workers could not assert this defense in a discrimination claim.[38]

The Fair Labor Standards Act also protects unauthorized workers from abuse. In a dramatic 2001 case, a group of mostly Mexican workers in New Jersey claimed that the operators of a bargain retail chain subjected them to "inhumane" working conditions and failed to pay them fair wages and overtime compensation when performing such tasks as building and stocking new stores. Workers generally received $230 for a seven-day workweek of about 12 hours per day, which amounted to $2.74 an hour. These workers also were often forced to work in stores without heat, access to meals, adequate water, proper ventilation, or adequate bathroom facilities. Bosses also called workers derogatory names.[39] The case was settled when the defendants apologized, agreed to ensure future compliance, and agreed to pay damages to the workers.[40]

## Alternate Basis for National Origin or Citizenship Discrimination: Section 1981

While it is probably the most popular basis for the claim of discrimination based on national origin, Title VII is not the only basis for such a claim. In *St. Francis College v. Al-Khazraji,*[41] the Supreme Court held that 42 U.S.C. § 1981 addressed national origin also. In this case, a U.S. citizen who was born in Iraq sued under section 1981 alleging discrimination when he was denied tenure. The Court held that, though originally designed to prohibit racial discrimination, the law

## Management Tips

- While a specific national origin may be a BFOQ, make sure that only individuals of that origin can do the specific job since courts have a high standard for BFOQs in this area.
- An employee may have a claim for national origin discrimination if the worker is simply *perceived* to be of a certain origin, even if the individual is not, in fact, of that origin.
- While English fluency may be required, you are not allowed to discriminate because of an accent (unless the accent makes it impossible to understand the individual). However, be cautious to evaluate the requirement of the job since there may be positions that do not actually require speaking English.
- An employer may not point to customer, client, or co-worker preference, comfort, or discomfort as the source of BFOQ.
- If you are a federal contractor, remember that you have additional responsibilities to engage in outreach and positive recruitment activities under the Guidelines on Discrimination Because of Religion or National Origin.
- While you are not prohibited from discriminating on the basis of citizenship under Title VII, you may be prohibited from discriminating on this basis under IRCA. Before instituting a policy, consider the implication of both statutes.
- Recognize the concerns of Middle Eastern employees in the post–September 11 era: Include the topic of ethnic diversity in any workplace diversity training. Intervene promptly on incidents of harassment. Remain sensitive and flexible. Refrain from mandatory transfers and other short-term solutions to harassment, intimidation, and discrimination.

also applied to "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." The requirement for section 1981 actions is that employees show they were discriminated against because of what they are (in this case, Arabic) and not just because of their place of origin or religion. In other words, they must show some nexus between their national origin and the major concern of section 1981, their ethnic characteristics or race.

Since *St. Francis College,* however, several courts have declined to extend section 1981 to more traditional claims of national origin discrimination. In *King v. Township of East Lampeter,*[42] for instance, plaintiffs sought section 1981 protection on the basis of their "Amish ethnic culture." The court denied the plaintiffs protection on this basis, distinguishing a New York case that found Orthodox Jews were indeed protected under section 1981. The court in *King* found that Jews are a distinct race for civil rights purposes but did not find the Amish to be a similarly distinct racial group and, without evidence that it has an independent, separate ethnic identity beyond religious observance, they were not protected under section 1981. Interestingly, the court was persuaded by the contention that one could fail to "practice" Judaism but still be a Jew, while "there is no proof of a similar population of 'non-practicing' Amish." Perhaps an argument could be made that the door therefore remains open on this issue.

If the increases are anywhere near the projections, then entry, development, or promotion barriers to full use of the total diversity of the workplace will likely result in loss in the business's effectiveness and productivity. For any business wishing to be on the cutting edge, or simply to effectively use its resources and encourage the best performance from employees, adherence to Title VII's requirements regarding race and national origin should be viewed as a business imperative and not merely as compliance with the law.

The significance to managers of this protection is there must be a complete review of all policies that may have an impact on employees or applicants of diverse national origin. As stated above, this impact may not be obvious.

Employers must be cognizant of the varying needs of employees from different backgrounds. For instance, employers may address the perceived problem of bilingual employees in a number of ways, such as offering English-as-a-second-language classes or tutors for semibilingual employees. Not only would this foster less isolation and exclusion of the employee, but it also would create greater confidence and less intimidation when the employees are speaking English. This type of proactive approach may prevent problems in this area before they emerge.

## Chapter Summary

- Title VII, the Civil Rights Act of 1964, makes it an unlawful employment practice for employers to limit, segregate, or classify employees in any way that would deprive them of employment opportunities based on their national origin.
- An employee or applicant must show the following to be successful in a claim of discrimination based on national origin discrimination:
  1. The individual is a member of a protected class.
  2. The individual was qualified for the position at issue.
  3. The employer made an employment decision against the individual.
  4. The position was filled by someone not in a protected class.
- "National origin" refers to an individual's ancestor's place of origin or physical, cultural, or linguistic characteristics of an origin group.
- An employer has a defense against a national origin discrimination claim if it can show that the national origin is a bona fide occupational qualification. However, in general, this is very difficult to do. An exception to the difficulty is the requirement of English fluency, if speaking English is a substantial portion of the individual's job.
- No accommodation of a worker's national origin is required, as it would be required in situations involving disability or religion.
- English-only rules applied at all times are presumptively discriminatory, according to the EEOC. If the employer is considering an English-only rule, it is recommended that the employer should
  1. Consider whether the rule is necessary.
  2. Determine if the rule is a business necessity.

3. Consider if everybody is fluent in English.
4. Communicate the rule to employees.
5. Enforce the rule fairly.

- An alternative basis for national origin or citizenship discrimination is 42 U.S.C. § 1981.
- Guidelines on Discrimination Because of Religion or National Origin are federal guidelines that apply to federal contractors or agencies and impose on those employers an affirmative duty to prevent discrimination.
- The Immigration Reform and Control Act, unlike Title VII, prohibits, in certain circumstances, discrimination on the basis of citizenship. The act does allow for discrimination in favor of U.S. citizens where applicants are equally qualified.
- Two statutorily allowed BFOQs under IRCA are
  1. English-language skill requirements that are reasonably necessary.
  2. Citizenship requirements specified by law, regulation, executive order, government contracts, or requirements established by the U.S. attorney general.

## Chapter-End Questions

1. Which, if any, of the following scenarios would support an employee's claim of discrimination on the basis of national origin?
   *a.* A Dominican chambermaid in a hotel is denied promotion to front-desk duties primarily because of her inability to clearly articulate and to make herself adequately understood in English. [*Majia v. New York Sheraton Hotel,* 459 F. Supp. 375 (S.D.N.Y. 1978).]
   *b.* Applicant with a speech impediment is unable to pronounce the letter "r." The applicant therefore often has difficulty being understood when speaking and is denied a position.
   *c.* The owner of a manufacturing facility staffed completely by Mexicans refuses employment to a white American manager because the owner is concerned that the Mexicans will only consent to supervision by and receive direction from another Mexican.
   *d.* An Indian restaurant seeks to fill a server position. The advertisement requests applications from qualified individuals of Indian descent to add to the authenticity of the restaurant. In the past, the restaurant found that its business declined when it used Caucasian servers because the atmosphere of the restaurant suffered. An Italian applies for the position and is denied employment.
   *e.* A company advertises for Japanese-trained managers, because the employer has found that they are more likely to remain at the company for an extended time, to be loyal and devoted to the firm, and to react well to direction and criticism. An American applies for the position and is denied employment in favor of an equally qualified Japanese-trained applicant, who happens to also be Japanese.

2. Hector Garcia, a bilingual Mexican-American, is a salesperson for Gloor Lumber and Supply, Inc. Management complimented Garcia's work on several occasions and gave him a $250 bonus at the end of his first year. The company had a rule that the employees could not speak Spanish on the job (except during breaks) unless they were dealing with customers who could not speak English. On one occasion, Garcia was asked a question on the job by another Mexican-American employee, and when he replied in Spanish he was discharged. The employer claims Garcia's infraction of the rule was only one of the reasons for his discharge. The employer offered evidence of Garcia's general failure to perform other aspects of his job and claims that the compliments and bonus Garcia received were motivational tools used by the company to encourage him to perform better, not evidence that he was doing a good job. Garcia claims that the English-only rule is discrimination based on national origin. What do you think? [*Garcia v. Gloor,* 618 F.2d 264 (5th Cir. 1980).]
3. Calvin Roach, a native-born American of Acadian descent, was fired by Dresser Industrial. Roach claimed that he was fired because of his "Acadian" national origin ("Cajun" descent) and his association with Dresser employees of the same origin. Employer claims that, since there is not and never was such a country as Acadia, employee's claim of national origin discrimination is not covered under Title VII. Do you agree? [*Roach v. Dresser Ind. Valve & Instrument Division,* 494 F. Supp. 215 (W.D. La. 1980).]
4. In 1998, the Human Resources Director at Colorado Central Station Casino (CCSC) implemented a blanket English-only language policy in the housekeeping department: any employee caught violating the policy would be disciplined. Housekeeping had the highest concentration of Latino employees and, while some employees on staff were bilingual, others were monolingual Spanish speakers. The reason offered for implementing the language policy was that a non–Spanish-speaking employee thought that other employees were talking about her in Spanish, and CCSC believed that it needed the policy in defense for undefined "safety reasons." Higher-level managers or other non–Latino employees would shout "English, English" at the Latino employees when encountering them in the halls in order to remind them of the policy. Is this "English-only" rule in violation of Title VII or is it acceptable? [*EEOC v. Anchor Coin d/b/a Colorado Central Station Casino, Inc.,* No. 01-B-0564 (D. Colo. July 21, 2003).]
5. Mamdouh El-Hakem was employed by BJY, Inc., for more than a year. His manager repeatedly called Mamdouh, an Arabic employee, "Manny" or "Hank," instead of his given name. His manager explained that he believed that Mamdouh would have a more effective opportunity for success with the firm's clients with a more Western-sounding name. However, Mamdouh made it clear during his entire time with BJY that he objected to the westernization of his name and requested repeatedly that the manager call him by his rightful moniker. Mamdouh finally sued for national origin discrimination. Does he have a claim? [*El-Hakem v. BJY, Inc.,* 415 F.3d 1068 (9th Cir. 2005).]
6. Hannoon, a Kuwaiti employee who worked as an information systems manager, requested Friday afternoons off to observe weekly Muslim prayer services. His supervisor noted in his personnel file, "first week on job requested Fri. off." In fact, Hannoon was permitted to take the time off and to work at other times to make up for those afternoons. Hannoon was terminated for poor performance and

he filed an action claiming national origin and race discrimination. What flaws can you find in his claim? [*Hannoon v. Fawn Eng'g Corp.,* 84 EPD ¶ 41,370 (8th Cir. 2003).]

7. Samsung Heavy Industries Co. replaced its American national sales manager with a Korean executive. The American sales manager filed suit claiming national origin discrimination though the countries are both party to the Treaty of Friendship, Commerce and Navigation, which would allow this. Is the company nevertheless barred by any other prohibition? Does the American manager have a viable claim? [*Weeks v. Samsung Heavy Indus. Co.,* 72 EPD ¶ 45,262 (7th Cir. 1998).]
8. Maria Cardenas, a Latina woman, worked for Aramark as a housekeeper at McCormick Place convention center for over 20 years. It was a long-standing rule for employees that they could not remove any items from a trade show for personal use, even if an exhibitor gave them away. Employees found in violation of this rule would be immediately fired. In October 2004, Cardenas and a co-worker, Juanita Williams, were stopped by a security guard who noticed them carrying food items away from a convention that had just ended. Both employees were discharged, but Williams was later reinstated because she was a newer employee and allegedly had been told by Cardenas that it was okay to take the items in question. Cardenas filed a national origin discrimination suit against Aramark. What does Cardenas need to show to prove that her termination was in violation of Title VII, and how might Aramark defend its decision if she states a prima facie case? [*Cardenas v. Aramark,* 101 FEP Cases 1114 (N.D. Ill. 2007).]
9. Rush Presbyterian requires that employees in all job classifications be able to speak and write English. Garcia, a Latino, contends that this rule discriminates against those for whom English is not a first language. The court held that, because there was no evidence that Latinos had been excluded from Rush's workforce in greater numbers than people of other origins, there was no adverse impact on Latinos. Is this true? Couldn't Latinos have been discouraged from even applying and, therefore, those nonapplicants do not appear in the numbers presented in the court? Can you imagine that a rule requiring proficiency in English does not have an adverse effect on minorities? [*Garcia v. Rush Presbyterian,* 660 F.2d 1217 (7th Cir. 1981).]
10. In 2002, Sami Elestwani worked for Nicolet Biomedical and was a key account manager. He was informed that he would be reassigned due to concerns about his ability to adequately perform his job because of his Arab heritage. His boss told him that the fact that he was Muslim, was from the Middle East, and had to travel extensively to meet with customers were "not good for the company." Nicolet offered him a lower-level position in a different part of the country. When he complained to human resources about his boss's remarks and the reassignment, he was fired. He was subsequently replaced by a non-Arab employee. Elestwani sued Nicolet for national origin discrimination, claiming that the company wanted to transfer him simply because of his religion, ethnicity, and cultural heritage. What result? [*Elestwani v. Nicolet Biomedical,* No. 04-C-0947-S (W.D. Wis. Aug. 23, 2005).]

## End Notes


1. See, for example, *DeSalle v. Key Bank,* 47 F.E.P. Cas. 37 (D. Me. 1988).
2. Tim Thornton, "U.S. Nears 300 million: So What?" *Roanoke Times,* October 12, 2006.
3. See "English-Only Rules May Spell Trouble for Employers," special to law.com, October 11, 2001, http://www.law.com. See also EEOC, *Job Patterns for Minorities and Women* (2000), p. 1.
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## Cases

Case 1

# Garcia v. Spun Steak Co. *998 F.2d 1480 (9th Cir. 1993)*

Defendant, Spun Steak Co., employs 33 workers, 24 of whom are Spanish-speaking. Two of the Spanish-speakers speak no English. Plaintiffs Garcia and Buitrago are production line workers for the defendant and both are bilingual. After receiving complaints that some workers were using their second language to harass and to insult other workers, Spun Steak enacted an English-only policy in the workplace in order to (1) promote racial harmony, (2) enhance worker safety because some employees who did not understand Spanish claimed that they were distracted by its use, and (3) enhance product quality because the USDA inspector in the plant spoke only English. The two plaintiffs received warning notices about speaking Spanish during working hours, and they were not permitted to work next to each other for two months. They filed charges with the EEOC, which found reasonable cause to believe that the defendant had violated Title VII. The district court found in favor of the employees and Spun Steak appealed. The appellate court reversed, finding that Spun Steak did not violate Title VII in adopting the English-only rule.

## O'Scannlain, J.

The Spanish-speaking employees do not contend that Spun Steak intentionally discriminated against them in enacting the English-only policy. Rather, they contend that the policy had a *discriminatory impact* on them because it imposes a burdensome term or condition of employment exclusively upon Hispanic workers and denies them a privilege of employment that non-Spanish-speaking workers enjoy.

The employees argue that denying them the ability to speak Spanish on the job denies them the right to cultural expression. It cannot be gainsaid that an individual's primary language can be an important link to his ethnic culture and identity. Title VII, however, does not protect the ability of workers to express their cultural heritage at the workplace. Title VII is concerned only with disparities in the treatment of workers; it does not confer substantive privileges. It is axiomatic that an employee must often sacrifice individual self-expression during working hours. Just as a private employer is not required to allow other types of self-expression, there is nothing in Title VII which requires an employer to allow employees to express their cultural identity.

Next, the Spanish-speaking employees argue that the English-only policy has a disparate impact on them because it deprives them of a privilege given by the employer to native-English speakers: the ability to converse on the job in the language with which they feel most comfortable. It is undisputed that Spun Steak allows its employees to converse on the job. The ability to converse—especially to make small talk—is a privilege of employment, and may in fact be a significant privilege of employment in an assembly-line job. It is inaccurate, however, to describe the privilege as broadly as the Spanish-speaking employees urge us to do.

The employees have attempted to define the privilege as the ability to speak in the language of their choice. A privilege, however, is by definition given at the employer's discretion; an employer has the right to define its contours. Thus, an employer may allow employees to converse on the job, but only during certain times of the day or during the performance of certain tasks. The employer may proscribe certain topics as inappropriate during working hours or may even forbid the use of certain words, such as profanity.

Here, as is its prerogative, the employer has defined the privilege narrowly. When the privilege is defined at its narrowest (as merely the ability to speak on the job), we cannot conclude that those employees fluent in both English and Spanish are adversely impacted by the policy. Because they are able to speak English, bilingual employees can engage in conversation on the job. It is axiomatic that "the language a person who is multilingual elects to speak at a particular time is. . .a matter of choice." The bilingual employee can readily comply with the English-only rule and still enjoy the privilege of speaking on the job. "There is no disparate impact" with respect to a privilege of employment "if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference."

The Spanish-speaking employees argue that fully bilingual employees are hampered in the enjoyment of the privilege because for them, switching from one language to another is not fully volitional. Whether a bilingual speaker can control which language is used in a given circumstance

is a factual issue that cannot be resolved at the summary judgment stage. However, we fail to see the relevance of the assertion, even assuming that it can be proved. Title VII is not meant to protect against rules that merely inconvenience some employees, even if the inconvenience falls regularly on a protected class. Rather, Title VII protects against only those policies that have a *significant* impact. The fact that an employee may have to catch himself or herself from occasionally slipping into Spanish does not impose a burden significant enough to amount to the denial of equal opportunity. This is not a case in which the employees have alleged that the company is enforcing the policy in such a way as to impose penalties for minor slips of the tongue. The fact that a bilingual employee may, on occasion, unconsciously substitute a Spanish word in the place of an English one does not override our conclusion that the bilingual employee can easily comply with the rule. In short, we conclude that a bilingual employee is not denied a privilege of employment by the English-only policy.

By contrast, non-English speakers cannot enjoy the privilege of conversing on the job if conversation is limited to a language they cannot speak. As applied "[t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home," an English-only rule might well have an adverse impact. Indeed, counsel for Spun Steak conceded at oral argument that the policy would have an adverse impact on an employee unable to speak English. There is only one employee at Spun Steak affected by the policy who is unable to speak any English. Even with regard to her, however, summary judgment was improper because a genuine issue of material fact exists as to whether she has been adversely affected by the policy. She stated in her deposition that she was not bothered by the rule because she preferred not to make small talk on the job, but rather preferred to work in peace. Furthermore, there is some evidence suggesting that she is not required to comply with the policy when she chooses to speak. For example, she is allowed to speak Spanish to her supervisor. Remand is necessary to determine whether she has suffered adverse effects from the policy. It is unclear from the record whether there are any other employees who have such limited proficiency in English that they are effectively denied the privilege of speaking on the job. Whether an employee speaks such little English as to be effectively denied the privilege is a question of fact for which summary judgment is improper.

We do not foreclose the prospect that in some circumstances English-only rules can exacerbate existing tensions, or, when combined with other discriminatory behavior, contribute to an overall environment of discrimination. Likewise, we can envision a case in which such rules are enforced in such a draconian manner that the enforcement itself amounts to harassment. In evaluating such a claim, however, a court must look to the totality of the circumstances in the particular factual context in which the claim arises.

In holding that the enactment of an English-only while working policy does not inexorably lead to an abusive environment for those whose primary language is not English, we reach a conclusion opposite to the EEOC's long standing position. The EEOC Guidelines provide that an employee meets the prima facie case in a disparate impact cause of action merely by proving the existence of the English-only policy. Under the EEOC's scheme, an employer must always provide a business justification for such a rule. The EEOC enacted this scheme in part because of its conclusion that English-only rules may "create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment."

We do not reject the English-only rule Guideline lightly. We recognize that "as an administrative interpretation of the Act by the enforcing agency, these Guidelines. . .constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." But we are not bound by the Guidelines. We will not defer to "an administrative construction of a statute where there are 'compelling indications that it is wrong.'"

In sum, we conclude that the bilingual employees have not made out a prima facie case and that Spun Steak has not violated Title VII in adopting an English-only rule as to them. Thus, we reverse the grant of summary judgment in favor of Garcia, Buitrago, and Local 115 to the extent it represents the bilingual employees, and remand with instructions to grant summary judgment in favor of Spun Steak on their claims. A genuine issue of material fact exists as to whether there are one or more employees represented by Local 115 with limited proficiency in English who were adversely impacted by the policy. As to such employee or employees, we reverse the grant of summary judgment in favor of Local 115, and remand for further proceedings. REVERSED and REMANDED.

## Case Questions

1. Do you agree with the contention that denying a group the right to speak their native tongue denies them the right to cultural expression?

2. Do employees have a "right" to cultural expression in the workplace?
3. Do you agree with the court that an English-only rule is not abusive per se to those whose primary language is not English? Do you believe that it creates a "class system" of languages in the workplace and therefore inherently places one group's language above another's?


## Prudencio v. Runyon, Postmaster General, United States Postal Service *986 F. Supp. 343 (W.D. Va. 1997)*

A brother and sister of Philippine origin took the U.S. Postal Service (USPS) test, scored high marks, and were never hired during a four-year period, while other non-Philippines with lower scores were hired. They sued for national origin discrimination. Because the Postal Service could not explain on which basis the decision was made not to hire the individuals, the court held that "as a matter of law, 'no reason' cannot serve as a 'legitimate, nondiscriminatory reason,' the plaintiffs' prima facie showing of national origin discrimination remains unrebutted." The court therefore found in favor of the plaintiffs.

**Michael, J.**

The plaintiffs, Maritess and Robin Prudencio ("Prudencio"), are brother and sister. Both are of Asian (specifically, Philippine) origin. In 1989, both took a United States Postal Service ("USPS" or "Post Office") qualifying examination in an effort to secure employment with the Post Office. Both of the plaintiffs passed the test; Maritess Prudencio received a score of 98.80 out of a possible score of 100 and Robin Prudencio got a score of 94.00. Upon receipt of such passing scores, the plaintiffs were qualified in all respects to be considered for employment.

After the test, in May 1989, the Post Office apparently placed job applicants' names on an eligibility "register" in Richmond from which names are drawn as and when positions become available at designated branches. Names were to be placed on the register in numerical order by the score each applicant received on the qualifying test. When a position opened up, a computer-generated list of names was to be produced in the order of the scores received on the test.

Between 1989 and November 1993, the Post Office never contacted the plaintiffs concerning their status for potential employment. Although on three separate occasions names were drawn, in which Maritess ranked within the applicants on three occasions and Robin met the scoring on two occasions, the plaintiffs were never on the hiring list. Of the four persons hired from the worksheet's list of names all had lower test scores than the plaintiffs; three of the persons hired were white, one was black, and none was Asian.

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The applicants have alleged sufficient facts in their complaint to state a claim for discriminatory failure to hire. The Prudencios are members of a protected class because of their national origin (Philippine); they were qualified, by virtue of their high scores on the Post Office tests, for the job in the Charlottesville branch for which the USPS was seeking applicants; they were not hired despite their qualifications; and the positions remained open and the USPS continued to seek or accept applications. The employer filled the positions in question with persons of the applicants' qualifications, but from outside the Title VII protected class (i.e., the white persons hired). Moreover, in the administrative proceedings below, the Post Office admitted that the plaintiffs met all elements of the prima facie test.

The USPS objects . . . that the plaintiffs established a prima facie case of national origin discrimination. The defendant argues . . . [that] the USPS did not know that the Prudencios are of Asian ancestry and, thus, within a Title VII protected class. Of course, while knowledge of a job applicant's race by an employer is a prerequisite for intentional discrimination, the necessary knowledge (or constructive knowledge) is present here. As an initial matter, the Prudencios' father, possessing the same surname, has been employed by the Post Office they applied to in Charlottesville for over fifteen years. Additionally, the USPS acquired actual notice of the Prudencios' national origin when the plaintiffs personally appeared before postal employees to take the

employment test in 1989 and again in 1993 to request copies of the "Individual Applicant Ranking Report." Because the burden of establishing a prima facie case of discrimination is not an "onerous" one, and because the USPS had either actual or constructive notice of the plaintiffs' protected national origin status, defendant's motion to dismiss or for summary judgment shall be denied. The Prudencios make out a classic prima facie case of employment discrimination under the *McDonnell Douglas* paradigm.

The defendant-employer must "articulate some legitimate, nondiscriminatory reason for the employee's rejection." Once a plaintiff has established a prima facie case of discrimination, "the employer must respond or lose."

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Here, the Post Office attempts to proffer two "legitimate nondiscriminatory reasons" that accounted for the omission of the Prudencios' names from the worksheet issued for the Charlottesville branch's vacancies. One such reason is that an administrative or computer error of some type in the Richmond office removed the Prudencios' names from the active list of applicants when the registry was automated; the Post Office headquarters in Richmond failed to forward the full list of qualified applicants to the branch office in Charlottesville where the ultimate hiring decision was made. Thus, because the Richmond Post Office, for whatever reason, omitted the plaintiffs' names from the registry, the Charlottesville branch was operating on a legitimate, nondiscriminatory basis when it failed to hire the Prudencios.

The plaintiffs argue, and the court agrees, however, that in addition to the above reason's overly syllogistic logic, the USPS cannot and does not know that an innocent error (administrative, computer, or otherwise) accounted for the plaintiffs' exclusion from the Charlottesville job candidates' list. Indeed, as the Post Office itself stated

> The Postal Service merely speculate[s] that the omission of the Plaintiffs' names from the hiring work sheets resulted from administrative or computer error. What actually caused the apparent error is not known.

In this court's view, the USPS's concession that it does not know the reason for the exclusion of the plaintiffs from the employment candidates' list is the logical and legal equivalent of proffering no reason for the omission. Because, as a matter of law, "no reason" cannot serve as a "legitimate, nondiscriminatory reason," the plaintiffs' prima facie showing of national origin discrimination remains unrebutted. Under the *McDonnell Douglas* framework, then, the Prudencios are entitled to judgment as a matter of law. Judgment GRANTED for the Prudencios.

## Case Questions

1. Who has to prove a company discriminated against an employee or applicant? Do you agree with this?
2. Do you think this was an "honest mistake" by the Post Office? If so, how can the Post Office prove that it had unintentionally removed the plaintiffs from the list?
3. As an employer, what is the best way for you to protect the company from charges accusing the employer of hiring discrimination?


## Kang v. U. Lim America, Inc. *296 F.3d 810 (9th Cir. 2002)*

Kang is a U.S. citizen of Korean national origin working for a California corporation called U. Lim America, Inc. All of U. Lim America's employees shared Korean heritage. Tae Jin Yoon was Kang's supervisor. Yoon subjected Kang and other Korean workers to verbal and physical abuse and discriminatorily long work hours. The verbal abuse consisted of Yoon screaming at Kang for up to three hours a day and calling him "stupid," "cripple," "jerk," "son of a bitch," and "asshole." The physical abuse consisted of striking Kang in the head with a metal ruler on approximately 20 occasions; kicking him in the shins; pulling his ears; throwing metal ashtrays, calculators, water bottles, and files at him; and forcing him to do jumping jacks. Kang began to cut back on the required overtime in order to spend time with his pregnant wife; Yoon fired him. Kang filed suit in California state court against U. Lim America and Yoon for national origin discrimination and harassment in violation of Title VII and the California Fair Employment and

Housing Act. The district court granted summary judgment to U. Lim America and Yoon on all Kang's causes of action. Kang appealed. The court of appeals reverses and finds in favor of the plaintiff Kang.

### Browning, C.J.

To prevail on his harassment claim, Kang must show: (1) that he was subjected to verbal or physical conduct because of his national origin; (2) "that the conduct was unwelcome"; and (3) "that the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive work environment." Generally, a plaintiff alleging racial or national origin harassment would present facts showing that he was subjected to racial epithets in the workplace. Here, however, Kang alleged that he and other Korean workers were subjected to physical and verbal abuse because their supervisor viewed their national origin as superior. The form is unusual, but such stereotyping is an evil at which the statute is aimed. See *Nichols v. Azteca Rest. Enters., Inc.* (2001) (holding that a plaintiff proved harassment "because of sex" where he was harassed because he failed to conform to male stereotypes).

Kang presented evidence that Yoon abused him because of Yoon's stereotypical notions that Korean workers were better than the rest and Kang's failure to live up to Yoon's expectations. On numerous occasions, Yoon told Kang that he had to work harder because he was Korean; he contrasted Koreans with Mexicans and Americans who he said were not hard workers; and although U. Lim America employed 50–150 Mexican workers, Yoon did not subject any of them to physical abuse. This evidence created a genuine issue of material fact as to whether Yoon's abuse and imposition of longer working hours was based on Kang's national origin.

Kang also presented evidence that the physical and verbal abuse and long working hours were in fact unwelcome. See *Faragher v. City of Boca Raton* (1998) (discussing the requirement that the victim perceive the environment as offensive).

Kang's evidence further showed that the verbal and physical abuse and discriminatory working hours created a work environment that was "objectively offensive . . . one that a reasonable person would find hostile or abusive." *Id.* "The more outrageous the conduct, the less frequent [sic] must it occur to make a workplace hostile." After considering all the circumstances including the frequency and severity of the conduct, the fact that the abuse was frequently "physically threatening or humiliating" and that it unreasonably interfered with Kang's work performance, we conclude that Kang presented evidence sufficient to survive summary judgment that Yoon subjected Kang to an objectively hostile environment.

## Case Questions

1. Do you agree that harassment because a worker is viewed as superior is as unethical or wrongful as harassment based on a perception that someone is inferior?
2. Does the conduct described seem sufficiently severe and pervasive as to constitute harassment under the *Faragher* definition? How would you decide if you were on the jury?
3. Can you make any argument that the definition of sexual harassment and of harassment based on national origin should be different?

## Case 4 Espinoza v. Farah Manufacturing Co. *414 U.S. 86 (1973)*

Cecilia Espinoza, a lawful Mexican alien, applied for a position at Farah Manufacturing's San Antonio Division. She was denied the position, however, as a result of Farah's policy to hire only U.S. citizens. The issue to be decided by the court is whether Title VII's proscription against discrimination on the basis of national origin protects against discrimination on the basis of citizenship. The Court determines that it does not.

### Marshall, J.

The term "national origin" on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came.

There are other compelling reasons to believe that Congress did not intend the term "national origin" to embrace citizenship requirements. Since 1914, the Federal Government itself, through Civil Service Commission regulations, has engaged in what amounts to discrimination against aliens by denying them the right to enter competitive examination for federal employment. But it has never been suggested that the citizenship requirement for federal employment constitutes discrimination because of national origin. To interpret the term "national origin" to embrace citizenship requirements would require us to conclude that Congress itself has repeatedly flouted its own declaration of policy. This Court cannot lightly find such a breach of faith. Certainly Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin. However, there is no indication in the record that Farah's policy against employment of aliens had the purpose or effect of discriminating against persons of Mexican national origin.

### Douglas, J., dissenting

It is odd that the Court which holds that a State may not bar an alien from the practice of law or deny employment to aliens can read a federal statute that prohibits discrimination in employment on account of "national origin" so as to permit discrimination against aliens.

Alienage results from one condition only: being born outside the United States. Those born within the country are citizens from birth. It could not be clearer that Farah's policy of excluding aliens is *de facto* a policy of preferring those who were born in this country.

## Case Questions

1. Which argument, the majority's or the dissent, do you find more compelling?
2. What implications does this case have for hiring practices in parts of the United States where aliens are prevalent?
3. If Espinoza could show that this policy, while arguably "facially neutral," actually impacts people of Mexican origin differently than people of American origin, wouldn't Espinoza have a claim for disparate impact?


## Singh v. Jutla & C.D. & R's Oil, Inc. *214 F. Supp. 2d 1056 (N.D. Cal. 2002)*

Macan Singh sued his employer, alleging that his employer reported Singh to the Immigration and Naturalization Service (INS) in retaliation for Singh's filing of wage claim, in violation of Fair Labor Standards Act (FLSA). On employer's motion to dismiss, the District Court held that (1) employee's filing of wage claim was protected activity and (2) employee's allegations were sufficient to state claim for retaliation.

### Breyer, D. J.

## Background

Defendant Jutla recruited plaintiff, Macan Singh, to come work for him in the United States. Jutla promised plaintiff a place to live, tuition for education, and that plaintiff would eventually become Jutla's business partner in his corporation, C.D. & R's Oil, Inc. Plaintiff, in the United States illegally, worked for Jutla from approximately May 1995 to February 1998 and received no pay.

On January 6, 1999, plaintiff filed a wage claim against defendants with the California Department of Industrial Relations ("Labor Commissioner"), pursuant to section 98 of the California Labor Code. Plaintiff sought unpaid wages and overtime pay for work actually performed. After plaintiff filed the claim, Jutla threatened to report him to the Immigration and Naturalization Services ("INS") unless the claim was dropped. Jutla also tried to force Singh to sign a written waiver of

his claims. Plaintiff, however, refused to submit to Jutla. The Labor Commissioner awarded plaintiff $69,633.73. Defendants appealed from the Labor Commission's judgment by filing an action in the Alameda Superior Court. On February 23, 2001, the first day of the trial, the parties settled. In a written agreement signed by both parties on May 3, 2001, Jutla agreed to make scheduled payments to Singh.

The following day, May 4, 2001, the INS arrested and detained plaintiff. Plaintiff has been in INS custody for fourteen months. He alleges that defendant Jutla contacted the INS and provided them with information of plaintiff's status in an act of retaliation.

On March 7, 2002, plaintiff filed a complaint with this Court against defendants for retaliation under the FLSA and the California Labor Code, requesting declaratory, injunctive, and monetary relief.

## Discussion

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### II. Pre-*Hoffman* Law

Defendants contend that under *Hoffman Plastic Compounds, Inc. v. NLRB,* plaintiff has no cause of action. Before this argument can be addressed, however, it is necessary to briefly discuss the relevant law prior to *Hoffman.*

#### *A. Undocumented Aliens Have a Cause of Action under the National Labor Reform Act ("NLRA")*

In *Sure-Tan, Inc. v. NLRB,* the Supreme Court held that undocumented aliens could bring an action under the NLRA. Broadly speaking, *Sure-Tan* stands for the proposition that undocumented workers are protected from unfair labor practices under the NLRA, and specifically, that when the evidence establishes that an employer reported the presence of an illegal employee to the INS in retaliation for the employee's protected union activity that the alien has a cause of action under section 8(a)(3) of the NLRA. The *Sure-Tan* court recognized, however, that if there is no specific finding of anti-union animus, reporting an undocumented alien employee would not be an unfair labor practice.

The *Sure-Tan* Court also recognized that undocumented aliens are "employees" within the meaning of section 2(3) of the Act. That provision broadly provides that "[t]he term 'employee' shall include any employee," subject only to certain specifically enumerated exceptions.

The *Sure-Tan* Court reasoned that allowing undocumented workers to bring a cause of action under the NLRB furthered the purposes of the NLRA because "[i]f undocumented alien employees were excluded from participation in union activities and from protections against employer intimidation, there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining." See *NLRB v. Jones & Laughlin Steel Corp.*

The Court held that application of the NLRA to illegal aliens "helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened."

#### *B. FLSA Covers Undocumented Aliens*

The underlying rationale in *Sure-Tan,* that the NLRA applies to illegal aliens, was extended in *Patel v. Quality Inn South,* where the Eleventh Circuit held that the FLSA applies to illegal aliens. Applying the *Sure-Tan* analysis, the court looked to the reasoning behind the FLSA and what its objectives were in terms of both legal and illegal workers. The *Patel* court also had to consider the Immigration Reform Control Act ("IRCA") which had not yet been passed when the Supreme Court handed down *Sure-Tan.* The IRCA is a comprehensive scheme that made combating the employment of illegal aliens in the United States central to the policy of immigration law. Consistent with *Sure-Tan,* the *Patel* court held that "the FLSA's coverage of undocumented aliens goes hand in hand with the policies behind the IRCA . . . If the FLSA did not cover undocumented aliens, employers would have an incentive to hire them . . . By reducing the incentive to hire such workers the FLSA's coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA. We therefore conclude that undocumented aliens continue to be 'employees' covered by the FLSA."

### *1. The FLSA's Anti-Retaliation Provision*

The FLSA's anti-retaliation provision provides that it shall be unlawful for "any person" to "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act . . ."

### *2. Reporting an Undocumented Worker to the INS with a Retaliatory Motive*

In *Contreras v. Corinthian Vigor Ins. Brokers, Inc.,* the court denied a motion to dismiss an undocumented worker's FLSA retaliation suit under circumstances virtually identical to the present case. The court concluded that "[t]here is no question that the protections provided by the FLSA apply to undocumented aliens." Though reporting an illegal alien to the INS is generally encouraged conduct because it is consistent with the labor and immigration policies established by the IRCA, the court in *Contreras* concluded that reporting an illegal alien *with* a retaliatory motive was prohibited conduct under § 15(a)(3).

## *C. Pre-*Hoffman*, Plaintiff Has a Cause of Action*

Under *Sure-Tan* and *Patel,* plaintiff would have a cause of action. According to *Sure-Tan,* an illegal employee has standing to bring a claim under the NLRA for a retaliatory reporting due to a protected union activity. The extension of *Sure-Tan* in *Patel* indicates that an illegal employee would also have standing to bring an anti-retaliation claim under the FLSA for protected FLSA conduct. Under this pre-*Hoffman* line of jurisprudence plaintiff would have a cause of action under section 215(a)(3), as the Northern District found in *Contreras* by applying both *Sure-Tan* and *Patel* specifically to the retaliatory act of reporting an undocumented worker's immigration status to the INS.

## III. *Hoffman*

Defendants contend that under *Hoffman* plaintiff's action is barred. Defendants claim that *Hoffman* does not just merely carve out the particular remedy of back pay, but rather, has greater significance in terms of the remedies available to an undocumented worker under the FLSA. The question before this Court is whether *Hoffman* has so altered the legal landscape that the underlying premises of both *Sure-Tan* and *Patel*—that undocumented workers have the right to particular remedies—have changed such that plaintiff no longer has a cause of action.

*Hoffman* does not compel the conclusion that plaintiff in this case is precluded from seeking a legal remedy. Given the facts in this case, the Court declines to extend *Hoffman* to bar plaintiff's action.

## *A.* Hoffman *Background*

In *Hoffman,* the Supreme Court held that back pay is not an available remedy for undocumented workers who bring claims pursuant to the NLRA. The Court held that to award back pay to an illegal alien for years of work "not performed" ran counter to the policies underlying the IRCA of 1986. *Hoffman* does not, however, hold that an undocumented employee is barred from recovering unpaid wages for work actually performed, nor does it preclude other traditional remedies.[1] In fact, the Court awarded injunctive and declaratory relief.

According to defendants, *Hoffman* should be read broadly, focusing not simply on the narrow issue of whether an undocumented worker is entitled to back pay, but rather, defendants' claim that it should be read to indicate that undocumented workers are not entitled to a wider array of remedies under the national labor laws. Defendants' argument likens all other forms of relief to back pay, thereby extending *Hoffman* so that an undocumented worker is precluded from bringing a claim under the FLSA's anti-retaliation provisions.

The *Hoffman* Court reaffirmed its holding in *Sure-Tan* that undocumented aliens are employees under the NLRA. Though *Hoffman* prevents an undocumented worker from seeking back pay, it does not preclude an undocumented worker from seeking *any* form of relief,

[1] *Hoffman* holds that undocumented employees are entitled to "traditional remedies" under the NLRA: "We have deemed such 'traditional remedies' sufficient to effectuate national labor policy regardless of whether the 'spur and catalyst' of backpay accompanies them (*Sure-Tan*)." The remedies awarded in *Hoffman* included a cease-and-desist order and the requirement that the employer "conspicuously post a notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices." Compensatory damages are included in the NLRB's "remedial arsenal." In determining an appropriate remedy under the NLRA, "the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts" (*Hoffman*).

as shown through the Court's granting of both injunctive and declaratory relief. While *Hoffman* did not address the remedies of compensatory and punitive damages, which are central here, given the factual circumstances of this case and the interplay with national immigration policy, the Court declines to extend *Hoffman* to bar the remedies that plaintiff seeks.

### *B. Defendant in This Case Is a "Knowing Employer"*

Defendant in this case was not just a knowing employer, but allegedly, actively recruited plaintiff to come work in the United States. Defendants continued to employ him for approximately three years, throughout which they were aware of his illegal status.

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### *D. Including Undocumented Workers in the FLSA's Coverage Is Consistent with Immigration Policy*

Allowing an undocumented worker to bring an anti-retaliation claim under the FLSA is consistent with the immigration policies underlying the IRCA. Congress enacted the FLSA to eliminate substandard working conditions by requiring employers to pay their employees a statutorily prescribed minimum wage and prohibiting employers from requiring their employees to work more than forty hours per week unless the employees are compensated at one and one half times their regular hourly rate. Congress enacted the IRCA to reduce illegal immigration not only to eliminate the economic incentive for illegal workers to come to this country, but also to eliminate employers' incentive to hire undocumented workers by imposing sanctions on employers who hire such workers. Though the FLSA does not impose sanctions, it also discourages employers from hiring such workers because it eliminates employers' ability to pay them less than minimum wage or otherwise take advantage of their status. As the *Patel* Court noted, "[i]f the FLSA did not cover undocumented aliens, employers would have an incentive to hire them. Employers might find it economically advantageous to hire and underpay undocumented workers and run the risk of sanctions under the IRCA." If employers know they have to pay illegal aliens the same wage as legal workers, they are far less likely to hire an illegal worker and run the risk of subjecting themselves to sanctions under the IRCA. As a result, there are fewer employment opportunities and therefore fewer incentives to enter this country illegally. Admittedly, similar arguments could be used to support the award of back pay, which was rejected in *Hoffman.* Indeed, every remedy extended to undocumented workers under the federal labor laws provides a marginal incentive for those workers to come to the United States. It is just as true, however, that every remedy denied to undocumented workers provides a marginal incentive for employers to hire those workers. The economic incentives are in tension. Given this tension, the courts must attempt to sensibly balance competing considerations. In this case, the balance tips sharply in favor of permitting this cause of action, and the remedies it seeks, to go forward. Prohibiting plaintiff from bringing this claim under the FLSA would provide a perverse economic incentive to employers to seek out and knowingly hire illegal workers, as defendant did here, in direct contravention of immigration laws. Though employers that succumbed to these incentives would run the risk of sanctions under the IRCA, that risk may be worth taking.[2] National labor and immigration policy is most appropriately balanced by permitting this case to go forward.

## Conclusion

Because this Court finds that plaintiff's action under the FLSA is not barred for the aforementioned reasons, defendants' motion to dismiss is DENIED.

## Case Questions

1. In your opinion, is there a conundrum created by legal protection of individuals who work in the United States illegally? What is your impression of the dicta and holding in this case?
2. Is it relevant to your above response that Jutla recruited Singh to come work for him in the United States?
3. Do you agree with the Court in *Patel* that protecting undocumented aliens by requiring that employers treat them the same as other workers will discourage illegal immigration?

[2] Indeed, it is the employees who face the most significant and immediate immigration sanctions.