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SPECIAL PROBLEMS RELATING TO NATIONAL ORIGIN DISCRIMINATION

By David E. Dubberly

Discrimination on the basis of national origin is prohibited by Title VII of the Civil Rights Act of 1964, Executive Order 11246, the Immigration Reform and Control Act of 1986 (IRCA), and the South Carolina Human Affairs Law.¹ The Civil Rights Acts of 1866² and 1871³ also cover some claims of national origin discrimination.

A. Definition

“National origin” refers to the place of one’s ancestry. The concept of national origin is closely related to concepts of citizenship immigration status, and even race, although each of the concepts is analytically distinct.⁴

Title VII does not define the term “national origin.” However, according to the legislative history, the EEOC, and most courts, Congress intended to include within the term members of all national groups and persons of common ancestry, heritage, or background.⁵ “National Origin,” for Title VII purposes, need not involve a recognized “nation,” thus an individual’s national origin could be from a country that is not officially recognized. Furthermore, courts may look to an individual’s ethnic characteristics in addition to that individual’s geographic birthplace to identify national origin.

Title VII arguably extends so far as to prohibit discrimination against individuals who associate with persons of a particular national origin and persons with characteristics generally identified with such persons. The EEOC Guidelines state that Title VII’s protection extends to the following:

- (1) marriage to or association with a person(s) of a specific national origin;
- (2) membership in, or association with, an organization identified with or seeking to promote the interests of national groups;
- (3) attendance at, or participation in, schools, churches, temples, or mosques generally used by persons of a particular national origin; and
- (4) use of an individual’s or spouse’s name that is associated with a particular national origin.⁶

B. Scope of Protection

National origin discrimination cases are similar to other types of discrimination cases and are brought under both disparate treatment and adverse impact theories.⁷ Claims of national origin discrimination are based upon employment decisions affecting a wide variety of terms and conditions of employment: from hiring⁸ and promotion,⁹ to harassment¹⁰ and discharge¹¹. Like race discrimination actions, national origin discrimination suits often revolve around the use of selection procedures that adversely affect protected groups.¹²

Often, selection criteria that use height or weight requirements, fluency-in-English requirements, and certain training or educational requirements may exclude individuals on the basis of national origin. For example, individuals may be excluded from employment because of characteristics peculiar to their heritage, such as shorter height than the average American. Similarly, individuals born outside of the United States may be excluded from employment because they have difficulty with English, or have an accent, or because their foreign education may not comply with a specific education requirement. Therefore, the EEOC's guidelines on national origin discrimination require that employers evaluate their selection criteria for adverse impact and disparate treatment on the basis of national origin. While Title VII does provide for a bona fide occupational qualification exception for national origin cases, the EEOC guidelines state that the exception will be "strictly construed."¹³

1. Language and Accent

(a) Fluency Requirements

Typically, challenges to language fluency requirements on disparate treatment grounds (claiming that such requirements are merely pretexts for unlawful national origin discrimination) have been unsuccessful. Some courts have rejected these challenges, finding the individual plaintiffs unqualified due to their lack of fluency and thus unable to make out a prima facie case of discrimination.¹⁴ Other courts have found that lack of fluency is a legitimate, nondiscriminatory reason for the adverse action. Some courts have held that intentional national origin discrimination cannot be inferred from fluency requirements.

With respect to adverse impact challenges, the EEOC closely scrutinizes fluency requirements.¹⁵ Nevertheless, most courts have found such requirements sufficiently job related, and thus lawful, notwithstanding any adverse impact.¹⁶

(b) English-Only Rules

The EEOC's position is that English-only rules are "a burdensome term and condition of employment."¹⁷ Therefore, the Commission will closely scrutinize such rules, presuming that English-only rules in the workplace violate Title VII.¹⁸ The EEOC does, however, allow application of English-only rules under limited circumstances if the employer can establish a business necessity and if the employer gives its employees full and fair notice of the rule.¹⁹

The Fourth Circuit has not ruled on the issue of whether an “English-only” policy would constitute national origin discrimination. However, notwithstanding the EEOC’s policy at least one district court in the circuit has found that “[t]he [EEOC’s] determination that the mere existence of an English-only policy satisfies the plaintiff’s burden of proof is not consistent with the drafting of the statute but is rather agency-created policy. The plaintiff still bears the burden of showing a prima facie case of discrimination.”²⁰ That court further found that “[t]here is nothing in Title VII which protects or provides that an employee has a right to speak his or her native tongue while on the job. The ability to converse on the job is a “privilege of employment.”²¹

(c) Accents

Because accents can often identify individuals with a particular geographic heritage, adverse employment decisions based on such accents can be a pretext for national origin discrimination. However, some accents can be so pronounced as to be an outright impediment to communication. Typically, courts view claims of national origin discrimination based on accent as fact specific, evaluating the employer’s legitimate interests (such as safety of customer service) and the extent of the employee’s communication problem.²²

2. Height and Weight Standards

Physical restrictions such as height and weight requirements may adversely affect certain groups who tend to fall below the general physical norm in this country. Height and weight requirements having an adverse impact may be considered discriminatory, unless the employer can prove that such requirements are reasonably necessary for the particular job.²³

3. Foreign Education and Training

Education and training requirements, like language, height, and weight requirements, often tend to favor or disfavor particular national origin groups. Therefore, exclusion of foreign-trained persons could violate Title VII if such a requirement is merely a pretext for intentional discrimination based on national origin, or if such requirement has an adverse impact on a particular national origin group and is not sufficiently job related.²⁴

4. National Origin Harassment

Employers are required to maintain an atmosphere in the workplace free from ethnic and racial harassment. This requirement may call for positive action by the employer directed toward harassing employees. If an employer permits such harassment, it may be liable for national origin discrimination. However, “[s]tray remarks” and isolated statements by those unconnected with the final decision-making process and to the negative employment actions are not sufficient to establish discriminatory animus.²⁵ To make out a claim of national origin harassment, a plaintiff must show (1) that discriminatory acts based on the plaintiff’s national

origin were so severe and pervasive as to create a hostile working environment, and (2) that there is some basis upon which liability can be imputed to the employer (such as knowledge of the existence of the hostile work environment without taking remedial action).²⁶

5. Exceptions

(a) Security Clearance

When a job requires (pursuant to federal law or executive order) a security clearance, employers may refuse to employ individuals who are unable to obtain security clearance because of their national origin.²⁷ For example, in Jamil v. Secretary, Dep't of Defense,²⁸ an Asian-American individual who was terminated for having his security clearance revoked could not prevail on his national origin discrimination claim under Title VII because his employer, the Department of Defense, “producing a legitimate reason for his dismissal, namely that he no longer held the security clearance required for his job.”²⁹

(b) Bona Fide Occupational Qualification

Title VII's bona fide occupational qualification (BFOQ) exception covers employment decisions based on a person's national origin, as well as sex and religion.³⁰ The exception has been described as follows:

[It] provides for a very limited exception to the provisions of the title. Notwithstanding any other provisions, it shall not be an unlawful employment practice for an employer to employ persons of a particular religion or national origin in those rare situations where religion or national origin is a bona fide occupational qualification.³¹

For Example, under the BFOQ exception, a French or Italian restaurant could advertise for and hire exclusively French or Italian chefs.³²

(c) Treaty Obligations

Treaties between the United States and a number of foreign countries contain clauses which confer upon companies headquartered in foreign countries the right to employ their citizens, in preference to U.S. citizens, to work in certain high-level positions within their United States operations. For example, many foreign companies do business in the United under bilateral Friendship, Commerce and Navigation treaties (FCNs) signed after World War II. FCNs typically provide that foreign companies may employ, “within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents, and other specialists of their choice.” Similar clauses are contained in the Air Transport Agreements in force between the United States and other governments.

In *Fortino v. Quasar*, three terminated U.S. executives won almost \$3 million in damages and costs in a national original discrimination case.³³ The U.S. executives were terminated during companywide reorganization. After the reduction-in-force, the percentage of executives of Japanese citizenship and origin at Quasar increased markedly, and their salaries increased also. The Japanese executives had entered the U.S. under E-1 (Treaty Trader) or E-2 (Treaty Investor) temporary visas. At trial, the company's lawyers did not raise the U.S.-Japan FNC Treaty. When the treaty was brought up as an additional defense on appeal, the appeals court reversed the verdict against the company, interpreting the treaty broadly to allow discrimination in favor of Japanese executives.³⁴

However, FNCs do not confer immunity. Other courts have concluded that the privilege to discriminate on the basis of citizenship is a narrow one, permitting foreign companies to employ their own "citizens for certain high level positions.³⁵ The privilege, however, is not a wholesale immunity from compliance with labor laws prohibiting other forms of employment discrimination."³⁶ In other words, if a plaintiff can prove that an employment decision favoring a foreign executive stems from a desire to discriminate on a basis prohibited by Title VII or other discrimination laws, instead of from a preference to have the foreign company managed by its own citizens, the plaintiff could possibly prevail despite the company's treaty rights.

C. The Immigration Reform and Control Act of 1986

While IRCA generally prohibits the hiring of unauthorized aliens,³⁷ it also contains two antidiscrimination provisions.³⁸ The first provision expands Title VII's national origin discrimination prohibition to cover smaller employers, those with four or more employees.³⁹ The second provision prohibits intentional discrimination in hiring and discharge based on citizenship status.⁴⁰

The citizenship discrimination provision is subject to three important limitations. First, the employee must be a U.S. citizen, a U.S. national, or an authorized alien pursuing naturalization at the time of the alleged discrimination.⁴¹ Additionally, employers are permitted to prefer a U.S. citizen over an alien "if the two individuals are equally qualified."⁴² Lastly, IRCA's "public function" exception allows an employer to use citizenship as a hiring criteria (1) if required to do so by law, regulation, or executive order; (2) if required to do so under a contract with a federal, state, or local government; or (3) if the Attorney General finds that hiring only citizens is critical to the employer's doing business with federal, state, or local government.⁴³

END NOTES

¹Although the South Carolina Human Affairs Law prohibits national origin discrimination, S.C. Code Ann. §1-13-80 (Cum. Supp.), no reported national origin discrimination cases have been brought under the state statute.

²Duane v. Geico, 37 F.3d 1036, 1044 (4th Cir. 1994) (§1981 prohibits private discrimination against aliens in the making of the contracts), cert. Dismissed mem., 515 U.S. 1101 (1995).

³Faulkner v. Jones, 10 F.3d 226, 230-231 (4th Cir. 1993) (“a classification based on . . . national origin. . . is examined most closely because the classification is deemed inherently suspect”); see also, Sylvia Development Corp. v. Calvert County, Md., 48 F.3d 810, 820 (4th Cir. 1995).

⁴For example, the Supreme Court has held that Title VII does not protect against citizenship discrimination, although citizenship discrimination could be a part of a scheme of or pretext for national origin discrimination. Espinoza v Farah Mfg. Co., 414 U.S. 86, 92-93 (1973).

⁵ The EEOC’s Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.1, provide: “The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual’s, or his or her ancestor’s, place of origin; or because an individual has the physical, cultural, or linguistic characteristics of a national origin group.”

⁶ Id.

⁷ See, Long v. First Union Corp., 894 F. Supp. 933, 939-940 (E.D. Va. 1997) (holding that plaintiffs were entitled to judgment as a matter of law on their claim of discriminatory failure to hire based on their Philippine ancestry because the defendant failed to produce any legitimate, nondiscriminatory reason for its failure to hire the plaintiffs).

⁸ See, Prudencio v. Runyon, 986 F. Supp. 343, 351 (W.D. Va. 1997) (holding that plaintiffs were entitled to judgment as a matter of law on their claim of discriminatory failure to hire based on their Philippine ancestry because the defendant failed to produce any legitimate, nondiscriminatory reason for its failure to hire the plaintiffs).

⁹ See, Rosado v. Virginia Commonwealth University, 927 F. Supp. . 917, 931 (E.D. Va. 1996) (holding that Puerto Rican plaintiff failed to establish element of her prima facie case that she was qualified for promotion).

¹⁰ See, Bodoy v. North Arundel Hosp., 945 F. Supp. 890, 898 (D. Md. 1996) (holding that plaintiff did not establish link between negative employment actions and a discriminatory animus based on Puerto Rican origin).

¹¹ See, Alvarado v. Montgomery Comm. College, 928 F.2d 118, 123 (4th Cir. 1991) (finding that native of Columbia, South America was discriminatorily discharged); see also, Gedeon v. Host Marriott Corp., No. 97-2566, U.S. App. LEXIS 16903, AT *6 (4th Cir. July 23, 1998).

¹² However, for a case of direct evidence of national origin discrimination, see, Yudovich v. Stone, 839 F. Supp. 382, 389 (E.D. Va. 1993) (describing the plaintiffs' supervisor as "a smoking platoon of weaponry illustrating the [employer's] anti-Semitic and anti-Russian atmosphere").

¹³ 29 C.F.R. §1606.4.

¹⁴ See, Jimenez v. Mary Washington College, 57 F.3d 369, 380 (4th Cir. 1995).

¹⁵ 29 C.F.R. 1606.6(b)(1).

¹⁶ Garcia v. Rush-Presbyterian-St. Luke Medical Ctr., 660 F.2d 1217, 1222 (7th Cir. 1981).

¹⁷ C.F.R. §1606.7(a).

¹⁸ Thus, the EEOC guidelines allow an employee to prove his prima facie case in a disparate treatment case merely by proving the existence of English-only policy. 29 C.F.R. §1606.7(a)&(b) (1997).

¹⁹ 29 C.F.R §1606(b) & (c).

²⁰ Long v. First Union Corp., 894 F. Supp. 933, 940 (E.D. Va. 1995).

²¹ Id. at 941 (citing Garcia v. Spun Steak, 993 F.2d 1480 (9th Cir. 1993)).

²² See, Bell v. Home Life Ins. Co., 596 F. Supp. 1549, 1555 (M.D. N.C. 1984) (noting that if the "plaintiff could prove that he had been discriminated against because of his accent, he would establish a prima facie case of national origin discrimination." However, on the facts of that case, the court found that the New Zealand-born plaintiff could not show any such discrimination took place). See also, Sandhu v. Dept. of Conservations, 874 F. Supp. 122, 127 & n.8 (E.D. Va. 1995). Much like accents, employment decisions regarding ethnic clothing could possibly be a pretext for national origin discrimination. Cf. Becerra v. Dalton, 94 F.3d 145, 150 (4th Cir. 1996) (holding that employee's claim that he was reprimanded for wearing a guayabera, an open-neck shirt commonly worn in the Hispanic community, did not present prima facie evidence of national origin discrimination).

²³ See, Craig v. County of Los Angeles, 626 F.2d 659, 667 (9th Cir. 1980) (finding minimum-height requirement for deputy sheriff unlawful because of discriminatory effect on Mexican-Americans), cert. denied, 450 U.S.919 (1981).

²⁴ Sinai v. New England Telephone and Telegraph Co., 3 F.3d 471, 472-73 (1st Cir. 1993) (interviewer told applicant that work experience in Israel “doesn’t count”; trial verdict for applicant affirmed), cert. denied, 573 U.S. 1025 (1994).

²⁵ Bodoy v. North Arundel Hosp., 945 F. Supp. 890, 895 (D. Md. 1996).

²⁶ Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126, 1130 (4th Cir. 1995).

²⁷ See, 42 U.S.C. § 2000e-2(g); EEOC Policy Statement on National Security Defense to Bias Charges, 405 Fair Empl. Prac. Man. (BNA) 6625.

²⁸ 910 F.2d 1203 (4th Cir. 1990).

²⁹ Id. at 1207.

³⁰ 42 U.S.C. § 2000e-2(e).

³¹ H.R. Rep. No. 914, at 27 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2403. The language of the BFOQ exception, with respect to national origin discrimination, is identical to that contained in the original House Bill which this committee report describes.

³² 110 CONG. REC. 2549 (1964) (statement of Representative John H. Dent).

³³ 751 F. Supp. 1306 (N.D. Ill. 1990).

³⁴ 950 F.2d 389, 393 (7th Cir. 1991).

³⁵ Wickes v. Olympic Airways, 745 F.2d 363, 356 (6th Cir. 1984) (emphasis in original).

³⁶ Id.

³⁷ 8 U.S.C. § 1324a(a)(1).

³⁸ 8 U.S.C. § 1324b(a)(1)(A)&(B). IRCA also prohibits intimidation and retaliation against individuals “for the purpose of interfering with any right or privilege secured under” the IRCA’s two antidiscrimination provisions. Id. at §1324b(a)(5).

³⁹ 8 U.S.C. § 1324b(a)(1)(A).

⁴⁰ 8 U.S.C. § 1324b(a)(1)(B).

⁴¹ 8 U.S.C. § 1324b(a)(3).

⁴² 8 U.S.C. § 1324b(a)(4).

⁴³ 8 U.S.C. § 1324b(a)(2)(C); *see* 28 C.F.R. § 44.200(b)(1)(iii).