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BOWLES

Law Report

LEGAL NEWSLETTER VOLUME 4, ISSUE 3

National Origin Discrimination in the Workplace Is Illegal

Following September 11, the Federal Government Has Issued Detailed Guidelines for Employers

In the wake of the September 11 attacks, discrimination due to national origin, one of the original classifications of workers covered by the federal Civil Rights Act of 1964 (also known as "Title VII"), has received renewed attention. Accordingly, the Equal Employment Opportunity Commission (EEOC), the federal agency responsible for the enforcement of Title VII, has recently issued new guidelines for investigating discrimination charges based on an employee's foreign birthplace, cultural characteristics or ancestry (EEOC National Origin Guidance).

Federal and state laws protect the equal opportunity of each qualified worker in employment regardless of his/her race, gender, religion, etc.

The Basic Principles of Discrimination Law: While an employer in theory needs no reason to fire an "at-will" worker, the proportion of employment-related litigation has grown over the past three decades because the number of recognized *illegal* reasons for termination – or other employment-related decisions – has been steadily expanding.

There are now no less than seven "protected classifications" of workers under federal law, including race/color, national origin/ancestry, sex/gender, religion, age (40 and over), and mental or physical disability. There are commonly additional protected classifications under state law. For example, California counts 11 such classifications, including marital status, veteran status, medical condition and sexual orientation.

It is generally unlawful for an employer to make an employment decision based on any one or more of the protected classifications. The only exception is a position where excluding a protected class member is a good faith occupational requirement (e.g., male candidates can be excluded from jobs as attendants in a women's locker room). Federal and state anti-discrimination laws are intended to ensure qualified workers have equal opportunity in employment regardless of their respective races, genders, religions, etc.

National Origin Discrimination Can Take Many Forms: The EEOC National Origin Guidance observes: "Title VII's protections extend to all workers in the United States, whether born in the United States or abroad and regardless of citizenship status. Title VII articulates the national policy against national origin discrimination in the workplace, while also preserving an employer's freedom of choice to make sound business decisions.... Today, about one in ten Americans is foreign-born...."

National origin discrimination includes uneven treatment due to a person's birthplace country, ancestry, accent or lack of fluency in English.

The EEOC guidance defines national origin discrimination as "treating someone less favorably because that individual (or his or her ancestors) is from a certain place or belongs to a particular national origin group." Thus, national origin discrimination includes adverse employment decisions (a) because a person (or his or her ancestors) comes (or does not come) from *a particular place*, not just a particular country

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Ban on Junk Fax Advertising Is Still the Law

Not All Unsolicited Faxes Are Improper But Extreme Care Should Be Taken

For more than a decade, the Telephone Consumer Protection Act (TCPA) has imposed a nationwide prohibition on unsolicited fax advertising. Perhaps relying on the hope that the federal courts would widely find this law an unconstitutional attempt to regulate commercial speech, some companies have nevertheless persisted in advertising their goods and services over the fax lines. However, that hope was misplaced. As confirmed by the recent U.S. Court of Appeals decision in *State of Missouri v. American Blast Fax, Inc. 323 Federal Reporter, Third Series (F.3d) 649 (8th Circuit, March 21, 2003)*, the TCPA is the law of the land. Advertisers who

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(e.g., Kurdistan); and (b) because a person belongs (or does not belong) to a particular ethnic group, i.e., "a group of people sharing a common language, culture, ancestry, and/or other similar social characteristics" (e.g., larger ethnic groups, such as Hispanics and Arabs, and smaller ethnic groups, such as Kurds or Gypsies).

Federal law also prohibits discrimination against a person because he or she is associated with an individual of a particular national origin.

Title VII also prohibits discrimination against a person "because he or she is associated with an individual of a particular national origin." The EEOC National Origin Guidance recognizes an employer cannot discriminate against an individual because of physical, linguistic, or cultural traits "closely associated with a national origin group, for example, discrimination against someone based on her traditional African style of dress"; or "based on the employer's *belief* that [the worker] is a member of a particular national origin group, for example, discrimination against someone perceived as being Arab based on his speech, mannerisms, and appearance, regardless of how he identifies himself or whether he is, in fact, of Arab ethnicity" (emphasis supplied).

National Origin Discrimination Prohibited at All Stages of Employment: The EEOC points out that such discrimination can occur at any stage of employment.

Thus, "Title VII prohibits employers from engaging in recruitment practices that discriminate on the basis of national origin… an employer may not recruit individuals belonging to some national origin groups while deliberately not recruiting members of other [such] groups. Nor may an employer adopt certain recruitment practices, such as word-of-mouth recruitment, where such practices have the purpose or effect of discriminating against particular national origin groups. Because employment agencies are covered by Title VII, they may not comply with requests from employers to engage in discriminatory recruitment or referral practices."

The government also cautions that an employer cannot hire, assign or promote workers on the basis of the perceived ethnic preferences of the company's customers.

Obviously, an employer also may not discriminate in discipline, demotion, and discharge decisions based on national origin. As a sign of the times, the EEOC supplies the following example: "Ahmed, who is Lebanese, was discharged from his position as a city bus driver. According to the employer, Ahmed was discharged because, while his performance was satisfactory, customers complained that they were wary of riding with an obviously Middle Eastern driver after the recent arrest of several suspected terrorists in the same city. The employer has unlawfully discharged Ahmed based on his national origin.

An employer cannot hire, assign or promote workers on the basis of the perceived ethnic preferences of the company's customers.

Discipline, demotion, and discharge decisions are typically based on either employee misconduct or unsatisfactory work performance. While neutral rules and policies regarding discipline, demotion, and discharge generally do not violate Title VII, they must be enforced in an even-handed manner, without regard to national origin."

The government thus advises employers adopt clearly defined, *job-related* criteria for all employment decisions. For example, "in conducting job interviews, employers can promote nondiscriminatory treatment by asking the same questions of all applicants and inquiring about matters related to the position in question. If an employer has clearly defined criteria for employment decisions, managers can be more confident that they are selecting the most qualified candidates."

Unlawful National Origin Harassment: The EEOC reports that harassment is one of the most prevalent allegations in national origin complaints submitted to the agency.

The government observes that "[n]ational origin harassment violates Title VII when it is so severe or pervasive that the individual being harassed reasonably finds the work environment to be hostile or abusive. Harassment based on national origin can take many different forms, including ethnic slurs, workplace graffiti, or other offensive conduct directed towards an individual's birthplace, ethnicity, culture, or foreign accent. A hostile environment may be created by the actions of supervisors, coworkers, or even non-employees, such as customers or business partners. Relevant factors in evaluating whether national origin harassment rises to the level of creating a hostile work environment may include any of the following:

- whether the conduct was physically threatening or intimidating;
- how frequently the conduct was repeated;
- whether the conduct was hostile and/or patently offensive;
- the context in which the harassment occurred; and
- whether management responded appropriately when it learned of the harassment."

The EEOC thus rightly advises that "the most important step for an employer in preventing harassment is clearly communicating to employees that harassment based on national origin will not be tolerated and that employees who violate the prohibition against harassment will be disciplined. In addition, an employer should have effective and clearly communicated policies and procedures for addressing complaints of national origin harassment and should train managers on how to identify and respond effectively to harassment.

"[Conversely], [e]mployees who are harassed should take appropriate steps at an early stage to prevent the continuation of the objectionable conduct. In some cases, an employee who is offended by a supervisor's or coworker's conduct may feel he or she can raise it directly with the individual who engaged in the objectionable conduct. In other situations, where the employee believes that the employer's intervention is required to prevent further harassment, the employee should notify the official designated by the employer's complaint or harassment procedures.

Harassment can take many different forms, including ethnic slurs or workplace graffiti directed towards an individual's birthplace, ethnicity, culture, or foreign accent.

In some circumstances, it may be reasonable for the employee to notify another appropriate official not specifically designated by the employer to accept complaints, such as where the employer's procedure requires the employee to report the harassment to his or her direct supervisor and that individual is the alleged harasser."

Employers Can Specify an "English Only" Workplace Only in Limited Circumstances: There is perhaps no greater potential for a national origin discrimination complaint than in the area of required fluency or practice of a particular language – commonly English – in the workplace. The guidance points out that in " 2000, approximately 45 million Americans (17.5 percent of the population) spoke a language other than English in the home. Of those individuals, approximately 10.3 million individuals (4.1 percent of the total population) spoke little or no

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"DISCRIMINATION"

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English, an increase from 6.7 million in the year 1990."

"Employers sometimes have legitimate business reasons for basing employment decisions on linguistic characteristics. However, linguistic characteristics are closely associated with national origin. Therefore, employers should ensure that the business reason for reliance on a linguistic characteristic justifies any burdens placed on individuals because of their national origin…

"An employment decision based on foreign accent does not violate Title VII if an individual's accent materially interferes with the ability to perform job duties. This assessment depends upon the specific duties of the position in question and the extent to which the individual's accent affects his or her ability to perform job duties. Employers should distinguish between a merely discernible foreign accent and one that interferes with communication skills necessary to perform job duties."

Similar to accent, an "individual's lack of proficiency in English may interfere with job performance in some circumstances, but not in others. For example, an individual who is sufficiently proficient in spoken English to qualify as a cashier at a fast food restaurant may lack the written language skills to perform a managerial position at the same restaurant requiring the completion of copious paperwork in English. [Thus], the employer should not require a greater degree of fluency than is necessary for the relevant position."

Last, Title VII (and California law) only "permit employers to adopt 'English-only' [or some other language only] rules under certain circumstances. As with any other workplace policy, an English-only rule must be adopted for nondiscriminatory reasons." California specifies that it is unlawful for an employer of five or more persons to adopt or enforce a policy that limits or prohibits the use of any language in the workplace unless: (1) the language restriction is justified by a business necessity; and (2) the employer has notified its employees of the circumstances and time when the language restriction is required to be observed and of the consequences for violating the language restriction." California Government Code section 12951(a). California defines that business necessity as "an overriding legitimate business purpose [that makes] the language restriction… necessary to the safe and efficient operation of the business;… the… restriction effectively fulfills [that] business purpose"; and there is no better alternative practice to the restriction that would fulfill that purpose." California Government Code section 12951(b).

Thus, a California manufacturing plant could by an appropriately worded written policy require all workers to speak the same language during working hours if necessary to effectively communicate and coordinate their actions for safety reasons. On the other hand, that same plant would be barred from issuing a policy requiring English to be spoken at lunch breaks where no safety-based purpose can be articulated for the practice.

In Limited Circumstances, Employers May Not Discriminate on the Basis of U.S. Citizenship: Under the federal Immigration Reform and Control Act of 1986, an employer is prohibited from hiring or recruiting an individual unless and until the company has received adequate documentation

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CORRECTION

In the recent article "California's New Employment Laws for 2003," Bowles Law Report volume 4, issue 2, we incorrectly stated that the California Fair Employment and Housing Act (FEHA) now protects against discrimination against anyone because of his or her age. FEHA only prohibits age discrimination against anyone "who has reached his or her 40th birthday." California Government Code sections 12926(b), 12940(a)(5) ■

"Human Resources."

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JUNK FAXES

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violate its requirements are still liable for automatic damages of up to $1,500 per fax.

Advertisers who violate TCPA requirements are liable for automatic damages of up to $1,500 per fax.

Since 1991, it has been "unlawful for any person within the United States… to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 United States Code (USC) section 227(b)(1)(C). "Unsolicited advertisement" is "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 USC section 227(a)(4).

Under the TCPA, unsolicited advertisements earn automatic damages of the actual monetary loss the receiving party suffered from the intrusion or $500 per violation, whichever is greater. Damages can be up to $1,500 per fax if the improper transmission was in knowing or willful violation of the TCPA. If the fax is not an advertisement, then there is no violation of the law. If the sender has an established business relationship with the recipient of the fax, then a fax advertisement is not prohibited. However, if there is no prior relationship, or the recipient has not expressly requested that the solicitation be faxed to him/her, then the fax is prohibited by law.

Nevertheless, on the premise that commercial speech is broadly protected under the First Amendment in spite of the TCPA, a number of companies have offered businesses widespread fax advertising services. In 2000, the State of Missouri thus sued two of those companies, American Blast Fax, Inc. and Fax.com, Inc. for violating the statutory restrictions on unsolicited fax advertising. Missouri was soon joined by the federal government as a complaining party against the fax companies.

If you experienced a surge in fax advertising in 2002, it may have prompted by a district court decision finding the TCPA unconstitutional; that decision has now been overturned.

If you experienced a surge in fax advertising in 2002, it may have been due to the initial, district court decision that year in the case, finding the TCPA unconstitutional. *Missouri ex rel Nixon v. American Fax Blast, 196 Federal Supplement, Second Series (F. Supp.2d) 920 (Eastern District*

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the prospect is authorized to work in this country. While an employer may legally choose to hire an American citizen over an equally qualified alien authorized to work in the U.S., the EEOC contends that "citizenship discrimination" violates Title VII "where it has the 'purpose or effect' of discriminating on the basis of national origin. For example, a citizenship requirement would be unlawful if it is a 'pretext' for national origin discrimination, or if it is part of a wider scheme of national origin discrimination."

Employers Still Have Discretion to Manage Their Businesses: While it is important to eliminate and prevent discrimination on the basis of worker background and characteristics unrelated to job skills, federal and state law acknowledge the rights of employers to define the functions and performance standards for the workforce. Thus, the EEOC recognizes that discrimination law "is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, [and does not require] employers to lower such standards."

Accordingly, a company is within its domain to set the levels of proficiency and temperament directly related to its operations and to make employment decisions based on an employee's or applicant's demonstrated ability to meet well-defined job qualifications. However, so long as a person is legally authorized to work in this country, a business is out-of-bounds in making employment decisions grounded on the subject's ethnicity or his/her country or region of origin. ■

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Missouri 2002). The judge dismissed the lawsuit on the ground that the TCPA violated the First Amendment guarantee of freedom of speech, concluding the government had failed to demonstrate any substantial interest in restricting unsolicited fax advertising.

The Telephone Consumer Protection Act places a nationwide prohibition on unsolicited fax advertising.

However, the United States and Missouri have now won a reversal of the district court's decision. The Eighth Circuit Court of Appeals cited among other things the testimony in Congress leading to the 1991 passage of the TCPA: "It was reported that at least one fax advertiser could 'routinely send 60,000 fax advertisements per week' and that 'business owners are virtually unanimous in their view that they do not want their fax lines tied up by advertisers trying to send messages.'" The appeals court also noted evidence from the district court indicating that "the costs and amount of interference resulting from unrestrained fax advertising continue to be significant." Thus, the appeals court found the district court judge in error and that the government did have a substantial interest in regulating the "junk fax" problem. 323 F.3d at 655.

As confirmed by the *American Fax Blast* decision, it thus remains critical that companies steer well clear of faxing an uninvited document to businesses and individual consumers that even implies a solicitation for goods and services. If you would like further information, please contact us. ■