September 11 Backlash Employment Discrimination

by Bryan P. Cavanaugh[1]

Complaints of national origin-related employment discrimination have risen since September 11, 2001. The federal government is particularly concerned and has fostered an environment that employers should heed. It has sued employers around the country for September 11 backlash discrimination. Employers should forbid national origin discrimination, guard against it, and eradicate it as soon as they discover it. Otherwise, they could face expensive lawsuits.

I. Introduction

The events and images of the September 11, 2001 terrorist attacks affected everyone in the United States. The ghastly images of the attacks on our country by Muslim extremists are indelible in this country's collective memory. As President Bush addressed the nation on the night of September 11, 2001, he vowed, "None of us will ever forget this day."[2] While September 11's precise effect upon the U.S. economy is unclear, it cannot be reasonably disputed that the attacks harmed it. Indeed, this country continues to feel the effects of the September 11 attacks. Naturally, the effects have reached the U.S. workplace. The attacks have affected the U.S. workforce as a whole and on a more personal level. Anecdotes abound of post-September 11 animosity and downright hatred of Arab-Americans and Muslims. This tension has increased allegations of unlawful employment discrimination throughout the U.S., including in Missouri. Since almost immediately after September 11, 2001, the federal government has expressed its heightened concern and special commitment to shed light on and to eradicate employment discrimination based on national origin.

II. Statutes

42 U.S.C. §§ 2000(e), *et seq.*, better known as "Title VII," and the Missouri Human Rights Act, §§ 213.010, RSMo, *et seq.*, each proscribe an employer from discriminating against an employee based on his or her national origin.[3] In deciding a case brought under the Missouri Human Rights Act, a court is guided not only by Missouri law but also by applicable federal employment discrimination decisions.[4]

The United States Equal Employment Opportunity Commission ("EEOC") enforces Title VII;[5] the Missouri Commission on Human Rights ("MCHR") enforces the Missouri Human Rights Act.[6]

Title VII's proscription against national origin discrimination applies to an employer with 15 or more employees;[7] the Missouri Human Rights Act's ban applies to an employer with six or more employees in Missouri.[8]

Each statute provides a private right of action to the person complaining.[9] A plaintiff is entitled to a jury trial under both of these acts.[10] A prevailing plaintiff may receive damages for lost past wages and perquisites, future lost wages and perquisites, emotional distress, consequential damages, punitive damages, and attorney's fees and costs. Before a plaintiff can sue, however, he or she must file a charge of discrimination with the EEOC or the MCHR and receive a notice of right to sue from it.[11]

III. Background and Developments

The EEOC has focused on pursuing claims of September 11 backlash discrimination, and employers should pay close attention to avoid liability.

Charges of national origin discrimination filed with the EEOC have risen each year from 1998-2002, both in number and percentage of total charges.[12] The number and percentage have risen even more sharply since September 11, 2001. Consistently each year since 1998, the EEOC itself has sued an employer or intervened in a private lawsuit against an employer in about 0.5% of Title VII charges it has received.[13]

The MCHR maintains only informal statistics of national origin discrimination charges and has no statistics about resolution or closure of these charges. Nevertheless, national origin discrimination charges filed with the MCHR have also risen in number and percentage of total charged since 1998, and more sharply since September 11, 2001.[14]

On September 14, 2001, the EEOC's chair, Cari M. Dominguez, exhorted all employers and employees "to promote tolerance and [to] guard against unlawful workplace discrimination based on national origin or religion."[15] She warned against misdirecting anger at the terrorists against innocent people of a certain national origin. In fact, she declared that preventing unlawful employment discrimination was a symbolic way to fight back against the terrorists.[16] Dominguez iterated President Bush's September 13, 2001 statement, "We must be mindful that as we seek to win the war against terrorism, we treat Arab-Americans and Muslims with the respect they deserve."[17]

The U.S. Department of Justice, the U.S. Department of Labor, and the EEOC issued a joint statement against post-September 11 employment discrimination on November 19, 2001.[18] They stressed that the first step to combat unlawful discrimination is to prevent it. This statement emphasized the need for tolerance of different faiths, opinions, and colors.[19]

On September 27, 2002, the EEOC filed a lawsuit against Alamo Rent-A-Car[20] alleging that the employer discriminated against an employee on the basis of her religion, Islam. The employer terminated the employee "for wearing a scarf to work over her hair due to her religious beliefs," according to the EEOC.[21] With the filing of this lawsuit, the EEOC's regional attorney and director in Phoenix warned employers to accommodate their employees' religious beliefs and promised to defend employees' right to abide by religious beliefs in the workplace.[22]

On September 30, 2002, the EEOC filed two September 11-related lawsuits. The first was against Chromalloy Castings Tampa Corporation, alleging that the employer terminated its employee on September 19, 2001 because of his national origin, Palestinian.[23] With the filing of this lawsuit, the EEOC's district director and regional attorney in Miami issued statements that reaffirmed the EEOC's commitment to safeguard the workplace rights of Arab-Americans after September 11.[24] The defendants have denied liability.[25] The second lawsuit, against the Worcester Art Museum, explicitly alleged that the employer terminated Zia Ayub on January 3, 2002 "on the basis of his religion Islam, and national origin, Afghan, in the wake of the terrorist attacks of September 11, 2001."[26] In its answer, the employer maintained that it terminated Ayub on January 4, 2002, for violating company policies.[27] Along with the filing of this lawsuit, EEOC Chair Dominguez called this termination "unfortunate" and promised to continue working with employers to promote tolerance.[28]

On November 13, 2002, the EEOC announced a pre-litigation settlement with a North Carolina medical practice that the EEOC maintained harassed and terminated one of its nurses because of her religion, Islam, and national origin in that her paramour was a Muslim "whom her co-workers believed to be of Middle-Eastern or Arab descent."[29] The nurse became a Muslim two days before the September 11 attacks and wore a head scarf to work afterwards. The employer asked the nurse to doff the scarf because it frightened patients. The employer agreed to conduct anti-discrimination training, to pay $35,000 to the nurse, and to offer her job back. When the EEOC announced this settlement, EEOC Chair Dominguez warned employers to eschew September 11-backlash discrimination. The nurse was pleased with the settlement, and the employer emphasized how the nurse's allegations had interfered with the employer's mission of caring for its patients.[30]

On December 2, 2002, the EEOC issued a comprehensive guide on national origin discrimination[31] because of, as the EEOC said, a sharp increase in backlash discrimination over September 11, the continuing terrorist threat, and the economic downturn. The EEOC encouraged employers not to tolerate discrimination based on national origin.

The EEOC filed another September 11-related lawsuit on April 7, 2003 against Norwegian American Hospital in Chicago.[32] This lawsuit claimed that the employer subjected its Muslim employee to harassment because of her religion and that the discrimination intensified after September 11, 2001. The discrimination allegedly included a manager's linking Islam to the Taliban.[33] With this lawsuit, EEOC Chair Dominguez issued another warning to employers to prevent September 11 backlash discrimination.

On July 10, 2003, the EEOC, in its fifth lawsuit alleging September 11-backlash discrimination, sued Pesce, Ltd., a Houston-based restaurant, for terminating its general manager because of his Egyptian national origin.[34] This lawsuit alleged that the employee was terminated on November 2, 2001 after the employer suggested that his Egyptian ancestry caused a decline in revenue after September 11, 2001. The EEOC stated that this lawsuit sends a message to employers that the EEOC will aggressively enforce federal laws prohibiting unlawful discrimination. The EEOC further committed to litigating September 11 backlash discrimination cases.[35]

As of July 16, 2003, the EEOC reported that it had received more than 800 charges "by individuals who are - or are perceived to be - Muslin, Arab, [Afghani,] Middle Eastern, South Asian or Sikh," and that "[n]early 100 individuals aggrieved by 9/11-related employment discrimination have received [more than] $1,425,000 in monetary benefits through [the] EEOC's enforcement, mediation, conciliation, and litigation efforts."[36]

On July 17, 2003, the EEOC filed suit in St. Louis against Trans States Airlines, Inc., in its sixth September 11-backlash discrimination lawsuit.[35] The EEOC alleges that, on September 18, 2001, the employer terminated commercial pilot Mohammed Hussein because of: his religion, Islam; his national origin, Fijian; his race, Pacific Islander; and his Arabic appearance. The employer insisted that it terminated Hussein primarily because of a report that he was in a drinking establishment while in uniform. The EEOC cautioned that the horrifying events of September 11 cannot excuse illegal behavior.[36]

On August 19, 2003, the EEOC again alleged national origin discrimination when it filed suit against Poggenpohl, U.S., Inc. in New York City.[37] The EEOC alleges in this lawsuit that the employer subjected its employee to a hostile work environment and terminated her because of her national origin (Middle-Eastern and Egyptian) and religion (Islam). The complaint specifically alleges that co-workers called the employee "Mrs. Osama Bin Laden" and "Mrs. Taliban," suggested she "find alternate employment as a suicide bomber for Saddam Hussein," and told her Muslims are "crazy" and "Muslims blow things up."[38]

On September 30, 2003, the EEOC filed two September 11-backlash national origin discrimination cases in New York City. The first alleges that supervisors and co-workers harassed 10 employees because of their national origin and religion.[39] The lawsuit specifically alleges that Muslim, Arab, and South Asian employees were called "terrorist," "Osama," "Al Queda," "Taliban," and "Dumb Muslim"; that they were cursed at; and that they were "accused of destroying the World Trade Center and the country."[40] The EEOC alleged that the employers knew or should have known of the harassment but failed to stop or to prevent it. The second lawsuit alleges that the employers terminated an eight-year employee because of his national origin in the aftermath of September 11 after he revealed that his grandfather was Lebanese and Muslim.[41]

IV. Defining "National Origin"

"'[N]ational origin' . . . refers to the country where a person was born, or, more broadly, the country [whence] his or her ancestors came."[42] The EEOC defines "national origin" more broadly in that it "include[s], but [is] not limited to, . . . an individual's, or his or her ancestor's, place of origin;" his or her "physical, cultural or linguistic characteristics of a national origin group."[43] The EEOC also broadly defines the grounds for national origin considerations to include: marriage or association with persons of a national origin group; membership in or association with an organization identified with or seeking to promote the interest of a national origin group; attendance or participation in schools, churches, temples, or mosques generally used by persons of a national origin group; and the association of a person's name or spouse's name with a national origin group.[44]

The MCHR's examples of national origin discrimination include: discriminating on the basis of proficiency in the English language when English language skills are not a requirement of the work to be performed, denial of equal opportunity to someone married to or associated with persons of a specific national origin, membership in lawful organizations identified or seeking to promote the interest of national groups, attendance at schools or

churches commonly utilized by persons of a given national origin, and denial of equal opportunity because a person's name or his or her spouse's name reflects a certain national origin.[45] Thus, the MCHR's and the EEOC's examples define "national origin" quite similarly.

V. Proving National Origin Discrimination

Federal circuits interpret Title VII with different nuances. This section lays out the current law in the Eighth Circuit and Missouri. "The framework for evaluating a Title VII discrimination claim depends on the type of evidence presented in support of the claim."[46] The two types of evidence of national origin discrimination are circumstantial evidence and direct evidence.

A. Circumstantial Evidence of National Origin Discrimination

Under both Title VII and the Missouri Human Rights Act, when a plaintiff relies on circumstantial evidence of discrimination, a court will apply the tripartite analysis of *McDonnell Douglas Corp. v. Green*.[47]

1. Step One: *Prima Facie* Case

Under the first step of this analysis, a plaintiff establishes a *prima facie* case of national origin discrimination by proving that: (1) he or she is a member of a national origin group;[48] (2) he or she was qualified for the relevant employment position; (3) he or she suffered an adverse employment action;[49] and (4) some evidence supports the inference that plaintiff's national origin motivated the employer's adverse employment action.[50] Simply stated, a plaintiff must prove in this first step that his or her employer discriminated against him or her *because of* his or her national origin.

2. Step Two: The Employer's Response

If the plaintiff meets this first step, then the employer "must meet a burden of production in the second step" by articulating a lawful reason "for the adverse employment action."[51]

3. Step Three: Proving Pretext

If the employer meets its rather easy burden in "the second step, [then] the burden [shifts back] to the plaintiff in the third step to prove that the [employer's] proffered reason is . . . merely . . . a pretext for [unlawful] discrimination."[52] A court may bypass the analysis of the *prima facie* case (first step) when the facts of the case permit it to dispose easily of the case under this third step.[53]

"'Pretext for discrimination' means both that the [employer's] proffered reason was false *and* that [the unlawful] discrimination was the [true] reason"[54] (emphasis added). But the jury may infer unlawful discrimination if "the plaintiff proves that the employer's proffered reasons are pretextual."[55]

Under the Missouri Human Rights Act, the "factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination."[56]

Even though the burden of production shifts back and forth, "[t]he ultimate burden of persuading the trier of fact that the defendant[s] intentionally discriminated against the plaintiff remains at all times with the plaintiff."[57]

B. Direct Evidence of National Origin Discrimination

A plaintiff usually relies on the circumstantial evidence tripartite approach of *McDonnell Douglas v. Green*. But a plaintiff may also prove the employer's illegal motive with direct evidence, which is uncommon, but a powerful plaintiff's weapon. "Direct evidence is that which demonstrates 'a specific link between the alleged discriminatory animus and the challenged [employment] decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated [the employer's] decision' to take the

adverse employment action."[58] For instance, in the context of national origin discrimination, direct evidence may involve plaintiff's supervisor calling him a racial epithet or poking fun at his national origin through words or gestures. In the post-September 11 workplace, direct evidence of race discrimination will probably be more common than before. The plaintiff will insist that these epithets directly prove the employer's unlawful *animus* and effected the adverse employment action. The employer will respond that such epithets involve casual remarks that had no link to the adverse action.[59]

A. Effect of Proving National Origin Discrimination (Mixed-Motive Cases)

An employer is liable once the plaintiff proves that his or her national origin motivated the employer to take the adverse employment action, even if national origin was only one of numerous motives.[60] "[O]nce the plaintiff persuades [the jury] that, more likely than not," his or her national origin motivated the employer's decision, then "the burden shifts to the employer to prove that" it would have made the same decision for legitimate reasons.[61] If the employer demonstrates this, then a plaintiff cannot recover damages, and the court cannot require the employer to reinstate the plaintiff. But the court may still issue a declaratory judgment, award injunctive relief, and award plaintiff his or her attorneys' fees.[62]

For example, a company refuses to promote an Iraqi employee to management. The employee sues under the Missouri Human Rights Act or Title VII. The jury believes that the employer denied the promotion because the plaintiff was inefficient in his duties, inaffable, rude to staff, and because he was from Iraq. The plaintiff wins and is entitled to declaratory relief, equitable relief, and his attorney is entitled to his or her fees. But the plaintiff cannot recover damages because the employer would have denied the promotion even if it had not considered the plaintiff's national origin.[63]

A court will apply the same analysis to a plaintiff's "mixed-motive" case under Title VII and under the Missouri Human Rights Act.[64] A plaintiff in a national origin discrimination case may obtain a mixed-motive instruction by proving the employer's unlawful motivation by "direct or [by] circumstantial evidence."[65]

VI. National Origin Harassment

A.Hostile Work Environment

Harassing an employee because of his or her national origin is a form of national origin discrimination.[66] Since anecdotes suggest that this kind of discrimination has increased after and because of September 11, an employer must respond to the growing litigious environment by preventing and eradicating harassment.

B. *Prima Facie* Case

A plaintiff proves a *prima facie* case of a hostile work environment based on his national origin by showing: (1) he or she is a member of a national origin group; (2) he or she endured unwelcome harassment; (3) a causal nexus between harassment and his national origin group status; (4) "the harassment affected a term, condition, or privilege of . . . employment;" and (5) the employer "knew or should have known about the harassment but 'failed to take prompt and effective remedial action.'"[67]

C. Not All Harassment is Actionable

Title VII does not create "a general civility code for the American workplace."[68] To be actionable under Title VII, the work environment must have been objectively hostile or abusive according to a reasonable person and subjectively hostile or abusive according to the plaintiff.[69] The harassment must be pervasive and severe enough "to alter the conditions of [plaintiff's] employment and create an abusive working environment."[70] In making this determination, "the totality of [the] circumstances" must be considered, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it reasonably interferes with an employee's work performance.[71] "Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"[72] "'[M]ere utterance of an . . . epithet which engenders offensive feelings in a employee' does not sufficiently affect the conditions of employment to implicate Title VII."[73]

D. Examples of National Origin Harassment

For instance, the plaintiff in *Al-Salem v. Bucks County Water & Sewer Authority*[74] was of Libyan national origin. He asserted that, over six months, he overheard a co-worker call him "'camel jockey' and a 'sand nigger,'" that a co-worker offered him pork even though he knew plaintiff's religion forbade it, and that he had heard of his supervisor's comments that he would not be promoted.[75] The court noted that these offensive comments were insufficient to create a hostile work environment.[76]

The Hispanic plaintiff in *Cerros v. Steel Technologies, Inc.*[77] alleged that his employer was liable for "a hostile work environment [based on] his national origin and race."[78] Over two years, co-workers and supervisors called him "brown boy," "spic," "wetback," "Julio," and "Javiar."[79] Moreover, graffiti appeared on the bathroom walls, including "spic," "Go Back to Mexico," "Tony Cerros is a Spic," "KKK," and "White Power."[80] While the trial court found that this behavior was not serious enough to constitute a hostile work environment,[81] the Court of Appeals did.[82]

The plaintiff in *Farjam v. New York Health and Hospital Corp.*[83] maintained that her employer created a hostile work environment based on her national origin (Iranian), religion (Islam), etc. Plaintiff alleged that, over 11 months, two co-workers questioned her about her Muslim practices; a co-worker criticized her English, commented on her receiving her degree in Iran, and teased her about her Muslim practices; another co-worker introduced her by saying, "She's Iranian"; and various co-workers tried to sabotage her work.[84] The court inferred she did not endure a hostile work environment.[85]

E. Affirmative Defense

An employer holds a potential affirmative defense to a hostile work environment claim when "there is no tangible employment action," e.g., termination, demotion, or pay cut.[86] An employer will not be liable for a hostile work environment if it proves that: (a) the employer exercised reasonable care to prevent and [to] correct promptly any . . . harassing behavior, and (b) that the . . . employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[87] The employee's "failure to use [the employer's] complaint procedure . . . will normally suffice to satisfy the employer's burden under the second element of this affirmative defense."[88] This affirmative defense is available to an employer against a claim of hostile work environment based on national origin.[89]

Even when the plaintiff suffers an adverse tangible action, "[p]rompt remedial action shields an employer from liability when the harassing conduct is committed by a co-worker rather than by a supervisor."[90] But an employer will be vicariously liable for harassment if the harasser is of a sufficiently high rank that he or she may be fairly treated as the employer's proxy.[91]

VII. Customer Preferences are Irrelevant

Customer preferences cannot justify discrimination that violates Title VII.[92] Neither the Missouri Human Rights Act nor cases interpreting it provide an exception to discrimination to accommodate customer preferences.[93]

It is reasonable to think that during the week after September 11, 2001, St. Louis airline passengers would have been apprehensive to fly upon seeing pilot Mohammad Hussein, who appears Middle Eastern.[94] During the months after September 11, 2001, customers may well have been alarmed at a customer service representative's Muslim dress.[95] Furthermore, a restaurant's customers' anxiety about the manager's Middle Eastern appearance cannot justify national origin discrimination, even with a clear link between the manager's Middle Eastern national origin and the loss of revenue.[96] Although one may empathize with these employers, the law does not permit customers' bias to justify an employer's unlawful discrimination.

Indeed, national origin discrimination is verboten unless national origin is a *bona fide* occupational qualification ("BFOQ") for a job, i.e., if membership in a particular national origin group is necessary to perform the essential functions of a job.[97] To legitimize national origin discrimination under the BFOQ exception is extremely difficult. The BFOQ exception is to be strictly construed, and there exist almost no cases justifying it.[98] The trial court in *Lemnitzer v. Philippine Airlines*,[99] for instance, found that national origin was a BFOQ. Although the Court of

Appeals affirmed this judgment, the trial court relied heavily not on Title VII, but on the contention that the Air Transport Agreement allowed the employer to discriminate on the basis of national origin by preferring Filipinos.[100]

VIII. What Is An Employer To Do?

An employer can defend a national origin discrimination lawsuit before it is filed by establishing clear anti-discrimination policies and procedures, distributing and requiring training and education based on those clear policies and procedures, and promptly correcting and undertaking other remedies when allegations of discrimination are made. Juries and courts are most always interested in the employer's reaction and investigation of the plaintiff's initial complaints. Although there is no duty to investigate complaints, the employer will substantially hurt its jury appeal and may waste its potentially powerful affirmative defense to a harassment claim if it does not investigate the initial complaints.

A careful employer will heed the EEOC's statements and actions and recognize that more and more employees are formally complaining about national origin discrimination, and more still since September 11, 2001. Successfully defending a lawsuit alleging national origin discrimination involves several pre-litigation measures: implementing prophylactic measures and thereby preventing the discrimination or harassment altogether, eliminating the informal complaint by thoroughly investigating and sufficiently correcting the matter, and verifying that the complaining employee is satisfied with the employer's investigation and remedies, if appropriate.

The employer's actions in *Sheikh v. Independent School District 535*[101] provide an exemplar for an employer faced with a complaint of national origin discrimination. Sheikh, a Muslim and Somali native, worked as a high school hall monitor. The employer allowed Sheikh to take a mid-day break on Fridays to attend services at a mosque. Sheikh offended some female co-workers by refusing, in accord with his religion, to shake hands with them. His co-workers ostracized him, "fabricated complaints about his job performance," and one co-worker "was alleged to have told two Somali students . . . that they looked like terrorists" and criticized Sheikh to the Council on American-Islamic Relations for refusing to shake hands with women, Sheikh maintained.[102]

When the principal of the high school learned of these incidents, he met with Sheikh numerous times and separately met with the female staff members to discuss these issues. The principal stated in these meetings "that Mr. Sheikh's refusal to shake hands with" women was not sex discrimination. The principal and the superintendent met with Sheikh about his complaints. The employer arranged for a representative of the Islamic Center of Rochester to speak to staff members about Somali culture and Muslim practices. The employer also hired "a human resources consulting firm" to investigate and to recommend how the employer "could encourage and ensure 'a harmonious working relationship.'"[103]

During Sheikh's extensive family leave in Africa, the employer laid him off, along with 12 other employees, in a reduction in force. When Sheikh returned, the employer found him the position of hall monitor at another high school of the employer. Again, the employer accommodated his requests for special breaks to worship and granted him a special religious exception to its sartorial policy. Complaints about Sheikh's work performance continued, however, and Sheikh became quite upset with a female co-worker one day. An assistant principal intervened, and the employer suspended Sheikh for poor job performance and for creating a negative work climate. Soon after, the employer laid him off due to substantial budgetary problems.

Sheikh sued under Title VII, alleging religious and national origin discrimination in the form of a hostile work environment, harassment, and refusal to recall after his second layoff. The court granted summary judgment for the employer on all counts. Although the court did not base its judgment on the *Ellerth* affirmative defense, the employer's prophylactic and remedial measures would have allowed it to invoke that powerful affirmative defense and increased its appeal to the jury.

To prevent and to defend against claims of September 11-related national origin discrimination, an employer should disseminate policies clearly forbidding discrimination and harassment based on national origin. These policies must elucidate what actions constitute harassment and unlawful discrimination and the consequences if an employee violates these policies. The policies must encourage employees to complain about suspected unlawful discrimination, clearly instruct employees how to complain about discrimination, and educate

management how to handle such complaints properly. Management should be taught how to identify and to confront unlawful discrimination even without a complaint.

Preventive employment practices also promote a respectful, productive, and happy work environment. An employer particularly concerned with September 11 backlash harassment should consider providing counseling or didactic lectures about Islam and Arab-Americans through its employee assistance program (EAP), if available. An employer should also consider providing training about unacceptable workplace behavior and diversity training.

Although training management and educating all employees on sound employment polices will cost an employer considerably, there may be a greater cost to the employer if a malcontent employee or the EEOC sues it under Title VII. In addition to defense costs, a liable employer may be responsible for damages of past lost wages, future lost wages, lost perquisites, punitive damages, possible reinstatement of the employee, and payment of the plaintiff's attorney's fees. A prudent employer strives to maintain a workplace free of harassment and unlawful discrimination, thereby decreasing its liability exposure and increasing its productivity.

Footnotes

[1] Mr. Cavanaugh is an associate at Sandberg, Phoenix & von Gontard, P.C., where he advises employers and defends them against discrimination claims. He earned his undergraduate degree from the University of Notre Dame and his law degree from Saint Louis University.

[2] President George W. Bush, Address to the Nation (Sept. 11, 2001), *available at* www.whitehouse.gov/news/releases/2001/0911-16.html.

[3] Specifically, 42 U.S.C. § 2000e-2(a)(1) states: "[i]t 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 race, color, religion, sex, or national origin[.]" Section 213.055.1, RSMo (2000), states: "[i]t shall be an unlawful employment practice: (1) for an employer, because of the race, color, religion, national origin, sex, ancestry, age, or disability of any individual to fail or refuse to hire 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 race, color, religion, national origin, sex, ancestry, age or disability[.]"

[4] *Pollock v. Wetterau Food Distrib. Group*, 11 S.W.3d 754, 762 (Mo. App. E.D. 1999).

[5] 42 U.S.C. § 2000e-4.

[6] Section 213.020, RSMo 2000.

[7] 42 U.S.C. § 2000e(b).

[8] Section 213.010(7), RSMo 2000.

[9] Section 213.111, RSMo Supp. 2003; 42 U.S.C. § 2000e-5(f).

[10] A Title VII plaintiff has the right to a jury trial in a civil action for damages. 42 U.S.C. § 1981a(c)(1). The Court in *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003), gave a plaintiff the right to a jury trial in a civil action for damages under the Missouri Human Rights Act.

[11] 42 U.S.C. § 2000e-5.

[12] See *Charge Statistics FY 1993 Through FY 2002*, *at* www.eeoc.gov/stats/charges.html (last visited June 22, 2004).

[13] *Id.*; *EEOC Litigation Statistics, FY 1992 Through FY 2003, at* www.eeoc.gov/stats/litigation.html (last visited June 22, 2004).

[14] These include charges of discrimination in employment, public accommodations, and housing.

[15] *EEOC Chair Urges Workplace Tolerance in Wake of Terrorist Attacks,* EEOC Press Release, September 14, 2001 *at* www.eeoc.gov/press/9-14-01.html (last visited June 16, 2004).

[16] *Id.*

[17] *Id.*

[18] *Joint Statement Agaiinst Employment Discrimination in the Aftermath of the September 11 Terrorist Attacks, at* www.usdoj.gov/crt/legalinfo/jointstatement.htm.

[19] *Id.*

[20] *Equal Employment Opportunity Comm'n v. Alamo Rent-A-Car LLC, and ANC Rental Corp.*, CIV02-1908-PHX-ROS (U.S. Dist. Ct. D. Ariz. Sept. 27, 2002).

[21] *Id.*

[22] *EEOC Sues Alamo Car Rental For Religious Bias,* EEOC Press Release, September 30, 2002 *at* www.eeoc.gov/press/9-30-02-f.html (last visited June 16, 2004).

[23] *United States Equal Employment Opportunity Comm'n v. Chromalloy Castings Tampa Corp.*, 8:02-CV-1769 (U.S. Dist. Ct. M.D. Fla., Tampa Div., Sept. 30, 2002). The EEOC amended this complaint on November 8, 2002 to name Sequa Corporation as a second defendant.

[24] *EEOC Files Post-9/11 National Origin Discrimination Suit Against Chromalloy Castings Tampa Corporation,* EEOC Press Release, September 30, 2002 *at* www.eeoc.gov/press/9-30-02-e.html (last visited June 16, 2004).

[25] Chromalloy Castings Tampa Corp. denied liability in its amended answer on February 3, 2003. Chromalloy Castings explicitly pleaded as an affirmative defense that the employee was terminated in October, 2001 as a business decision that the September 11 terrorists' attacks necessitated.

[26] *Equal Employment Opportunity Comm'n v. Worcester Art Museum*, 02-CV-40176 (U.S. Dist. Ct., Dist. Mass., Sept. 30, 2002).

[27] Filed on November 26, 2002.

[28] *EEOC Files Post-9/11 Religion and National Origin Termination Lawsuit Against Worcester Art Museum,* EEOC Press Release, September 30, 2002 *at* www.eeoc.gov/press/9-30-02.html (last visited June 16, 2004).

[29] *EEOC and North Carolina Medical Practice Reach $35,000 Settlement in Post-9/11 Backlash Discrimination Claim,* EEOC Press Release, November 13, 2002 *at* www.eeoc.gov/press/11-13-02.html (last visited June 16, 2004). See 29 C.F.R. §1606.1: a person is of Arabian "national origin" if he or she conducts a romantic relationship with another person perceived to be Arab-American.

[30] *Id.*

[31] December 4, 2002 Daily Labor Report, 233 DLRA-2, 2002.

[32] *United States Equal Employment Opportunity Comm'n v. Norwegian Am. Hosp.*, 03C-2360 (U.S. Dist. Ct. N.D. Ill. April 7, 2003).

[33] *EEOC Sues Chicago Area Hospital For Post-9/11 Backlash Discrimination,* EEOC Press Release, April 7, 2003 *at* www.eeoc.gov/press/4-7-03.html (last visited June 16, 2004).

[34] *United States Equal Employment Opportunity Comm'n v. Pesce, Ltd.*, H-03-2503 (U.S. Dist. Ct. S.D. Tex., July 10, 2003).

[35] *EEOC v. Trans States Airlines*, 03-CV-964 (U.S. Dist. Ct. E.D. Mo. July 17, 2003). *Egyptian Manager Fired Because of National Origin, EEOC Says in Post-9/11 Backlash Discrimination Lawsuit,* EEOC Press Release, July 10, 2003 *at* www.eeoc.gov/press/7-10-03.html (last visitied June 16, 2004).

[36] July 16, 2003 Daily Labor Report, 136DLRA-6, 2003; *see also Muslim Pilot Fired Due to Religion and Appearance, EEOC Says in Post-9/11 Backlash Discrimination Lawsuit,* EEOC Press Release, July 17, 2003 *at* www.eeoc.gov/press/7-17-03.html (last visited June 16, 2004).

[37] EEOC Press Release, July 17, 2003.

[38] *Equal Employment Opportunity Comm'n v. Poggenpohl, U.S., Inc.*, 03CV-6190 (U.S. Dist. Ct. S.D.N.Y. Aug. 19, 2003).

[39] *EEOC v. Plaza Hotel and Fairmont Hotel and Resorts, Inc.*, No. 03CV7680 (U.S.Dist. Ct. S.D.N.Y. Sept. 30, 2003).

[40] *Id.* See *EEOC Sues Plaza Hotel & Fairmont Hotels & Resort For Post-9/11 Discrimination,* EEOC Press Release, September 30, 2003 *at* www.eeoc/gov/press/9-30-03b.html (last visited June 17, 2004).

[41] *EEOC v. Applied Graphics Technologies, Inc. and Newsweek, Inc.*, No. 03CV7681 (U.S. Dist. Ct. S.D. N.Y. Sept. 30, 2003).

[42] *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973).

[43] 29 C.F.R. § 1606.1

[44] *Id.*

[45] 8 C.S.R. § 60-3.070 (2001). Regulations on the Missouri Human Rights Act "have the force and effect of law and are therefore binding on courts." *Pollock*, 11 S.W.3d at 766.

[46] *Mohr v. Dustrol, Inc.*, 306 F.3d 636, 639 (8th Cir. 2002).

[47] 411 U.S. 792 (1973). *Midstate Oil Co. v. Missouri Comm'n on Human Rights*, 679 S.W.2d 842, 846 (Mo. banc 1984); *Conway v. Missouri Comm'n on Human Rights*, 7 S.W.3d 571, 574 (Mo. App. E.D. 1999). Notably, this seminal case (*Green*) arose out of U.S. District Court in the Eastern District of Missouri.

[48] See the broad definition of "national origin" in 29 C.F.R. § 1606.1 and in 8 C.S.R. § 60-3.070.

[49] E.g., rejection of an employment application, demotion, failure to be promoted, reduction in salary or perquisite, and outright termination.

[50] *Hanoon v. Fawn Engineering Corp.*, 324 F.3d 1041, 1046 (8th Cir. 2003). The court in *Gilmore v. AT&T*, 319 F.3d 1042 (8th Cir. 2003), articulated the four *prima facie* elements of the first step of the *McDonnell Douglas v. Green* scheme thus: "(1) [the plaintiff] was a member of a protected group; (2) [he or she] was meeting the

legitimate expectations of [his or] her employer; (3) [he or] she suffered an adverse employment action; and (4) similarly situated employees who are not members of the protected group were treated differently. Id. The individuals used" in this fourth element of the first step "'must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances.' Id."

[51] *Hannoon*, 324 F.3d at 1046; *e.g.*, plaintiff's poor job performance, inefficiency, inability to work well with co-workers, or the employer's loss of income necessitating layoffs.

[52] *Id.*

[53] See, *e.g.*, *Crone v. United Parcel Serv., Inc.*, 301 F.3d 942, 944-45 (8th Cir. 2002) (affirming trial court's summary judgment for the employer because the plaintiff offered no credible evidence of unlawful discrimination).

[54] *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1056 (8th Cir. 1997) (relying on *St. Mary's Honor Center v. Hicks*, 509U.S. 502, 516, 516 n.6 (1993)).

[55] *Kim*, 123 F.3d at 1056. "The plaintiff can establish that he or she has been the victim of intentional discrimination 'either directly by persuading the trier of fact that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)).

[56] *Conway*, 7 S.W.3d at 575. In short, if the jury disbelieves the employer's proffered reasons for its action against the plaintiff, it is "permit[ted], but not compel[led], . . . to infer the ultimate fact of [national origin] discrimination." *Id.*; see also, *Hicks*, 509 U.S. at 511.

[57] *Hannoon*, 324 F.3d at 1046.

[58] *Mohr*, 306 F.3d at 640.

[59] *Id.* at 640-41. See also *Price Waterhouse v. Hopkins*, 490 U.S. 228 251-52 (1989). See the examples of direct evidence of national origin discrimination in section VI.D. *infra*.

[60] 42 U.S.C. § 2000e-2(m) states that unless otherwise provided, "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

[61] *Mohr*, 306 F.3d at 640; *Gagnon v. Sprint Corp.*, 284 F.3d 839, 847 (8th Cir. 2002).

[62] 42 U.S.C. § 2000e-5(g)(2)(B)(i).

[63] An employer would deem this result a Pyrrhic victory at best. In these fact-intensive cases, a plaintiff's attorney's fees can reasonably climb into six figures. "A prevailing plaintiff ordinarily is to be awarded [his or her] attorney's fees in all but special circumstances." *Kline v. City of Kansas City*, 245 F.3d 707, 708 (8th Cir. 2001).

[64] *Gagnon*, 284 F.3d at 848.

[65] *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

[66] *Hannoon*, 324 F.3d at 1045, 1048; *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993) (under Title VII); *Mason v. Wal-Mart Stores, Inc.*, 91 S.W.3d 738, 741-42 (Mo. App. W.D. 2002); *Pollock*, 11 S.W.3d 754 (under the Missouri Human Rights Act).

[67] *Diaz v. Swift-Eckrich, Inc.*, 318 F.3d 796, 800 (8th Cir. 2003) (listing elements to prove hostile work environment harassment based on race by co-workers); *Hannoon*, 324 F.3d at 1048 (listing the same elements to prove hostile work environment based on national origin by supervisors).

[68] *Thorn v. Amalgamated Transit Union*, 305 F.3d 826, 831 (8th Cir. 2002).

[69] *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998).

[70] *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986).

[71] *Id.* at 69.

[72] *Faragher*, 524 U.S. at 788.

[73] *Harris*, 510 U.S. at 21.

[74] Civil Action No. 97-6843 (E.D. Pa. 1999).

[75] *Id.*

[76] *Id.*

[77] 288 F.3d 1040 (7th Cir. 2002).

[78] *Id*. at 1042.

[79] *Id.*

[80] *Id.*

[81] *Id.* at 1045-46.

[82] *Id.* at 1048. The Court of Appeals relied on the standards elucidated in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Oncall v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); and *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001).

[83] 2000 U.S. Dist. Lexis 3741 (U.S. Dist. Ct. S.D. N.Y., March 23, 2000).

[84] *Id.* at *29.

[85] *Id.* at *31.

[86] *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

[87] *Id.* at 745.

[88] *Id.*

[89] *Cerros*, 288 F.3d at 1048; *Serrano v. Best Roofing Tech., Inc.*, 2002 WL 1485256 (July 12, 2002 4th Cir.); *Stoglin v. Wal-Mart Stores*, 2000 WL 33362001 at *3 n.3 (September 11, 2000 U.S. Dist Ct. S.D. Iowa).

[90] *Meriwether v. Caraustar Packaging Co.*, 326 F.3d 990, 994 (8th Cir. 2003).

[91] *See, e.g., Faragher*, 524 U.S. at 789-90.

[92] *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1214 (8th Cir. 1985); *Lam v. University of Hawaii*, 40 F.3d 1551, 1560 n.13 (9th Cir. 1994); *Platner v. Cash & Thomas Contractors, Inc.*, 908 F.2d 902, 905 n.5 (11th Cir. 1990).

[93] *Pollock*, 11 S.W.3d at 762.

[94] See notes 35-37.

[95] See notes 20-22.

[96] See notes 34-35.

[97] 42 U.S.C. § 703(e)(1) (2004).

[98] 29 C.F.R. § 1606.4 (2003).

[99] 783 F. Supp. 1238 (N.D. Cal. 1991).

[100] 52 F.3d 333 (9th Cir. 1995).

[101] 2001 WL 1636504 (U.S. Dist. Ct. D. Minn. Oct. 18, 2001).

[102] *Id.*

[103] *Id.*