Employ Respons Rights J
DOI 10.1007/s10672-009-9132-4

Post-9/11 Backlash in the Workplace: Employer Liability for Discrimination against Arab- and Muslim-Americans Based on Religion or National Origin

Stan Malos

Abstract In the wake of the September 11, 2001 terrorist attacks, discrimination and violence directed toward American immigrants in general, and Arab- and Muslim-Americans in particular, increased markedly. Yet, despite a November, 2001 joint initiative undertaken by the EEOC, the Justice Department, and the Labor Department to increase sensitivity to and combat instances of potential discrimination or harassment against individuals who are—or are perceived to be—Muslim, Arab, Afghani, Middle Eastern, or South Asian, EEOC charge statistics for workplace discrimination claims involving religion, ethnicity, national origin, and citizenship indicate that the reported incidence of such conduct has continued to increase. This paper examines recent federal court cases that involve employment discrimination claims by Arab- and Muslim-Americans at both the trial court and appellate court levels to identify problematic fact patterns that may give rise to employer liability and to better understand judicial treatment of the legal issues when such cases are taken up on appeal. Management guidance for reducing potential liability when such situations arise in the workplace is developed based on recent findings in the case law. Analogous international implications are also discussed.

Key words employment discrimination · workplace harassment · religion · national origin · Muslim-Americans · Arab-Americans

In the wake of the September 11, 2001 terrorist attacks on the World Trade Center towers in New York City, a wave of hysteria and paranoia spread across the United States, and the incidence of discrimination and violence directed toward immigrants in general, and Arab- and Muslim-Americans in particular, increased markedly (Cavanaugh 2004; Gandara 2006). Despite a November, 2001 joint initiative undertaken by the EEOC, the Justice

Portions of this paper were presented at the Pacific Northwest Academy of Legal Studies in Business Annual Meetings, Portland, Oregon, April 17–18, 2009

S. Malos (✉)
Management/HRM, College of Business, San Jose State University, One Washington Square, San Jose, CA 95192-0070, USA
e-mail: malos_s@cob.sjsu.edu

Department, and the Labor Department to increase sensitivity to and combat instances of potential discrimination or harassment against individuals who are—or are perceived to be—Muslim, Arab, Afghani, Middle Eastern, or South Asian, EEOC charge statistics for the latest years available indicate that the number of workplace discrimination claims involving religion, ethnicity, national origin, and citizenship or immigration status has increased from an annual average of about 8,600 for the 3 year period prior to the turn of the century to almost 11,000 for the period 2001–2006, and now accounts for almost 15% of all discrimination charges filed during those years. The latest figures available, those for 2007, indicate that national origin claims alone numbered almost 9,400, some 11.4% of all Title VII claims filed, while religion claims numbered almost 3,000, about 3.5% of all claims filed. Indeed, these numbers probably understate the true incidence of the problem, given that many victims of such conduct, as recent legal-or illegal-immigrants, may fear repercussions from the employer or the government if they contact the EEOC or a state or local human rights agency such as California's Fair Employment and Housing Commission (see generally, Kelly 2008; Lopez 2006; Rosenblum 2006; Saucedo 2006). It also should be kept in mind that these EEOC figures represent only administrative agency filings at the federal level, and not actual lawsuits handled through the state and federal court systems, typically at much higher cost to the employer, once a right-to-sue letter has been issued to litigants by the relevant government agency. A review conducted for this paper found 15 District Court and 5 Circuit Court published opinions issued within the federal court system since 2005 that deal directly with 9/11 backlash or related issues. Any hope that the problem may have been reduced or eliminated since 2001 thus would seem premature.

EEOC guidelines now emphasize that legal prohibitions on discrimination, harassment, or retaliation apply to any improper employment action based on affiliation or association with a particular religious or ethnic group; physical, linguistic, or cultural traits and clothing associated with any such group; or the perception or belief that a person is a member of a particular racial, national origin, or religious group, whether or not such a perception is correct. To be sure, the problem of religion, ethnicity, and national origin discrimination includes backgrounds such as Latino (Saucedo 2006), African (Boas 2007), Sikh (Gohil and Sidhu 2008) and others (Rivera 2007), and religious discrimination certainly is not limited to perceived Arab or Muslim targets. However, it has been projected that Islam will soon surpass Judaism as the largest minority faith in the U.S. (Zaheer 2007), and the number of discrimination claims by Muslims between September 11, 2001 and the same date in 2005 nearly doubled when compared with the previous 4-year period (Choudhury 2008). Given these trends and a corresponding increase in the numbers of both overt and less obvious fact patterns involving post-9/11 discrimination and harassment, how should an employer be prepared to handle the following situations:

- A qualified South Asian man who wears a Sikh turban applies for a cashier position at a retail store, but the company fears that such religious attire will make customers uncomfortable and drive them away, thus costing them business; what should the company do?
- An Arab American sales person complains to his manager that a high-producing coworker regularly calls him names such as "camel jockey," "rag head," "the ayatollah," and "our local terrorist," thus embarrassing him in front of coworkers and customers and costing him sales and corresponding commissions; what are the consequences of ignoring such complaints?
- Muslim workers who currently pray at their work stations want to use a conference room for prayer during business hours because its windows face Mecca; how far must the employer go to try to accommodate this request?

- A temporary worker who wears a hijab in conformance with her Muslim beliefs is asked to remove it while working at the front desk or to have her agency assign a different worker so as not to present "the wrong image" to clients or customers; must she comply with this request?
- An individual of Middle Eastern descent applies for a security guard job with a company whose contracts include government clients and is asked to undergo a background investigation as a condition of possible hire when other applicants are not; is this practice permissible?

Each of these scenarios represents real occurrences that have increased in frequency to the point where they are dealt with as illustrative examples in EEOC compliance documents; together they underscore the potential conflict between arguably legitimate business concerns and possibly illegal conduct for which an employer may be subject to potential liability from multiple sources simultaneously. Gandara (2006) argues that an employer sued for post-9/11 backlash discrimination in the workplace based on race and national origin may be subject to dual liability under both Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981, and thus, potentially susceptible to double recovery of damages based on the same alleged discriminatory conduct (recent case examples in the review which follows support this premise). Meanwhile, Bansak (2005); White (2007), and others have expressed concerns over the lingering effects of the Immigration Reform and Control Act (IRCA) for reasons including selective enforcement against particular ethic and minority groups. Nonetheless, as noted in a recent call for research in this area (Journal of Managerial Psychology 2008), contemporary reviews of the employment discrimination literature largely ignore issues related to recent immigrants and corresponding ethnicity, religion, and national origin claims. It is therefore important to examine the current extent of the problem, and to better understand how to recognize and minimize the ongoing impact of post-9/11 backlash claims in the workplace.

Proving Workplace Discrimination, Harassment, or Retaliation in the U.S.

Employment litigation can be expensive, divisive, and disruptive for employers even when cases are ultimately resolved in their favor. Because the same fact situation may give rise to potential liability for discrimination or harassment based on race, color, religion, or national origin under Title VII of the Civil Rights Act of 1964 as well as race discrimination under earlier post-Civil War reconstruction statutes such as 42 U.S.C. §1981, it is important to understand distinctions among such claims and differences in how they are proved—or defended—in court.

Under the U.S. Supreme Court's decision in *McDonnell Douglas v. Green* (1973), plaintiffs may raise an inference of discrimination (a *prima facie* case) either with direct evidence or by showing protected status (e.g., membership in a particular religion or racial minority), qualifications for a particular job, rejection for that job, and placement in the job of someone not in the protected class. The employer then can counter with a legitimate non-discriminatory reason for its decision (e.g., selecting someone with better qualifications), after which the plaintiff can try to show that the employer's stated reason is pretextual. Because protected status is relatively easy to demonstrate, disputes in such cases often center on job performance, either to negate the plaintiff's alleged qualifications or to assert performance problems as a legitimate non-discriminatory reason for failure to hire, retain, or promote. Where the claim is based on race, color, or national origin, this process is fairly

straightforward. However, where the claim is based on failure to accommodate a religious practice or belief such as prayer in the workplace or schedule changes to avoid working on the Sabbath, the employer need show only a *de minimus* burden to avoid liability because of "undue hardship" under the Supreme Court's decision in *TWA v. Hardison* (1977). Religious discrimination claims involving reasonable accommodation thus may be easier to defend than those based on other legal theories under Title VII.

On the other hand, hostile environment harassment claims require plaintiffs to show that they were subjected to unwelcome, severe, and pervasive verbal or physical conduct involving some aspect of protected status that a reasonable person would find hostile or offensive, or which unreasonably interferes with performance on the job; see *Meritor Savings Bank v. Vinson* (1986); *Pennsylvania State Police v. Suders* (2004). Because this standard applies across the board whether the protected status is race, color, religion, or national origin, hostile environment claims generally may be harder for employers to defend than disparate treatment discrimination claims.

Title VII also protects claimants from retaliation for reporting an alleged violation, opposing discrimination or harassment in the workplace, or cooperating in an investigation of any of the above; see *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee* (2009). Plaintiffs must show a causal connection between such protected conduct (usually temporal proximity) and "materially adverse action" by the employer, such as demotion, termination, abusive treatment by supervisors or co-workers, or economic loss, that would be likely to deter a reasonable person from asserting a valid claim under Title VII; see *Burlington Northern & Santa Fe Railway Co. v. White* (2006). Because retaliation claims can go forward even where the underlying "source claim" for discrimination or harassment fails, such claims may be among the hardest of all Title VII claims for employers to defend. Finally, because both hostile environment and retaliation claims typically turn on the credibility of witness testimony about workplace conditions and linkages among protected status, protected activity, and adverse consequences, these claims may be among the hardest for employers to eliminate by way of summary judgment.

Proposition 1 *Religious discrimination claims involving requests for reasonable accommodation may be easier for employers to successfully defend than other 9/11 backlash claims based on race, color, or national origin under Title VII.*

Proposition 2 *Disparate treatment discrimination claims may be easier for employers to successfully defend than 9/11 backlash claims based on hostile environment harassment or retaliation under Title VII.*

Proposition 3 *9/11 backlash claims based on Title VII alone may be easier for employers to successfully defend than 9/11 backlash claims based on both 42 U.S.C. §1981 and Title VII.*

Proposition 4 *Disparate treatment discrimination claims may be easier for employers to defeat on summary judgment (without trial) than 9/11 backlash claims based on hostile environment harassment or retaliation under Title VII.*

Method

In order to identify problematic fact situations that can give rise to post-9/11 backlash claims, as well as to determine how appellate courts deal with the legal issues raised by

such claims, both trial court and appellate court decisions were reviewed. The Lexis/Nexis database was used to find cases in the federal court system published during the most recent 5-year period (2005–2009) that allege workplace discrimination, harassment, or retaliation against Arab- or Muslim-American employees based on religion or national origin. District Court cases were grouped by outcome (favorable for the plaintiff-employee or for the defendant-employer) and their geographic location noted to see whether any obvious regional differences might appear in post-9/11 attitudes toward Arab- and Muslim-Americans based on relative proximity to the attacks themselves in New York City. Circuit Court cases, although fewer in number, received somewhat more attention because of their stronger value as legal precedent for use in predicting the outcome of analogous future cases.

Recent U.S. District Court Decisions with Outcomes Favorable to the Plaintiff-Employee

In *Zayed v. Apple Computers* (San Jose, CA, 2006), Nancy Zayed, an Arab Muslim woman of Egyptian descent, had worked successfully as an at-will engineer in Apple's software operations division since 1994. Zayed experienced dramatic changes in her work environment after the events of September 11, 2001. Colleagues began asking her whether the Quoran really instructed Muslims to participate in suicide bombings, stared at her with allegedly malicious expressions, frequently slammed her door, and often stormed off after arguments over Zayed's stated opposition to the war in Iraq. At one point, Apple sent out requests for her citizenship status, and placed red, white, and blue ribbons outside most employees' doors but excluded Zayed, who interpreted this as singling her out based on race, ethnicity, and religion. By mid-2004, Zayed found herself isolated and marginalized, and believed she was denied projects and career opportunities given to male Caucasian non-Arab colleagues. Zayed also claimed she was evaluated poorly despite never having any issues brought to her attention by her superiors. Apple countered by raising numerous performance issues that they claimed had been long standing, and eventually demoted her. Ultimately, Zayed took disability and sick leave in part due to stress caused by allegedly demeaning and intimidating treatment by managers and co-workers at Apple. She was then offered a lower grade assignment and told that if she did not accept it, Apple would conclude she was resigning. Finally, in late 2004, while still on disability leave, Zayed was terminated and sued Apple under state and federal law for discrimination, harassment, retaliation, defamation, and infliction of emotional distress based on religion, national origin, and gender.

Apple moved for summary judgment based on lack of evidence of discriminatory intent. Although the court partially granted Apple's motion with respect to defamation and certain instances of retaliation, it allowed the lawsuit to go forward on race, national origin, religion, and gender discrimination, as well as failure to prevent harassment, failure to promote, and infliction of emotional distress under California state law. Evidence cited by the court as warranting trial included screaming by supervisors challenging Zayed's honesty and work status as well as both face to face and email allegations that she did not work well under pressure when she never missed a deadline. The case illustrates how difficult it can be for an employer to avoid having to defend a case on multiple legal fronts even when the evidence may be equivocal in many areas; competing arguments about work quality and other performance issues typically require a jury to hear evidence and evaluate credibility, making such cases difficult to resolve short of trial.

Al-Aqrabawi v. Pierce County (Tacoma, WA, 2008), a case from the Pacific Northwest, involved the employer's motion for summary dismissal of claims that it had discriminated against plaintiff, a Jordanian-born Arab American of the Muslim faith who was educated as

a physician abroad but worked as a nursing assistant at a county mental health facility due to licensing issues in the U.S. Plaintiff alleged discriminatory animus in a failure to promote case including comments shortly after September 11, 2001 by an LPN that "I don't know if you're one of them," and by an RN that "we have to send in our Phantoms and bomb their Mecca," as well as queries whether he was Muslim. In a complicated fact setting overall, the employer was successful in having conspiracy, emotional distress, and age claims dismissed, but the plaintiff was allowed to proceed on discrimination, hostile environment, and retaliation claims under both Title VII and 42 U.S.C. §1981, lending support to Gandara's (2006) concerns discussed above.

In *EEOC v. Go Daddy Software, Inc*. (Phoenix, AZ, 2006), the court was also required to address an employer's motion for summary judgment seeking to dismiss the case, here on the EEOC's allegations that Go Daddy had discriminated against Youssef Bouamama, a Moroccan-born Muslim hired as a technical support representative through a temporary staffing agency. This time, the EEOC was allowed to go forward based on evidence of comments by former supervisors and co-workers that Bouamana was asked about his religion and national origin just prior to interviews for positions within the company, and comments in the context of terrorism that "we should bomb all the Rag Heads" and "Muslim bastards need to die." The case also presented punitive damages claims and serves as a reminder that even employees placed through a staffing agency may generate dual-employer liability in the workplace to which they are assigned under the anti-discrimination and retaliation provisions of federal law.

Moving from Arizona to Texas, two decisions from the same case illustrate the difficulties employers face when confronted with allegations of post-9/11 backlash that depend on the credibility of witnesses. In *Ibrahim v. City of Houston* (2008), the court upheld Ibrahim's claims for national origin, religion, and race discrimination based on direct evidence that Ibrahim, an Arab and Muslim of Egyptian descent and the only Middle Easterner working at the city's Health and Human Services agency, was fired by a Caucasian white supervisor who allegedly told another employee he did not want Ibrahim around because of his religion and national origin despite successful performance on the job. After further discovery and a new motion to dismiss the case based on proffered testimony by the employer's top official as to Ibrahim's allegedly deficient performance, a subsequent opinion (*Ibrahim v. City of Houston*, 2009), again denied summary judgment. The court, after a lengthy review of the factual record and applicable legal standards, found that even if the proffered evidence of poor performance were accepted as a legitimate, non-discriminatory reason for Ibrahim's termination under the *McDonnell-Douglas* burden shifting rubric, there remained material issues of possible pretext that precluded summary judgment and militated toward trial. Further action in the case currently is pending as of this writing.

From the Southwest U.S. to its Northeast, we turn our attention to four cases from New York, a jurisdiction of possible special interest because of its proximity to the events of September 11, 2001. The first of these, *John Doe Anti-terrorism Officer v. City of New York* (2008), involved the court's denial of a motion to dismiss the Arab-American plaintiff's claims for hostile environment harassment under 42 U.S.C. §1981, which were based on his being forced to read on a daily basis offensive emails from a city counter terrorism advisor that contained racially and religiously discriminatory material targeted at Arabs and Muslims (examples include assertions that "a good Muslim can't be a good American," "burning the hate-filled Koran should be viewed as a public service," and opinions that it would be a good idea to "vaporize" Mecca). The second, *El Sayed v. Hilton Hotels Corp*. (2008), involved the court's refusal to dismiss the Title VII and 42 U.S.C. §1981 claims for national origin, ethnic, religious, and racial discrimination of El Sayed, a naturalized U.S.

citizen and practicing Muslim of Egyptian and Arabic descent who was verbally abused and referred to by a supervisor as "Muslim Taliban" at staff meetings and other company events. The other two New York cases contained mixed results, but both ultimately left intact at least some of the plaintiff-employees' claims. In *Sabra v. Shafer et al*. (2008), the court dismissed hostile environment claims brought by a Muslim Arab of Egyptian national origin after references to him as the "Butcher of Baghdad" and "Saddam" were found to be insufficiently severe and pervasive, but sustained his claims for retaliation after his treatment materially worsened subsequent to complaints about discrimination and harassment to the company's EEO office and the City's Commission on Human rights. And in *Heba v. New York State Division of Parole* (2007), a similar result obtained when the court dismissed race, religion, and national origin hostile environment claims by Heba, yet another Muslim of Egyptian and Arabic background, as based on comments and conduct too infrequent to be found harassing and more consistent with interpersonal issues than with ethnic disputes. The court, however, left intact the plaintiff's retaliation claims; cases like *Sabra* and *Heba* thus illustrate the quandary employers face whereby a retaliation claim can go forward on the same overall fact pattern even after failure of the underlying "source claim" for wrongful conduct originally reported to the employer.

Finally, in *Omari v. Waste Gas Fabricating Co*. (Bethlehem, PA, 2005), a case from another location not far from the 9/11 attacks, Omari, a Muslim Berber originally from Algeria, alleged discrimination, hostile work environment, and retaliation for filing an EEOC complaint based on race, religion, and national origin, once again under both Title VII and 42 U.S.C. §1981. Substantial evidence emerged of changes in his treatment after the World Trade Center bombings on September 11, 2001 despite his having had no problems prior to that time. For example, Omari was repeatedly called Osama, terrorist, cave-dweller, camel driver, immigrant, accused of making a bomb, asked if he knew how to drive a plane into a building, and shown a cartoon of Afghan soldiers launching missiles while being told "this is you, this is how you guys are fighting back home." Omari tried to explain that he was not a terrorist and was not even an Arab, but was unable to make the comments stop. After complaining to management and the EEOC, Omari found himself subjected to even worse verbal and physical abuse, and eventually terminated for alleged performance reasons that were clearly pretextual. Omari was ultimately successful at a bench trial before a U.S. Magistrate, and received a monetary award plus costs and attorney's fees for hostile environment and retaliation.

Recent U.S. District Court Decisions with Outcomes Favorable to the Defendant-Employer

Cases that represent a substantive or procedural victory for the defendant-employer include *Lahrichi v. Lumera Corporation* (Seattle, WA, 2006). In that case, which involved the credibility of competing discrimination vs. performance evidence, the court granted summary judgment dismissing claims including race and religious discrimination as well as those for emotional distress and negligent supervision. Adil Lahrichi, an Arab-American and practicing Muslim of Moroccan descent, began work with Lumera, a high-tech startup formed in 2000. Lahrichi had been out of the country on vacation in September, 2001, returned in October, and alleged that his previously "successful and productive" career deteriorated quickly due in part to inability to attend company events involving alcohol, comments perceived to be about his religion, and the perception of his "looking Arab." The court found most of the comments about which concern was expressed to be innocuous and not necessarily related to religion or national origin, and the alcohol-related social events to be discretionary, not mandatory. The court thus dismissed the case, finding any

discriminatory meaning to be conclusory on the part of Lahrichi and unconnected with any adverse employment action. The case is currently on appeal.

In *EEOC v. WC&M Enterprises, Inc*. (Houston, Texas, 2005), the employer was successful in obtaining summary dismissal of post-9/11 hostile environment harassment and economic harm allegations based on national origin and religion by Mohommed Rafiz, a Muslim car salesman originally from India. Despite investigating the claim for over a year, the EEOC was unable to convince the court that Rafiz' national origin—India—had anything to do with any adverse action. Further, despite comments from supervisors such as "this is not the Islamic country where you came from," Rafiz was not fired from his job, and his sales actually increased to levels consistently above average for other salespersons with the company during the same post-9/11 time periods. The case illustrates that even the EEOC can have difficulty distinguishing among related but conceptually distinct legal claims that arise out of the same factual allegations.

Mihoubi v. Caribou Coffee (Atlanta, GA, 2007) and *Soliman v. Hillsborough School District* (Tampa, FL, 2008), two cases from the Southeast U.S., both present successful motions by employers to summarily dismiss allegations of discrimination and harassment based on religion and national origin. In *Mihoubi*, a Muslim of Algerian national origin was unable to show that isolated incidents of allegedly discriminatory conduct (e.g., comments that the company's imminent IPO would free it from it's then-Bahranian ownership, or that Bahranian residents dressed "strangely") rose to the level of actionable hostile environment with requisite severity and pervasiveness required by applicable harassment case law. And in *Soliman*, an unsuccessful Muslim job applicant of Egyptian national origin represented himself and sued for discrimination and harassment under both Title VII and 42 U.S.C. §1981; the court dismissed his claims for failure to make out a *prima facie* case under the Supreme Court's *McDonnell Douglas v. Green* (1973) burden shifting rubric because Soliman had no direct evidence of discrimination or harassment, and was unable to show either that the employer knew of his religion or national origin at the time he applied or that candidates that the employer did hire to fill the desired positions were not in fact more qualified than Soliman.

In *El-Bakly v. Auto Zone* (Chicago, IL, 2009), El-Bakly, yet another Muslim of Egyptian national origin, sued for wrongful demotion, hostile environment, and infliction of emotional distress, but was unsuccessful at trial on all claims except for co-worker hostile environment. He then filed post-trial motions for a new trial and judgment as a matter of law notwithstanding the verdict, but the judge found no reason to overturn the jury's determination of credibility regarding whether alleged statements such as "Mustafa got training in Afghanistan" and "Allah in my ass" had in fact actually occurred or were sufficiently severe so as to warrant redress for hostile environment. (In the "quit while you're ahead" department, the court also overturned the jury's verdict for the only claim on which El-Bakly had been successful at trial—co-worker harassment—as well as its corresponding punitive damage award.)

Recent U.S. Circuit Court of Appeals Decisions

Some of the results in the foregoing District Court decisions may seem fact-specific and difficult to reconcile, in part because of overlap among and confusion about the differing types of proof necessary for discrimination, hostile environment harassment, and retaliation claims under Title VII, as distinguished from those brought under 42 U.S. C. §1981. An opinion authored by distinguished jurist Richard Posner of the Seventh Circuit in *Abdullah v. Prada USA* (2008) may help to untangle some of this confusion.

In that case, Abdullah, a Muslim born in Iran, was fired from her sales position in a Prada retail store. She sued on her own behalf for discrimination and retaliation under both Title VII and 42 U.S.C. §1981 using a form provided by the court to *pro se* (self-representing) litigants. The district judge dismissed her Title VII claims as too late, and dismissed her §1981 case on the grounds that her complaint did not adequately set forth distinct claims for race as required by that statute. Bearing in mind the plaintiff's *pro se* status, Judge Posner held that dismissal of these claims, as well as one for retaliation based on derogatory rumors about Abdullah spread by Prada after her complaint, was premature. Judge Posner's thoughtful opinion points out the following:

> Race, nationality, and ethnicity are sometimes correlated but are not synonyms. A racial group as the term is generally used in the United States today is a group having a common ancestry and distinct physical traits. The largest groups are whites, blacks, and East Asians. Iran is a country, not a race, and an "Iranian" is simply a native of Iran. Iranians and other Central Asians are generally regarded as "white," whatever their actual skin color; many Indians, for example, are dark. Some Central Asians are indistinguishable in appearance from Europeans, or from Americans whose ancestors came from Europe, while others (besides Indians), for example Saudi Arabians, would rarely be mistaken for Europeans. Some Iranians, especially if they speak English with an Iranian accent, might, though not dark-skinned, strike some Americans as sufficiently different looking and sounding from the average American of European ancestry to provoke the kind of hostility associated with racism. Yet hostility to an Iranian might instead be based on the fact that Iran is regarded as an enemy of the United States, though most immigrants to the United States from Iran are not friends of the current regime.
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> [42 U.S.C. §1981 was] passed in 1866 ... [and] it was then routine to refer to nationalities or ethnic groups as races—the "German race," for example. Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended §1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory ... A distinctive physiognomy is not essential to qualify for §1981 protection.

The court went on to hold that whether or not Abdullah's complaint was based on ethnicity, and thus race for §1981 purposes, was a question of fact requiring determination by the lower court on remand. The case underscores the different meanings and significance of protected class statuses both within Title VII and when compared with 42 U.S.C. §1981. It also provides an example of judicial willingness to interpret broadly civil rights statutes such as these in order to give practical effect to their remedial intent.

Another recent case from the Seventh Circuit, *Hasan v. Foley & Lardner* (2008), also illustrates judicial willingness to consider the broader context of specific fact patterns when necessary to enforce the legislative intent of remedial civil rights laws. Hasan was a Muslim of Indian descent who found his work hours and compensation reduced after the events of 9/11. He was ultimately terminated, allegedly due to economic factors, and sued under Title VII. The District Court dismissed his case on summary judgment, finding reduction of hours insufficient to state a claim under Title VII. On appeal, the Circuit Court considered not only the reduction in hours but also the close temporal proximity to 9/11, anti-Muslim

comments from co-workers, Hasan's previously favorable performance ratings, and inconsistent evidence as to whether anyone else had been fired for economic reasons, and reinstated the lawsuit. The difficulty for employers of ultimately prevailing in such cases upon summary judgment is thus made clear; plaintiffs eventually will likely be given their day in court if a favorable construction of their allegations seems reasonably possible.

On the other hand, in *Hussain v. R. James Nicholson, Secy., Dept. Veteran Affairs* (2006), the plaintiff sought reinstatement of his dismissed claims for failure to promote based on race, religion, and national origin, but was unsuccessful. Hussain, a Muslim of Indian descent, applied to replace his supervisor but was turned down. Although able to establish a *prima facie* case that he was qualified, Hussain was unable to rebut the employer's evidence that the candidate it did promote was more qualified than he was, nor was he able to establish any basis for his retaliation claim. These results were affirmed *en banc* by the D.C. Circuit Court of Appeals.

Finally, a pair of cases from the Fourth Circuit reached opposite results—one found insufficient evidence upon which to reinstate the plaintiff's dismissed claims, while the other reached a contrary conclusion—and the distinctions between the cases are telling for employers. In *Baqir v. Principi* (2006), the plaintiff, a doctor and practicing Muslim of Pakistani national origin, found dismissal of his Title VII hostile environment claims against the Veterans Administration upheld, as was dismissal of his retaliation claim; the court found insufficient evidence that Baqir was qualified to perform the more complicated cardiology surgery he desired to do, and saw no evidence of retaliatory intent in the employer seeking adequate evidence of Baqir's certification and professional qualifications to do so. Conversely, in *EEOC v. Sunbelt Rentals* (2008), the EEOC obtained reinstatement of its claims on behalf of an African American truck driver who had converted to Islam after the 9/11 attacks, who started wearing a beard and traditional Muslim headgear to work, and who began leaving work early on Fridays to attend prayer sessions. When the driver was subjected to verbal abuse about his religion, he reported each incident to the employer, who did nothing to stop the harassing conduct. The court found material issues of fact regarding the severity and pervasiveness of the unwelcome conduct, as well as the employer's failure to take prompt corrective action, that warranted remand for trial.

Discussion

As noted earlier in the introductory section, it is possible that the true extent of post-9/11 backlash may be under-reported by victims who are unaware of their legal rights or who fear repercussions from their employer, the government, or both. Nonetheless, although limited in raw numbers, this sample of recent cases offers overall support for three of the four propositions investigated. At the outset, Proposition 1 did not find direct support among the cases examined, in that the religious discrimination claims found tended to involve direct evidence of hostile environment rather than requests for reasonable accommodation (see, e.g., *EEOC v. Sunbelt Rentals*); employers thus were unable to assert the relatively easy undue hardship defense, so they generally fared no better on the religion cases found than they did with other 9/11 backlash claims under Title VII (of course, this also may be because the former type of claim rarely gets beyond summary judgment and into the reported cases given its long odds for plaintiffs). However, employers did appear to have more success with disparate treatment discrimination claims based on *McDonnell-Douglas* burden shifting, where they were able to convincingly show inadequate performance or inferior qualifications in failure to hire or failure to promote cases,

respectively, thus offering support for Proposition 2 (see, e.g., *Baqir v. Principi, EEOC v. WC&M Enterprises, Inc*., *Hussain v. R. James Nicholson, Secy., Dept. Veteran Affairs, Lahrichi v. Lumera Corporation,* and *Soliman v. Hillsborough School District*). Further, the case law also supports the notion that employers have a tougher time defending both Title VII and §1981 claims simultaneously in the same lawsuit, thus supporting Proposition 3 (see, e.g., *Al-Aqrabawi v. Pierce County* and *El Sayed v. Hilton Hotels Corp*.). Finally, the cases are consistent with Proposition 4 in that credibility-laden hostile environment and retaliation claims were more difficult to defeat on summary judgment than related disparate treatment 9/11 backlash claims (see, e.g., *EEOC v. Sunbelt Rentals, John Doe Anti-terrorism Officer v. City of New York, Heba v. New York State Division of Parole,* and *Sabra v. Shafer et al.)*.

While no clear geographic effects among the cases emerged, it is interesting to note that regions most proximate to the 9/11 attacks yielded results generally favorable to the plaintiffs. One could speculate that more salient and widespread sensitivity to the attacks in locations closer to where they occurred spawned more severe backlash effects, thus providing plaintiffs with stronger *prima facie* cases of discrimination, harassment, or retaliation. The results, however, probably are more amenable to a case-by-case liability analysis given the small number of cases in each geographic area and the corresponding presence of relatively severe factual allegations elsewhere (see, e.g., *Al-Aqrabawi* and *Go Daddy Software* in Seattle and Phoenix, respectively*)*.

On the larger issues, the cases taken together suggest that courts may be reluctant to allow disgruntled employees to bootstrap personal or professional issues to a level of cognizable civil rights violations simply because differential race, religion, or ethnicity may be involved. On the other hand, courts also appear reluctant to deprive legitimate discrimination and harassment victims of their day in court where it appears reasonably likely that post-9/11 backlash or related mistreatment based on religion or national origin in fact may have occurred.

These results have practical implications for employers and managers who seek to reduce both performance and legal problems related to post-9/11 backlash. First, the importance of developing and using valid and reliable hiring and performance evaluation methods cannot be overstated; convincing evidence of legitimate, non-discriminatory hiring and appraisal methods based on job-related criteria uniformly applied appears to have been critical in backlash cases where the employer succeeded in having plaintiffs' claims summarily dismissed and dismissal subsequently upheld on appeal[1]. Second, because many of the cases in which the employer was unsuccessful in having backlash claims dismissed

[1] Indeed, these recommendations are consistent with EEOC guidelines for employers facing religious discrimination claims, which provide in part:

- Employers can reduce the risk of discriminatory employment decisions by establishing written objective criteria for evaluating candidates for hire or promotion and applying those criteria consistently to all candidates.
- In conducting job interviews, employers can ensure nondiscriminatory treatment by asking the same questions of all applicants for a particular job or category of job and inquiring about matters directly related to the position in question.
- Employers can reduce the risk of religious discrimination claims by carefully and timely recording the accurate business reasons for disciplinary or performance related actions and sharing these reasons with the affected employees.
- When management decisions require the exercise of subjective judgment, employers can reduce the risk of discriminatory decisions by providing training to inexperienced managers and encouraging them to consult with more experienced managers or human resources personnel when addressing difficult issues.

turned on co-worker or supervisor abuse and/or the employer's failure to promptly correct improper behavior when brought to its attention, employers may be well advised to adopt anti-discrimination, anti-harassment, and anti-retaliation policies that go beyond the initial U.S. government joint initiative, and perhaps even beyond practices now recommended by the EEOC based on its codification of prior case law.

For example, other ethnically diverse English-speaking countries such as New Zealand and Australia, and some in Scandinavian Northern Europe and elsewhere, provide legal redress for generalized workplace bullying (see, e.g., New Zealand's Employment Relations Act of 2000; Australia's NSW Occupational Health and Safety Act of 2000) that does not require a victim to have any special protected status other than employment or presence in the workplace to apply. Rather, these laws and related enforcement policies make clear that supervisors and co-workers are expected to conform their workplace behavior appropriately whether they happen to like the religion, national origin, ethnicity, accents, or other expressed traits of certain employees or not, and to avoid repeated verbal, physical, or psychological conduct intended to exert inappropriate power or dominance or likely to offend, intimidate, degrade, humiliate, insult, marginalize, or cause fear and distress in the presence of co-workers, customers, or clients. Along these lines, employers in the U.S. and elsewhere may wish to consider the following recommendations adapted from research in contexts such as gender stereotype and appearance discrimination:

(1) Adopt and enforce general non-retaliation, non-bullying, and civility policies that go beyond EEOC anti-discrimination and anti-harassment guidance that is based on current, but not necessarily emerging, case law;
(2) Provide effective internal grievance procedures with basic due process guarantees so that Arab- and Muslim-American employees aren't forced to take 9/11 backlash issues to court;
(3) Avoid imposing less favorable working conditions, reducing performance ratings for trivial reasons, denying benefits, or otherwise treating post-9/11 backlash victims and similar complainants differently from other employees to minimize retaliation liability;
(4) Train supervisors and co-workers to deal more tolerantly with ethnicity, religion, national origin, and other identity expression that might not comport with their personal preferred notion of appropriateness (i.e., "sorry if this bothers you, but it's just not up to you");
(5) Emphasize that, notwithstanding personal sensibilities or subjective preferences about such matters, anything not implicating actual job performance or the effective operation of the business should be of no concern to co-workers or anyone else in the workplace, and that both supervisors and co-workers will be evaluated—and, if necessary, disciplined or fired—should they be unable or unwilling to conform their behavior accordingly (Malos 2007).

Limitations and Directions for Future Research

There are of course limitations to any conclusions drawn from a limited sample of recent federal cases in the U.S., and those drawn here are no exception. First, from the plaintiff's perspective, merely avoiding dismissal of one's backlash claims on summary judgment, as occurred in many of the cases reviewed, only keeps the matter alive, but does not ensure a victory if and when the case actually goes to trial, nor is there any guarantee that a successful result at trial will be upheld on appeal (see, e.g., *El-Bakly*, discussed above). Similarly, from the employer's perspective, winning dismissal of some or all of a plaintiff's

claims on summary judgment may be a pyrrhic victory where the lower court's decision is overturned on appeal, or where the case goes to trial on retaliation claims based on mishandling an employee's complaint even though some causes of action have been dismissed (see, e.g., *Sabra* and *Heba*, discussed above). Second, it is likely that the current case law review omits a substantial number of analogous state law claims, many of which may be brought as such due to substantive or procedural advantages for the plaintiff in doing so; future research should plug this gap, and may in fact find regional effects for attitudes toward Arab- and Muslim-Americans that did not emerge here, not to mention analogous attitudes in Western and other countries outside the U.S. Finally, because judicial opinions are drafted by judges with the intention of justifying the conclusions reached, there is danger in attempting to conduct policy capturing with case law (Roehling 1993), and the results, though consistent with common sense legal and management principles, should be accepted with some level of caution. Guidance in the area will no doubt gain further refinement as additional case law in the area is forthcoming.

Conclusion

As noted by Kelly (2008) and others, religious and ethnic diversity is likely to increase further in the U.S. and other countries as time goes on, and increased levels of resentment also may occur in the wake of the international financial crisis and possible patterns of nationalism and economic protectionism that have already begun to emerge. In the U.S., unless and until Congress takes action on the Workplace Freedom of Religion Act, legislation proposed most recently in 2007 but as yet not enacted or otherwise applied in the private sector, employers will need to rely on state law, EEOC administrative guidance, or their own policies to reduce the influence of religion and national origin discrimination in the workplace and their own legal liability when it arises. In the final analysis, if any lesson is clear from reviewing the recent case law, it is that management prevention is far more likely to be effective in addressing these workplace issues than litigation, no matter what its eventual outcome.

Acknowledgement The author gratefully acknowledges research funding and support from the Donald and Sally Lucas Graduate School of Business, San Jose State University.

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