

## **Discriminatory Practices against Muslims in the American Workplace**

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*The terrorist attacks of September 11, 2001 in the United States by radical extremists have brought about more discrimination and harassment in the workplace toward Muslim employees. This article examines civil rights law in the United States as applied to the religious discrimination and harassment of Muslim employees. The article closely examines the legal prohibitions against religious discrimination and religious harassment against employees in the context of Muslim employees. The extraterritorial effects of U.S. anti-discrimination laws are also explored for American firms and expatriates operating abroad. The employer's duty to accommodate the religious needs and practices of its employees is analyzed as is the undue hardship limitation on the accommodation duty. The authors provide specific suggestions on how to accommodate reasonably the religious needs, observances, and practices of Muslim employees. Recommendations are offered for how to avoid legal liability pursuant to anti-discrimination and harassment laws.*

### **INTRODUCTION**

The workplace is an arena where the private life of an employee, encompassing his or her religious beliefs, and his or her work life can collide, thereby raising important as well as contentious issues of the role of religion in the U.S. workplace. The presence of religiously observant Muslim employees in the workplace, as well as employees of other religious beliefs, of course, can create conflicts between workplace policies and rules and religious observances and practices. These conflicts can become acute when the religious beliefs are held by, and the religious practices observed by, employees who are members of minority or nontraditional religions (Cavico and Mujtaba, 2011a). Tension can also arise among employees when a particular employee's religious practices are perceived to impinge on another employee's work life. Examples of such conflicts and tensions are dress and grooming requirements, religious observances, prayer breaks, ritual washings, religious calendars and quotations, and prohibitions with certain medical examinations, testing, and procedures. Ruan (2008) points out that "as American workplaces become more diverse, it is inevitable that a growing number of workers will desire to express themselves in religious ways in the workplace" (p. 22). Zaheer (2007) adds that the Islamic religion will present "unique problems" for employers in seeking to fairly allow religious expression in the workplace due to the "practice intensive nature" of the Islamic religion (p. 497). Solieman (2009) points to a report by the Council on American-Islamic Relations (CAIR) concerning the state of Muslim-American civil liberties in the United States, and which includes information on Muslim-Americans in the U.S.

workforce. In its 2008 report, the Council reported that discrimination in the workplace increased by 18% from the previous year; and furthermore that in 2003 only 196 cases of employment discrimination were related to the Council, but by 2007 the number increased to 452 (Solieman, 2009, p. 1072).

The Civil Rights Act of 1964 is the most important civil rights law in the United States. This statute prohibits discrimination by employers, labor organizations, and employment agencies on the basis of race, color, sex, religion, and national origin. (Civil Rights Act, 42 U.S.C. Section 2000e-2(a)(1)). Regarding employment, found in Title VII of the statute, the scope of the statute is very broad, encompassing hiring, apprenticeships, promotion, training, transfer, compensation, and discharge, as well as any other “terms or conditions” and “privileges” of employment. The act applies to both the private and public sectors, including state and local governments and their subdivisions, agencies, and departments. An employer subject to this act is one who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year (42 U.S.C. Section 2000e(b)). One of the principal purposes of the act is to eliminate job discrimination in employment (Cavico and Mujtaba, 2008). The focal point of this work is Title VII of the Civil Rights Act, which deals with employment discrimination.

Discrimination, in employment or otherwise, can be direct and overt or indirect and inferential (Cavico and Mujtaba, 2011b). Typically, there are two types or categories of employment discrimination claims against employers involving the hiring or promotion of employees. The first theory of recovery is called “disparate treatment” which involves an employer who intentionally treats applicants or employees less favorably than others based on one of the protected classes of color, race, sex, religion, national origin, age, or disability. The discrimination against the employee is willful, intentional and purposeful; and thus the employee needs to show evidence of the employer’s specific intent to discriminate. However, intent to discriminate can be inferred. So, for example, when the employee is a member of a protected class, such as a racial minority, and is qualified for a position or promotion, and is rejected by the employer while the position remains open, and the employer continues to seek applicants, then an initial or *prima facie* case of discrimination can be sustained.

Civil Rights laws are enforced in the U.S. by the federal government regulatory agency – The Equal Employment Opportunity Commission (EEOC). The EEOC is permitted to bring a lawsuit on behalf of an aggrieved employee, or the aggrieved employee may bring a suit himself or herself for legal or equitable relief. It also again must be stressed the Civil Rights Act is a federal, that is, national law. Since the U.S. is a federal system, it accordingly must be noted that almost all states in the U.S. have some type of anti-discrimination law – law, moreover, which may provide more protection to an aggrieved employee than the federal law does.

According to EEOC, for the fiscal year 2008, which ended September 30, the agency received the unprecedented number of 95402 workplace discrimination claims, which represented a 15% increase from the previous year (EEOC Press Release, 2009). The EEOC provides updated information on charges of discrimination cases that have been filed with them. The *Wall Street Journal* also noted that employment discrimination claims overall had increased, now also at a “record high,” totaling 95,402, which represented a 15% increase (Levitz and Shishkin, 2009, p. D1). T. Data also was provided by the EEOC in March of 2008. As reported by *HR Magazine*, the agency’s annual report of private sector discrimination charges “painted a disheartening picture” (Grossman, 2008, p. 63). There were 83,000 discrimination claims filed with the EEOC in 2007, which represented the largest one year increase since 1993 (Grossman, p. 63).

Regarding claims of religious discrimination, the *Wall Street Journal* noted in October of 2008 (Dvorak, 2008) that such claims filed with federal, state, and local agencies doubled over the last 15 years, and increased 15% during 2007, to 4515 claims; yet that amount was fewer than 5% of workplace discrimination claims overall. The increase was due to greater religious diversity in the U.S. workplace as well as more openness about religion in the workplace (Dvorak, 2008). Earp (2007) relates that the number of religion-based charges received by the EEOC had increased 107% between the fiscal years 1992 and 2007. Earp (2007) also relates that between September 11, 2001 and March 11, 2008, the EEOC as well as state and local agencies had received 1016 charges alleging “post-9/11 backlash employment

discrimination” (pp. 138-39). Zaheer (2007) notes that there has been “a nearly twofold increase in religious discrimination claims over the last fifteen years, which can be attributed, at least in part, to changing demographics and immigration patterns” (p. 498). Solieman (2009) points out that in the year after the September 11<sup>th</sup> attacks, there were 706 charges filed for discrimination based on the Islamic religion; yet during the prior year there were only 323 charges (p. 1072). Gandara (2006) notes that by 2005 the number of religious discrimination charges filed with the EEOC by Muslims in the four years since the September 11 attacks had doubled from the number of charges files in the four years prior to the attacks (p. 172). Furthermore, Gandara (2006) indicates that from September 11, 2001 to June 11, 2005 Muslim employees filed over 2100 charges of workplace religious discrimination with the EEOC (p. 173).

## **THE LAWSUIT – PROCEDURAL AND SUBSTANTIVE ELEMENTS**

### **Employee’s Initial or Prima Facie Case**

When the EEOC finds “reasonable cause” it grants the aggrieved party a “right-to-sue” letter which allows the employee to proceed to the federal courts. The agency itself actually may go to court on behalf of the complaining employee, or the employee may also choose to be represented by private legal counsel. Regardless, in either situation, the *prima facie* case is the required initial case that a plaintiff employee asserting discrimination must establish. Basically, *prima facie* means the presentment of evidence which if left unexplained or not contradicted would establish the facts alleged. Generally, in the context of discrimination, the plaintiff employee must show that: 1) he or she is in a class protected by the statute; 2) the plaintiff applied for and was qualified for a position or promotion for which the employer was seeking applicants; 3) the plaintiff suffered an adverse employment action, for example, the plaintiff was rejected or demoted despite being qualified, or despite the fact that the plaintiff was performing his or her job at a level that met the employer’s legitimate expectations; 4) after the plaintiff’s rejection or discharge or demotion, the position remained open and the employer continued to seek applicants from people with the plaintiff’s qualifications. These elements if present give rise to an inference of discrimination. The burden of proof and persuasion is on the plaintiff employee to establish the *prima facie* case of discrimination by a preponderance of the evidence (*Equal Employment Opportunity Commission v. The GEO Group, Inc.*, 2010; *Gul-E-Rana Mirza v. The Neiman Marcus Group, Inc.*, 2009; Grisham, 2006). In the case of *Imtiaz v. City of Miramar* (2009), the plaintiff, a Muslim employee of Indian origin, alleged in his initial complaint that he was subject to “numerous discriminatory remarks and harassment” and was assigned “undesirable tasks” that were not assigned to other similarly situated non-Indian and non-Muslim employees (p. 3). He sued for religious, national origin, and racial discrimination and harassment; but the federal district court dismissed the lawsuit for the failure to establish a *prima facie* case due to the “vagueness” and factual inadequacy of the allegations in his complaint (*Imtiaz v. City of Miramar*, 2009, pp. 3-4).

### **The Disparate Treatment Theory**

“Disparate treatment,” as noted, in essence means intentional discrimination. That is, the employer simply treats some employees less favorably than others because of their protected characteristics. The Equal Employment Opportunity Commission provides an example of disparate treatment of religious expression in the workplace, to wit: an employer allowing one secretary to display a Bible on her desk at work, while telling another secretary in the same workplace to put the Quran on his desk out of sight “because co-workers will think you are making a political statement, and with everything going on in the world right now, we don’t need that around here” (Questions and Answers about Religious Discrimination in the Workplace, EEOC, 2010, p. 3). Proof of a discriminatory intent on the part of the employer is critical to a disparate treatment case. The plaintiff employee can demonstrate this intent by means of direct or circumstantial evidence; but the employer’s liability hinges on the presence of evidence that discrimination actually motivated the employer’s decision. A disparate treatment case will not succeed unless the employee’s protected characteristic actually formed a part to the decision-making

process and had a determining affect on the outcome. Of course, if the motivating factor in the employer's decision was some criterion other than the employee's protected characteristic, then there is no disparate treatment liability (Mujtaba and Cavico, 2010; Grisham, 2006).

### **Direct Evidence**

Direct evidence is evidence that clearly and directly indicates the employer's intent to discriminate; that is, such evidence is the motivating factor, and thus the proverbial "smoking gun," that directly discloses the employer's discriminatory intent (*Nazeeth Younis v. Pinnacle Airlines, Inc.*, 2010; *Gul-E-Rana Mirza v. The Neiman Marcus Group, Inc.*, 2009). Yet as emphasized by Solieman (2009): "Of course, clear proof of an employer's intent simplifies a Title VII case. For the most part, however, cases with proof are few and far between" (p. 1093). In seeking to build a case, another commentator noted that "offering direct proof of motive in the form of ...slurs or other incriminating behavior is a more common approach, and one that is likely to be more effective. Such evidence must, however, be evaluated on a case-by-case" (Labriola, 2009, p. 380). A very instructive illustration is the federal appeals case of *El-Hakem v. BUY, Inc.* (2005), where the fact that a company's CEO gave an employee, a native of Egypt and a practicing Muslim, a "Westernized" nickname, "Manny," and continued to use that nickname for over a year despite repeated objections from the employee, who wanted to be called by his given name, "Mamdouh," was deemed to be sufficient evidence of an intent to discriminate based on race, even though the name "Manny" is not a racial insult or epithet. The federal appeals court also found that the CEO's conduct was severe enough for a finding of a hostile work environment (*El-Hakem*, 2005). One legal commentator noted that the requisite level of the conduct varies inversely with the frequency and duration of the conduct; and "therefore, although (the CEO's) conduct may not seem severe on its face, the required level of severity is lower because of the higher frequency and pervasiveness of (the CEO's) conduct" (Milz, 2006, pp. 289-90). Another example of a direct evidence case provided by Solieman (2009) dealt with an Arab plaintiff who was able to establish a *prima facie* discrimination case against his employer by submitting evidence that the employer stated that she wanted to "get rid of all the Arabs" (p. 1083).

Nevertheless, not every type of name, insult, or epithet will be found actionable by the courts (Labriola, 2009). Consequently, the further the discriminatory memo, remark, or comment is made from the time of discharge, the greater the risk that a court will brand it as a "stray remark," and thus find it too remote to qualify as direct evidence of discrimination (Labriola, 2009). Similarly, the more ambiguous and general the comment is, or the more the statement can be subject to varying interpretations, there exists less likelihood that a court will declare it direct evidence of discrimination (Labriola, 2009). Another important factor in determining the viability of a statement as direct evidence of discrimination is whether the statement was made by a decision-maker or a person with supervisory, managerial, or executive authority in a company or organization.

However, statements made by an employer in the course of attempting to accommodate the employee's religious practices may be protected to some extent. To illustrate, Abdo (2008) discusses a federal district case where the court stated its hesitancy to impute discriminatory intent to statements made by the employer while seeking to accommodate the employee's religious practices

### **Circumstantial Evidence**

Illegal discrimination is an intentional legal wrong. Since proof of this wrongful intent – discriminatory or otherwise - is notoriously difficult for a plaintiff to obtain, the courts at times permit discriminatory motive to be inferred from the facts of the case (*Gul-E-Rana Mirza v. The Neiman Marcus Group, Inc.*, 2009). Problematical discriminatory situations would arise from suspicious timing of or even from the fact of differences in treatment, such as better treatment of similarly situated employees not in the protected class (*Nazeeth Younis v. Pinnacle Airlines, Inc.*, 2010; *Gul-E-Rana Mirza v. The Neiman Marcus Group, Inc.*, 2009). One recent federal appeals case underscores the necessity of a plaintiff demonstrating that similarly situated employees received favorable treatment (*Nazeeth Younis v. Pinnacle Airlines, Inc.*, 2010). The case dealt with a Muslim employee, a pilot, who was discharged for poor

performance. He claimed that he was discriminated against because of his religion. However, he failed to identify any non-Muslim or non-white pilots who received more favorable treatment; and consequently the appeals court affirmed the dismissal of his religious discrimination case (*Nazeeth Younis v. Pinnacle Airlines, Inc.*, 2010, pp. 363-34). To compare, in the federal district court case of *Gul-E-Rana Mirza v. The Neiman Marcus Group, Inc.* (2009), an inference of discrimination was found. In the case, the plaintiff employee, a Muslim of Pakistani descent, worked as a sales associate on commission at a “high-end” retail store. She was the only Muslim Pakistani associate. The evidence in the case indicated that the manager of her department gave preferential treatment to her co-workers, and that she was singled out for poor treatment, for example, by assigning her to stock room duties during periods of high sales volume, by threatening her with firing, and by refusing to give her a day off for a religious holiday (*Gul-E-Rana Mirza v. The Neiman Marcus Group, Inc.*, 2009). Consequently, the court denied the defendant employer’s motion to dismiss the case, finding that the preferential treatment of the plaintiff’s co-workers gave rise to an inference of impermissible discrimination (*Gul-E-Rana Mirza v. The Neiman Marcus Group, Inc.*, 2009, p. 861). Solieman (2009) provides another similar example of a circumstantial indirect evidence case where the non-Arab employees were offered a choice of work assignments and days off, but the plaintiff and other Arab employees were not (pp. 1083-84). Regarding the differences in treatment, if it is systematic and thus rises to the level of a pattern, or as one court said, a “convincing mosaic,” the inference of bias and deliberate discrimination is naturally much stronger. Burden-shifting is an integral part to a circumstantial evidence case. That is, the plaintiff employee must still make out his or her initial or *prima facie* case, and thus raise an inference of discrimination, but one that can then be rebutted. Next, in order to rebut this inference, the defendant employer must show that its policy or practice was based on an appropriate, legitimate, and non-discriminatory business reason (Cavico and Mujtaba, 2009). Examples would be poor performance, resistance to management, insubordination, and failure to report to new managers or supervisors, or the need to match employees with positions that require a certain knowledge and skill-set. An example of an “inference” case is the federal court decision in *Muhammad Mujtaba Hussain v. PNC Financial Group* (2010). In the case, the employee, a Muslim from Pakistan, who worked for the employer as a licensed financial sales consultant, was terminated for allegedly poor performance and insubordination. He sued, contending his discharge was based on religious and national origin discrimination; and the employer sought to dismiss the complaint contending that there was no evidence of discriminatory intent (*Muhammad Mujtaba Hussain v. PNC Financial Group*, 2010). The allegations in the complaint included the following: the plaintiff employee was harassed, ostracized, and criticized for his supposed lack of communication skills, his accent, and his national origin; co-workers would perform Christian and/or Catholic gestures, such as making the sign of the cross, when they approached the employee, though knowing he was a Muslim; although it was known that his religious beliefs forbid drinking, the employee was singled out at a holiday raffle when he won a prize and was asked if he wanted to exchange it for wine; employees asserted that he struggled to communicate in English though he has a Master’s degree in English and passed state licensure exams in English; the employee made numerous complaints about a hostile work environment with no resolution; and the employee’s sales productions were consistently high (*Muhammad Mujtaba Hussain v. PNC Financial Group*, 2010, pp. 441-42). Based on these allegations, the court concluded that the plaintiff employee provided sufficient facts to support an inference that his discharge was motivated by religious and national origin discrimination; and thus the court denied the defendant employer’s motion to dismiss the case (*Muhammad Mujtaba Hussain v. PNC Financial Group*, 2010, pp. 8-9). Solieman (2009), specifically in an accommodation context, relates when an inference for the need for an accommodation discriminatorily influenced a determination to reject an applicant:

- (i) prior to an offer of employment the employer makes an inquiry into an applicant’s availability without having a business necessity justification; and (ii) after an employer has determined the applicant’s need for an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that factors other

than the need for an accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible (p. 1079).

### **Pretext**

In a circumstantial case, when the defendant employer does contend that its rationale was an appropriate, legitimate, and non-discriminatory business one, the plaintiff employee is allowed to show that the proffered reason was really a pretext for discrimination. Pretext means that the employer's stated reason was fake, phony, a sham, a lie; and not that the employer made a mistake or error in judgment or made a "bad" decision (*Zahra Mowafy v. Noramco of Delaware, Inc.*, 2009; *Gul-E-Rana Mirza v. The Neiman Marcus Group, Inc.*, 2009; *Mansoor Alam v. HSBC Bank*, 2009). A pretextual reason is one designed to hide the employer's true motive, which is an unlawful act of discrimination. The employer's explanation can be foolish, trivial, or even baseless, so long as the employer honestly believed it. The genuineness of the reason, not its reasonableness, is the key (Solieman, 2009). The plaintiff employee bears the burden of showing that the employer's proffered reason was merely a pretext. The plaintiff employee, however, need not show the pretext beyond all doubt; he or she need not totally discredit the employer's reasons for acting; rather, he or she must provide sufficient evidence to call into question and to cast doubt on the legitimacy of the employer's purported reasons for acting. Providing such evidence of pretext allows the plaintiff employee to contend that the reason given by the employer for the discharge or demotion or negative action was something other than the reason given by the employer (Solieman, 2009).

The following types of evidence have been used by the courts to enable the plaintiff employee to demonstrate pretext: (1) disparate treatment or prior poor treatment of the plaintiff employee; (2) disturbing procedural irregularities or the failure to follow company policy; (3) use of subjective criteria in making employment decisions; (4) the fact that an individual who was hired or promoted over the plaintiff was obviously not qualified; and (5) the fact that over time the employer has made substantial changes in its proffered reason for the employment decision (Tymkovich, 2008). An example of a pretext case is the federal court of appeals decision in *Zafar Hasan v. Foley & Lardner LLP* (2008). In the case, the plaintiff, an attorney at a law firm, who was Muslim and of Indian descent, contended that his dismissal from the law firm was based on religious and national origin discrimination. He pointed to several anti-Muslim comments that were made by co-workers, such as that Muslims do not belong in America and that they should all be kicked out, as well as the refusal of senior partners to give him work when he asked for it. The defendant employer law firm, however, offered a rebuttal to his arguments by saying that the plaintiff was discharged for poor performance, and the defendant employer also contended that the fact that the plaintiff was not given more work was due to the firm's poor economic performance. However, the plaintiff then countered these assertions of legitimate reasons for the discharge by providing evidence that an internal memo of the firm revealed that its economic condition was strong, that the plaintiff had positive previous performance reviews as well as a good relationship with his department's primary client, and that the law firm actually hired two new associates after firing the plaintiff (*Zafar Hasan v. Foley & Lardner LLP*, 2008, pp. 26-27). Based on this evidence, the court of appeals concluded that a "reasonable jury" could find that the reason given for the termination of the plaintiff employee was "pretextual," and thus a "reasonable jury" could conclude that the plaintiff was fired because he is a Muslim and of Indian descent (*Zafar Hasan v. Foley & Lardner LLP*, 2008, pp. 26-27). To compare, in the federal district court case of *Zahra Mowafy v. Noramco of Delaware, Inc.* (2009), the court found that the plaintiff employee, a Muslim woman who was a senior chemist, could not demonstrate that the defendant employer's reason for her termination – poor performance – was a pretext. The plaintiff employee did submit evidence that co-workers asked "all sorts of questions about Islam and Islamic beliefs and why are Muslims producing terrorists," as well as evidence that a co-worker screamed in fright when she observed the plaintiff conducting prayers in a bathroom. However, there was no mention of any explicit slurs or religious epithets (*Zahra Mowafy v. Noramco of Delaware, Inc.*, 2009). The court ruled that this conduct was insufficient to meaningfully serve as evidence of pretext, particularly when the plaintiff's record of poor performance was "well documented" (*Zahra Mowafy v. Noramco of Delaware,*

*Inc.*, 2009, p. 619). Similarly, in the federal district court case of *Mansoor Alam v. HSBC Bank* (2009), the plaintiff employee could not demonstrate a pretext. In the case, the employee, a Muslim and a bank employee, was terminated for poor annual performance reviews and the bank's need to downsize. However, the employee responded by saying the proffered reasons were merely a pretext for religious discrimination. The employee pointed to the following evidence, to wit: he once asked a supervisor to alter his Friday lunch schedule to accommodate his prayer time, but was refused and told to "go to Mecca" to pray, another manager said that he "can't put up with so many Muslims in the department" while he walked by the plaintiff employee's cubicle, and that he found photographs of Osama Bin Laden and other terrorists on his desk (*Mansoor Alam v. HSBC Bank*, 2009, pp. 4-5). The plaintiff also claimed that the bank's reduction-in-force was not necessary and that he was replaced by a younger non-Muslim employee (*Mansoor Alam v. HSBC Bank*, 2009, pp. 22-23). The court, however, ruled that the plaintiff employee did not present sufficient evidence of pretext. Though the court noted that there was "friction" between the plaintiff and his immediate supervisor, the critical factor for the court was the fact that the employment decisions regarding the downsizing, work performance, and the particular plaintiff's termination were made by bank personnel not primarily involved with the incidents of discrimination and harassment that the plaintiff raised to show pretext (*Mansoor Alam v. HSBC Bank*, 2009, pp. 27-28). This decision of the federal district court was affirmed by the court of appeals (*Mansoor Alam v. HSBC Bank*, 2010). Solieman (2009) also provides examples of two pertinent cases where the plaintiff employees failed to demonstrate that the employers' reasons for the discharge were pretextual. In one, the plaintiff employee, a Muslim immigrant from Afghanistan, who worked at a meat packing plant, made a *prima facie* case of discrimination and harassment based on religion and national origin. However, the employee was not able to overcome the employer's proffered reason for the discharge, to wit, that the plaintiff employee harassed a co-worker (pp. 1087-88). In the other case cited by Solieman (2009), the plaintiff employee was the general manager of a large hotel, and he was also the president of the Dallas-Ft. Worth chapter of the Council on American Islamic Relations. The plaintiff employee after the September 11 attacks gave several interviews as president of the Islamic organization. In subsequent articles, he was identified as the defendant hotel's general manager. His employer expressed concern about the employee serving as president of the local chapter, particularly when the hotel chain's name was mentioned in a newspaper article. Subsequently, the employer decided to transfer the plaintiff employee to a lower level position at a hotel in Washington, D.C. The plaintiff employee then sued for constructive discharge and established the initial case of religious discrimination. However, the employer countered by saying the reason for the transfer was a non-discriminatory one, to wit: low sales and revenues. The employee then attempted to show that this reason was merely pretextual by providing what the court said was "believable evidence" for the low sales and revenues. However, that was not sufficient to show pretext (Solieman, 2009, pp. 1091-92). Solieman (2009) explained: "As long as (defendant hotel) officials could show that their perception of (plaintiff employee's) performance, accurate or not, was the motive for transferring him, then they fulfilled their obligation under the pretext theory" (p. 1092).

However, there are limits as to what a court will accept as evidence of pretext. To illustrate, for many years, attorneys have encouraged employers to publish and widely disseminate written policy statements of their commitment to non-discrimination. Attorneys have argued that the published policies were an important defense tool in any subsequent lawsuit (Corbin and Duvail, 2008). In the case of *Hoard v. CHU2A, Inc. Architecture Engineering Planning* (2007), the Court of Appeals for the Eleventh Circuit addressed the legal relevance of an employer's failure to have a published anti-discrimination policy, and concluded that the failure did not demonstrate that the employer's stated reason for its adverse employment action was pretextual. In *Hoard*, the plaintiff was an employee who was a fifty-eight year old man. He brought a lawsuit against CHU2A, alleging age discrimination as prohibited by the Age Discrimination in Employment Act. After an adverse district court decision, the employee, Hoard, argued on appeal that the absence of a published policy by the employer constituted adequate evidence of pretext. The district court entered summary judgment in favor of CHU2A because the court decided that Hoard failed to establish any evidence of pretext to rebut the employer's stated, legitimate, non-discriminatory reason for the adverse employment action taken against him. The appeals court summarily rejected the

employee's contention and thus affirmed the district court's decision (Corbin and Duvail, 2008). Nonetheless, it is still very prudent – legally, morally, and practically – for an employer to have a written and communicated anti-discrimination policy.

Once sufficient evidence of pretext is shown, a judge may allow a jury, as finder of fact, to infer that the true reason for the action was improper discrimination. The failure of the employer to give any reason – foolish or not – for the discharge of a protected worker at the time of termination has been construed as evidence that the employer's asserted business reason, for example, allegedly poor performance, which was given much later, was merely a pretext for discrimination. The prudent employer is well advised, therefore, despite a certain management "prevailing opinion" to the contrary, to provide in a direct and unambiguous manner to a terminated employee, even an employee at-will, at the time of discharge, an appropriate business-related reason for the discharge, and to have a written record of the transaction.

### **The Disparate Impact Theory**

Disparate impact discrimination means unintentional discrimination on the part of the employer. In a disparate impact case, the employer's policies and practices are neutral "on their face" in their treatment of employees, yet they fall more harshly or disproportionately on a protected group of employees; and they cannot be justified by legitimate, reasonable, and non-discriminatory business reasons. The disparate impact theory has long been a widely used and accepted means of establishing illegal discrimination under Title VII of the Civil Rights Act (Mujtaba, Cavico, Edward, and Oskal, 2006).

It is very important to again be aware that a disparate impact case is materially different from a disparate treatment case. In a disparate impact case, the plaintiff employee need not prove an intentional act of discrimination by his or her employer in order to recover. In essence, the plaintiff employee will first have to show that there is a statistical disparity, and that younger and older employees are affected differently by the policy or practice; and then he or she will have to demonstrate that the challenged practice was based on a discriminatory reason. In a disparate impact case, moreover, the plaintiff employee cannot establish his or her initial case by pointing to a general policy of the employer that produced the disparate impact; rather, the plaintiff employee must isolate and identify the employer's specific discriminatory-motivated policies or practices that are allegedly responsible for any perceived disparities, and then link them to the disparity. That is, a close "nexus," or connection, must be established between the specific practice and any observed statistical significance in order to prove illegal discrimination.

### **The Bona Fide Occupational Qualification Exception (BFOQ)**

The employer can also defend a discrimination lawsuit by interposing the *bona fide* occupational qualification doctrine (BFOQ). Pursuant to the BFOQ doctrine, the employer will be obligated to show that the challenged criterion is reasonably related to the normal operation of the employer's business, and that there is a factual basis for believing that only employees of a certain characteristic would be able to do the particular job safely or effectively. That is, the employer must demonstrate that all or substantially all persons excluded from the job in question are in fact not qualified. The BFOQ defense is a limited one, however. To prevail, the employer must demonstrate that it had reasonable factual cause to believe that all or substantially all of the older persons would be unable to perform the duties of the job in a safe and efficient manner. If the employer's rationale in interposing the BFOQ is the objective of public safety, the EEOC will require that the employer demonstrate that the challenged age restriction does in fact effectuate that public policy goal, and that no reasonable alternative exists which would better or equally advance the goal with a less discriminatory effect. Courts, moreover, have construed the BFOQ defense narrowly in all civil rights cases. The EEOC itself counsels that the exception will have only limited scope and application (Cavico and Mujtaba, 2009).



## THE EXTRATERRITORIAL EFFECT OF U.S. LAW

The globalization of the world's economy has resulted in employers assigning increasingly larger numbers of employees to international assignments. One initial issue that results from such globalization is the responsibility of multinational companies that operate in the United States. The general rule of law in such a case is that U.S. civil rights laws apply to multinationals operating in the U.S. or its territories to the same extent as U.S. employers. Employees are covered regardless of their citizenship or work authorization. Employees who work in the U.S. are protected by U.S. law whether they work for a U.S. or foreign employer. The exception arises when the foreign employer is covered by an international treaty, convention, or other agreement that limits the full applicability of U.S. anti-discrimination employment law, for example, by allowing the foreign company to prefer its nationals over others for certain positions. Another important, and more problematical, employment discrimination issue concerns the rights of workers who are employed by a U.S. employer or by a foreign employer in a workplace in a foreign country. The difficult issue is whether the extensive U.S. legal protections afforded to employees in the U.S. carry overseas. This legal question typically is regarded as an issue of the "extraterritoriality" of U.S. law. A U.S. company that is "going global" thus must be prepared to face the legal as well as practical implications of establishing operations overseas, in particular the challenging situation when a company finds itself torn between obeying U.S. law and complying with the law of the host country (Cavico and Mujtaba, 2008).

The early, leading Supreme Court case ruling on the extraterritoriality of U.S. law was not an employment discrimination case, but rather dealt with federal anti-trust law. In *American Banana Company v. United Fruit Company* (*American Banana Company v. United Fruit Company*, 1909), although both parties to the dispute were U.S. citizens, the alleged violation of the Sherman Anti-Trust Act occurred in Panama. The Court unanimously ruled at the time that the Sherman Act did not apply to acts occurring beyond the borders of the U.S. Moreover, a majority of the courts expressed reservations concerning even extending a statute extraterritorially. Another concern, raised by Justice Holmes writing for the majority, was that extending a statute extraterritorially would contravene the fundamental sovereignty principle of international law. *American Banana Company* consequently set forth the general rule governing extraterritorial jurisdiction; that is, a very strong presumption exists against the extraterritorial application of U.S. law. This presumption, furthermore, can be overcome only in exceptional instances.

Civil Rights laws protect U.S. citizens working overseas for a U.S. controlled foreign employer (*Morelli v. Cedel*, 1998). The prohibitions of such statutes shall not apply where the employer is a foreign person not controlled by an U.S. employer; *Morelli v. Cedel*, 1998). "At a minimum," declared one court, "the (law) does not apply to the foreign operations of foreign employers – unless there is an American employer behind the scenes" (*Morelli v. Cedel*, 1998). Civil Rights statutes, therefore, does not apply to a foreign corporation operating outside the U.S. even when the foreign firm employs U.S. citizens unless a U.S. company controls the foreign corporation. Regarding the important "control" issue, the aforementioned four critical factors are specified in the Act; and thus are used by the courts in discrimination cases to determine control: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control of the employer and the corporation. The purpose of the statutory "control" element, according to one court, is to protect the principle of sovereignty; that is, "no nation has the right to impose its labor standards on another country." Civil Rights statutes, however, do protect employees working in the U.S. for a domestic branch of a foreign company. An exception to extra-territoriality also exists if the application of the U.S. civil rights law would violate the law of the other country where the workplace is located. This principle, as noted, termed the "foreign laws" or "foreign compulsion" defense, means that a U.S. employer will not be legally liable if compliance with the Civil Rights law would cause the employer to violate the laws of the nation where the workplace is located. In one case, the U.S. Court of Appeals for the District of Columbia ruled that where the U.S. law would cause a U.S. company to violate a foreign collective bargaining

agreement, which technically could be argued as not equating to a “law,” the foreign compulsion defense applied (*Mahoney v. RFEIRL*, 1995).

An employer in the United States whether a domestic or an international one must be aware of U.S. anti-discrimination employment law as well as the extra-territorial application of U.S. civil rights laws. Yet the global business person must also be concerned with other legal jurisdictions’ anti-discrimination law. Such an examination, though naturally important, is beyond the scope of this study, which has focused on U.S. law and the extraterritorial effect of U.S. law.

## MANAGEMENT STRATEGIES

Although the focus here is primarily on religious discrimination, a mention initially must be made of discrimination based on national origin, particularly since in the analysis herein national origin discrimination claims very well could be intertwined with religious discrimination ones. The EEOC states that Title VII’s prohibition against religious discrimination could overlap with prohibitions based not only on national origin, but also race and color. That is, “where a given religion is strongly associated – or perceived to be associated – with a certain national origin, the same facts may state a claim of both religious and national origin discrimination. All four bases might be implicated where, for example, co-workers target dark-skinned, Muslim employee from Saudi Arabia for harassment because of his religion, national origin, race, and/or color” (Questions and Answers about Religious Discrimination in the Workplace, EEOC, 2010, p. 8). Discrimination based on one’s national origin is, of course, illegal pursuant to the Civil Rights Act. Solieman (2009) notes that the EEOC defines national origin discrimination “broadly” and thus includes but is not limited to “the denial of equal employment because of an individual’s, or his or her ancestor’s, place of origin; or because an individual has the physical, cultural, or linguistic characteristics of a national origin group” (p. 1079). Furthermore, such discrimination can encompass the denial of employment opportunities due to such factors as birthplace, ancestry, culture, or linguistic characteristics, such as accent (Solieman, 2009). Solieman (2009) emphasizes that “nearly every Muslim-American is vulnerable to national origin employment discrimination based on these outlined cultural elements. Even second or third generation Muslims born in the United States...can have Arabic-sounding names that subject them to such vulnerabilities” (p. 1079).

The EEOC and the courts have been enforcing such laws to prevent discrimination against Muslim and Arab-American employees. Accordingly, employers must comprehend the importance of educating and training employees, including and especially managers and supervisors, to act in a legal manner as well as the consequences for not acting legally. Employers also must instruct their employees to be culturally competent, that is, to be cognizant of and sensitive to their employees’ religious beliefs, observations, and practices as well as their cultures, heritages, and ethnic backgrounds. Regarding the employer’s duty to make a reasonable accommodation to an employee’s religious observations and practices, it must emphasize that when the employer makes no effort to accommodate the employee the employer places itself in a very precarious legal position. As noted, the courts in such a case will be very skeptical of any subsequent undue hardship claim. The employer must at the least attempt to accommodate the employee in a reasonable and good faith manner.

Educating the workforce is a critical element to legally, morally, and practically solving religious issues and potential conflicts in the workplace. Accordingly, awareness of, tolerance to, and respect for other religions and their observances and practices should be included by the employer in the employees’ diversity, sensitivity, and cultural competency education and training. The goal should be, emphasizes Ruan (2008), for the employees to embrace religious diversity as they are inculcated to do, and hopefully will do, with other forms of diversity.

Legal complexity also naturally results from the globalization of business – in the employment field and otherwise. Foreign firms as well as U.S. ones consequently must be keenly aware of U.S. law; and also U.S. firms must be aware of not only foreign law, but also the extraterritoriality of U.S. laws. The employer’s fundamental objectives, of course, are to obey the law, avoid getting sued and going to court,

but if sued in court to prevail. U.S. anti-discrimination employment laws clearly protect U.S. citizens working for U.S. employers, no matter where the workplace is located. The Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination and Employment Act now have been amended to include protection for U.S. employees working overseas for U.S. firms. Thus Title VII, the ADA, and the ADEA currently are coextensive in their extraterritorial effect. These acts accordingly have a very broad extraterritorial reach, encompassing not only U.S. firms doing business in the U.S. and overseas, but also U.S. controlled firms. A crucial issue, therefore, is whether a foreign firm is sufficiently controlled by a U.S. firm. Yet it is essential to emphasize that the courts consistently have held that only U.S. citizens are protected; and thus only a U.S. citizen may properly institute a discrimination lawsuit under Title VII of the Civil Rights Act based on employment decisions made at a foreign workplace by a U.S. employer or by a foreign employer controlled by a U.S. multi-national firm. Therefore, resident aliens and foreign nationals working overseas for U.S. companies are excluded from the protections of the Civil Rights Act. A “simple” solution to the extraterritoriality problem examined herein might be to apply U.S. employment discrimination laws to any company incorporated in the U.S., regardless of where its employment operations take place. Yet, this “answer” is not feasible due to the very strong presumption in U.S. law against the extraterritorial application of U.S. law, which typically is predicated on concerns about sovereignty, comity, and jurisdiction. This presumption is overcome only in exceptional instances. Legally, and most significantly, the distinct possibility exists of different global business practices and employment standards, as well as different degrees of legal protection, for U.S. employees and non-U.S. employees working for the same international business firm and in the same workplace. Failure to be cognizant of U.S. employment discrimination law, including its extra-territorial aspects, as well as the labor law of the host country, will result in increased exposure to legal liability for the multinational firm. Consequently, the manager of the multinational firm must ensure to the extent possible that the firm complies with both U.S. civil rights employment law and also any anti-discrimination laws of the host country.

The astute, prudent, and ethical employer can avoid religious-based discrimination claims as well as other discrimination lawsuits in the workplace if the employer takes reasonable measures to educate and train the workforce in the areas of culture, religion, and diversity and then firmly prohibits discrimination and harassment based on religion and other characteristics.

## **SUMMARY**

This article examined the laws of discrimination in the United States, including their extra-territorial application for American firms that have employees and branches overseas. The article, therefore, provided an explication of the U.S. Civil Rights Act and other discrimination laws. The authors also discussed the nature and role of the Equal Employment Opportunity Commission in implementing and enforcing discrimination law. The article also disclosed that United States multinational business firms, as well as foreign firms operating in the U.S., must be aware of U.S. civil rights law when conducting business in the United States. These firms also must be keenly aware of the important and far-reaching legal extraterritorial rule that a U.S. company that employs U.S. citizens anywhere in the world generally will be subject to a civil rights lawsuit if these employees are discriminated against based on the protected categories such as religion.

One “theme” to this work is that the prudent and wise employers and managers are well-advised to be cognizant of important civil rights anti-discrimination statutes. The purposes of this article, moreover, were to provide to leaders, employers, and managers practical strategies, tactics, and recommendations to comply with anti-discrimination laws, to maintain fair employment practices, and how to handle actual discrimination lawsuits. Recommendations were supplied to managers on how to deal with civil rights statutes, and especially how to avoid legal liability for religious and national origin discrimination and harassment against Muslim employees pursuant to the important Title VII anti-discrimination statute. Practical suggestions were offered by the authors on how employers can accommodate in a reasonable manner the religious observances and practices of their Muslim employees.

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