

# POST-9/11 BACKLASH DISCRIMINATION IN THE WORKPLACE: EMPLOYERS BEWARE OF POTENTIAL DOUBLE RECOVERY

I.	INTRODUCTION .....	169
II.	BACKGROUND .....	170
	A. <i>The Backlash</i> .....	170
	B. <i>The Evolution of Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Commission</i> .....	174
	1. Claims Based on Religious Discrimination .....	176
	a. "Religion" .....	177
	b. "Reasonable Accommodation" and "Undue Hardship" .....	178
	2. Claims Based on Hostile Work Environment.....	181
	C. <i>The Effects of the Civil Rights Act of 1991</i> .....	183
III.	A COMPARATIVE ANALYSIS OF EMPLOYMENT DISCRIMINATION CLAIMS .....	185
	A. <i>Claims Filed Based on Religious Discrimination</i> .....	186
	B. <i>Claims Filed Based on National Origin</i> .....	188
	1. Recovery Under § 1981 for National Origin Discrimination.....	189
IV.	POTENTIAL DOUBLE RECOVERY AGAINST EMPLOYERS .....	192
	A. <i>True Extent of Liability Under Compensatory Damages Cap</i> .....	195
	B. <i>Potential Recovery Against Employer Post- Settlement</i> .....	196
V.	TIPS AND SUGGESTIONS ON HOW EMPLOYERS CAN MINIMIZE BACKLASH.....	197
VI.	CONCLUSION.....	200

## I. INTRODUCTION

Following the terrorist attacks of September 11, 2001 (the "9/11 attacks"), workplace discrimination claims based on religion and/or national origin have increased at an unprecedented rate.<sup>1</sup> This comment seeks to inform and

---

1. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, QUESTIONS AND ANSWERS

forewarn employers of a few of the potential causes of action that could be filed against them based on post-9/11 backlash discrimination and the potential extent of their liability for such discrimination. For instance, employers are now vulnerable to causes of action under both Title VII of the Civil Rights Act of 1964 (the "1964 Act")<sup>2</sup> and 42 U.S.C. § 1981<sup>3</sup> for claims arising out of backlash discrimination in the workplace based on race and/or national origin. The inquiry then becomes whether or not these two statutes leave an employer susceptible to double recovery based on the same alleged discriminatory actions. This comment also provides employers with suggestions on how to minimize the occurrence of backlash discrimination in the workplace.

## II. BACKGROUND

### A. *The Backlash*

On the morning of September 11, 2001, terrorists carried out attacks on the United States which claimed the lives of nearly three thousand people<sup>4</sup> and forever crippled the American sense of security.<sup>5</sup> As two airplanes crashed into the World Trade Center towers,<sup>6</sup> a state of hysteria and paranoia began spreading across the nation.<sup>7</sup> The public quickly began placing the blame on terrorist groups having Arab and Muslim backgrounds,<sup>8</sup> giving rise to an abrupt swelling of backlash "discrimination, hatred, and violence directed toward Arab- and Muslim-Americans."<sup>9</sup>

---

ABOUT THE WORKPLACE RIGHTS OF MUSLIMS, ARABS, SOUTH ASIANS, AND SIKHS UNDER THE EQUAL EMPLOYMENT OPPORTUNITY LAWS, <http://www.eeoc.gov/facts/backlash-employee.html> (last modified May 14, 2002) [hereinafter EEOC Q&A ABOUT WORKPLACE RIGHTS].

2. *Id.*; see generally Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, 78 Stat. 241, 253-66 (codified in scattered sections of the U.S.C.).

3. See 42 U.S.C. § 1981 (2000).

4. Clyde Haberman, *The Price of Life after 9/11*, N.Y. TIMES, June 18, 2004, at B1.

5. See Susan J. Becker, *Tumbling Towers as Turning Points: Will 9/11 Usher in a New Civil Rights Era for Gay Men and Lesbians in the United States?*, 9 WM. & MARY J. WOMEN & L. 207, 207 (2003) (discussing the "omnipresent fear of additional, perhaps even more savage, terrorist attacks").

6. *Timeline of Terror*, SEATTLE TIMES, Sept. 11, 2001, at A2.

7. See Francis X. Clines, *A Day of Terror: Washington; Stunned Tourists, Gridlocked Streets, Fleeing and Fear*, N.Y. TIMES, Sept. 12, 2001, at A20.

8. See John Donnelly, *Attack on America; Specialists Wait to Pin the Blame*, BOSTON GLOBE, Sept. 11, 2001, at A1 (stating that government officials suspected Osama bin Laden, Al-Qaeda, and other Arab organizations—which view America as a prominent threat to Islam—had played a leading role in organizing the terrorist attacks).

9. Michael L. Krenn, *"America's Face to the World." The Department of State, Arab-*

The sudden surge of anti-Arab/anti-Muslim xenophobia carried with it nationwide animosity, hate, and hostility.<sup>10</sup> While President Bush promised to avenge “those behind these evil acts,”<sup>11</sup> citizens vowed “whoever they are, they are going to pay!”<sup>12</sup> Religious community leaders in the U.S. spoke in outrage against the religion of Islam and its followers, some referring to Muslims as “worse than Nazis,” while others referred to Islam as “a very evil and wicked religion.”<sup>13</sup> In a nation where the terms “Arab” and “Muslim” are used interchangeably,<sup>14</sup> the once “underlying current of discrimination” plaguing the lives of many Arab-Americans prior to the 9/11 attacks now flows freely and openly.<sup>15</sup>

No doubt a fast-growing minority, the Arab-American population has increased by at least forty percent within the last two decades.<sup>16</sup> As of September 2004, approximately three million Arab-Americans and seven million Muslim-Americans resided in the United States.<sup>17</sup> While hate crimes fueled by resentment and fear persist,<sup>18</sup> Arab- and Muslim-Americans increasingly face discrimination in all aspects of their lives, including in the workplace.

The 9/11 attacks prompted a quick response from the U.S. government and its agencies in an attempt to mitigate public backlash in the workplace towards Arab- and Muslim-Americans.<sup>19</sup> Within three days of the 9/11 attacks, the Equal

---

*Americans, and Diversity in the Wake of 9/11*, 7 J. GENDER RACE & JUST. 149, 150 (2003).

10. *Id.* at 149.

11. *How the Towers Went Down: The Tragic Timeline*, DAILY NEWS (N.Y.), Sept. 12, 2001, at 24.

12. Clines, *supra* note 7, at 20.

13. Aladdin Elaasar, *A Worried America Finds a New Scapegoat*, TIMES UNION (Albany), Sept. 10, 2004, at A11 (quoting televangelist Pat Robertson stereotyping Muslims as “worse than Nazis,” the Rev. Jerry Falwell referring to the Prophet Muhammad as a “terrorist,” and the Rev. Franklin Graham denouncing Islam as “a very evil and wicked religion”).

14. See John Iwasaki, *Arab Americans Describe Unique Struggle in U.S.; Terror Attacks Added to Burden, Survey Finds*, SEATTLE POST-INTELLIGENCER, Aug. 6, 2005, at B1.

15. See Lisa Zagaroli, *Arab Americans Look to System for Justice; Faced with Post 9-11 Discrimination, They Rally in Suburban D.C. to Find Their Political Voice*, DETROIT NEWS, June 6, 2002, at 01A.

16. ASS'N OF TRIAL LAWYERS OF AMERICA, *The Post 9/11 Backlash: American Treatment of a Vulnerable Minority in the Workplace*, in 2 ATLA ANNUAL CONVENTION REFERENCE MATERIALS 1807, 1807 (2004) [hereinafter *Post 9/11 Backlash*].

17. Elaasar, *supra* note 13, at A11.

18. *Id.*; see also Krenn, *supra* note 9, at 150 (stating that in the FBI's 2001 report on hate crimes, 481 hate crime attacks occurred against people perceived to be Arab or Muslim, representing an increase of more than 1,500 percent from 2000).

19. See Krenn, *supra* note 9, at 149.

Employment Opportunity Commission (“EEOC”) issued a call to all employers and employees across the United States to “promote tolerance and guard against unlawful workplace discrimination based on national origin or religion” particularly targeted against Arab- and Muslim-Americans.<sup>20</sup> While the Department of Justice and EEOC gave warnings regarding workplace discrimination,<sup>21</sup> the Department of State and its officials, including Secretary of State Colin Powell, vigorously denounced all discriminatory practices targeting Arab- and Muslim-Americans.<sup>22</sup>

Despite pleadings from top U.S. government officials and government agencies for a cessation of backlash discrimination towards Arab- and Muslim-Americans, “the [EEOC] . . . and state and local fair employment practices agencies . . . documented a significant increase in the number of charges alleging workplace discrimination based on religion and/or national origin.”<sup>23</sup> Arab and Muslim individuals have been reporting many of these allegations.<sup>24</sup>

Prior to fiscal year 2001, the EEOC received fewer than 2,000 charges of religious discrimination in the workplace per year.<sup>25</sup> Since the 9/11 attacks, the number of religious discrimination charges filed reached nearly 2,500 each fiscal year to date.<sup>26</sup> In 1992, religious discrimination claims accounted for only 1.9% of all charges filed with the EEOC, compared with 3.1% in 2004.<sup>27</sup> By 2005, the number of discrimination charges filed with the EEOC by Muslims in the four years since the 9/11 terrorist attacks had doubled from the number of those filed in the four years prior to the attacks.<sup>28</sup>

Since September 11, the number of discrimination charges based on national origin has also increased dramatically.<sup>29</sup> Prior

---

20. Press Release, U.S. Equal Employment Opportunity Comm’n, EEOC Chair Urges Workplace Tolerance in Wake of Terrorist Attacks (Sept. 14, 2001), <http://www.eeoc.gov/press/9-14-01.html> [hereinafter EEOC Press Release].

21. See Krenn, *supra* note 9, at 149.

22. *Id.* at 154.

23. EEOC Q&A ABOUT WORKPLACE RIGHTS, *supra* note 1.

24. *Id.*

25. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, RELIGION-BASED CHARGES: FY 1992 – FY 2005, <http://www.eeoc.gov/stats/religion.html> (last modified Jan. 27, 2006) [hereinafter EEOC RELIGION-BASED CHARGES].

26. See *id.*

27. Amy Joyce, *Discriminating Dress; External Symbols of Faith Can Unfairly Add to Interview Stress*, WASH. POST, Sept. 25, 2005, at F6.

28. *Id.*

29. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, ORIGIN-BASED CHARGES: FY 1992 – FY 2005, <http://www.eeoc.gov/stats/origin.html> (last modified Jan. 27, 2006) [hereinafter EEOC ORIGIN-BASED CHARGES].

to the 9/11 attacks, the highest number of charges filed with the EEOC based on national origin in one year was 7,792, in 2000.<sup>30</sup> In 2002 alone, over 9,000 charges were filed based on national origin.<sup>31</sup>

Following the 9/11 attacks, the EEOC began to monitor the filing of “backlash” cases, those comprised of charges in which employees’ discrimination claims are specifically linked to public bias due to the events of September 11.<sup>32</sup> Between September 11, 2001 and June 11, 2005, 980 charges alleging post-9/11 backlash discrimination were filed with the EEOC.<sup>33</sup> During the same time period, Muslim employees filed over 2,100 charges with the EEOC alleging workplace religious discrimination.<sup>34</sup> In addition to claims filed with the EEOC, roughly 280 claims of workplace discrimination were filed with the Council on American-Islamic Relations (“CAIR”)<sup>35</sup> in 2004 alone.<sup>36</sup>

These numbers, although an obvious increase from years preceding the 9/11 attacks, represent only a portion of actual discriminatory actions plaguing American workplaces. Many discriminatory actions may go unreported due to a victim’s fear of negative repercussions from the employer or the government. Much of America’s current Middle-Eastern population consists of legal and illegal immigrants,<sup>37</sup> which lends support to the logical conclusion that many victims may be apprehensive about contacting a government agency such as the EEOC to file a claim. Thus, employers must acknowledge that the presence of backlash discrimination in the workplace is likely more prevalent today than the statistics reflect.

The influx of discrimination in the workplace toward Arab-

30. *Id.*

31. *Id.* (showing that the number of charges filed based on national origin in the years following 2002 continues to remain well over 8,000 per year).

32. Stephanie Armour, *Post-9/11 Charges of Bias Continue*, USA TODAY, July 6, 2005, at 3B.

33. *Id.*

34. *Id.*; see also S. Mitra Kalita, *Job Fair Caters to Muslim Immigrants; Years after 9/11 Attacks, Bias is Still Perceived*, WASH. POST, Mar. 26, 2005, at D12 (describing the EEOC’s category “Code Z,” which consists of complaints brought by “individuals who are or are perceived to be Muslim, Arab, Afghan, Middle Eastern or South Asian”).

35. See Council on American-Islamic Relations, <http://www.cair-net.org/default.asp?Page=About> (last visited Nov. 11, 2006) (“The Council on American-Islamic Relations (CAIR) is a nonprofit 501(c)(4), grassroots civil rights and advocacy group. CAIR is America’s largest Islamic civil liberties group, with regional offices nationwide and in Canada.”).

36. Armour, *supra* note 32.

37. See Steven A. Camarota, *The Muslim Wave*, NAT’L REV., Sep. 16, 2002, at 24 (“[T]he number of immigrants from the Middle East . . . [was] nearly 1.5 million in 2000. Of this population . . . about 150,000 are illegal aliens . . .”).

and Muslim-Americans can be attributed in part to the notion that terrorists continue to lurk among us.<sup>38</sup> For example, three years after the 9/11 attacks, speculations surfaced that Al-Qaida had possibly infiltrated major financial companies to plot yet another attack on American soil.<sup>39</sup> Many employers continue to question whether any of their own agents take part in terrorist activities, thereby possibly implicating the company.<sup>40</sup> Companies worry that their transactions may be “misconstrued as providing direct or indirect support of terrorism.”<sup>41</sup> The USA PATRIOT Act, a piece of legislation quickly passed in response to the 9/11 attacks, pressures all employers to investigate their employees.<sup>42</sup> Otherwise, employers could face severe penalties if found to be sheltering a terrorist or benefiting from terrorist activity.<sup>43</sup> Thus, harassment in the workplace has become an act of patriotism for employees guilty of linking individuals perceived to be of Arab or Muslim descent to the 9/11 terrorists.<sup>44</sup>

B. *The Evolution of Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Commission*

Title VII of the Civil Rights Act of 1964 “recognized the prevalence of discriminatory employment practices in the United States and the need for federal legislation to deal with the problem.”<sup>45</sup> Title VII provides that “[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race . . . [or] religion . . . .”<sup>46</sup> Under the 1964 Act, “[t]he term ‘religion’ includes all aspects of religious observance and practice,

---

38. See Maryann James & Christopher Latham, *Security Issues at Work; Applicants Face More Scrutiny*, NEWSDAY (N.Y.), Aug. 6, 2004, at A52 (describing the “delicate balancing act” employers engage in between the need for increased scrutiny of employees for safety purposes and the need to avoid any discriminatory actions).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*; see generally Becker, *supra* note 5, at 207 (describing the USA PATRIOT Act as “ill-conceived and poorly drafted legislation” quickly signed into law by President George W. Bush within mere weeks of the 9/11 attacks).

44. *Post 9/11 Backlash*, *supra* note 16, at 1807 (“Arab Americans were subjected to discrimination [in the workplace] based on their religion. Either they were harassed because they are Muslim, or denied accommodations concerning religious dress or prayer breaks. . . . The tone of the harassing remarks became more threatening and intimidating post 9/11.”).

45. H.R. REP. NO. 92-238, at 3 (1971), as reprinted in 1972 U.S.C.C.A.N. 2137, 2139.

46. 42 U.S.C. § 2000e-2 (2000).

as well as belief . . . .”<sup>47</sup>

Title VII created the EEOC, which began operations one year after the passage of the 1964 Act.<sup>48</sup> In its early years, many perceived the EEOC to be a “toothless tiger” due to its lack of enforcement powers.<sup>49</sup> Between 1965 and 1971, the EEOC “made significant contributions to equal employment opportunity” by helping to determine the boundaries of discrimination law.<sup>50</sup> Congressional findings in 1971 showed that the original plan to “rely[] on conciliation and voluntary compliance” with Title VII proved inadequate in preventing discrimination.<sup>51</sup> This led Congress to pass the Equal Employment Opportunity Act of 1972, which granted the EEOC “authority to issue . . . judicially enforceable cease and desist orders” and transferred to the EEOC both “the functions and responsibilities of the Office of Federal Contract Compliance” and “the Attorney General’s authority in practice or pattern discrimination suits.”<sup>52</sup> It further established one of the central focuses of this paper—the power of the EEOC to sue in federal court if it is unable to secure an acceptable conciliation agreement from an employer, on the basis of either a private charge of discrimination or on a charge filed by the EEOC commissioner.<sup>53</sup>

---

47. *Id.* § 2000e(j); see Joel P. Kelly & Theodora R. Lee, *What Employment Counsel Need to Know After September 11, 2001*, in *Advanced Corporate Compliance Workshop 2002*, 987, 1041-42 (PLI Corp. Corporate Law & Practice Course, Handbook Series No. B0-019S, 2002), WL 1291 PLI/Corp 987 (“Examples of ‘religious beliefs’ held to be protected under Title VII include: (1) ‘Old Catholic’ belief employee had to keep her head covered at all times; (2) wearing of an anti-abortion button with a picture of a fetus; (3) a Jehovah’s Witness’ refusal to work on military tanks; and (4) the refusal to take unpaid leave for a religious observance.”).

48. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, 1965 – 1971: A “TOOTHLESS TIGER” HELPS SHAPE THE LAW AND EDUCATE THE PUBLIC, <http://www.eeoc.gov/abouteeoc/35th/1965-71/index.html> (last visited Nov. 11, 2006).

49. *Id.*

50. *Id.*

51. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, THE 1970S: THE “TOOTHLESS TIGER” GETS ITS TEETH – A NEW ERA OF ENFORCEMENT, <http://www.eeoc.gov/abouteeoc/35th/1970s/index.html> (last visited Nov. 11, 2006).

52. See H.R. REP. NO. 92-238, 1 (1971), as reprinted in 1972 U.S.C.C.A.N. 2137, 2137.

53. See 42 U.S.C. § 2000e-5(b), (f) (2000) (“If the Commission determines after . . . investigation that there is reasonable cause to believe that [a] charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. . . . If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.”).

## 1. Claims Based on Religious Discrimination

Since its implementation, the history of Title VII of the Civil Rights Act of 1964 has involved much uncertainty. For example, Congress initially failed to specify the scope of the duty imposed by Title VII.<sup>54</sup> Another example was the lack of guidance as to whether “employer[s] had an affirmative duty to accommodate employee religious practices.”<sup>55</sup> In an effort to rectify these problems, the EEOC issued an amended guideline stating that, under the 1964 Act, employers had an affirmative duty “to accommodate the religious needs of their employees when accommodation could be achieved without working an undue hardship on their business.”<sup>56</sup> Because EEOC guidelines are merely persuasive authority,<sup>57</sup> some courts did not adopt the EEOC’s view and held instead that an employer did not in fact have an affirmative duty but only had to refrain from actions “that were discriminatory in purpose.”<sup>58</sup>

These conflicting interpretations led Congress to amend Title VII to state: “[t]he term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”<sup>59</sup> In amending Title VII, Congress left open to judicial interpretation what the notions “religion,” “reasonably accommodate,” and “undue burden” encompass.<sup>60</sup>

---

54. Peter Zablotsky, *After the Fall: The Employer’s Duty to Accommodate Employee Religious Practices Under Title VII After Ansonia Board of Education v. Philbrook*, 50 U. PITT. L. REV. 513, 514 (1989).

55. *Id.*

56. *Id.*

57. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) (noting that the EEOC does not have Congressional authority to promulgate rules and regulations, and that EEOC guidelines are not entitled to great weight where they conflict with prior EEOC policy); *see also* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 381-82 (1969) (stating that where “Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation,” the guideline is entitled to some deference).

58. Zablotsky, *supra* note 54, at 514-15.

59. 42 U.S.C. § 2000e(j) (2000); Zablotsky, *supra* note 54, at 515 (“In effect, the definition of religious discrimination as contained in the amendment made it an unlawful employment practice under section 703(a)(1) of Title VII for an employer not to reasonably accommodate, in the absence of undue hardship to the employer’s business, the religious practices of his employees.”).

60. *See* Zablotsky, *supra* note 54, at 516-17.



## a. "Religion"

Congress's circular definition of religion<sup>61</sup> has led to the need for judicial and administrative interpretation. In *United States v. Seeger*, the Supreme Court established a new test for defining "religion" in the Selective Service context: "the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."<sup>62</sup> The Court further stated that although the test applied is an objective one, the "validity of what [the claimant] believes cannot be questioned."<sup>63</sup> The Court left to the lower courts the task of deciding "whether the beliefs professed by a [claimant] are sincerely held and whether they are, in his own scheme of things, religious."<sup>64</sup> This "threshold question of sincerity" must be determined on a case-by-case basis.<sup>65</sup>

In a later decision, *Welsh v. United States*, the Supreme Court interpreted the definition of "religion" in the Selective Service context once again.<sup>66</sup> *Welsh*, like *Seeger*, sought exemption from the Selective Service based on the conscientious objector exemption.<sup>67</sup> The Court found the plaintiff to be "religious" regardless of the fact that he did not characterize himself as such.<sup>68</sup> Although the plaintiff's strong objection to war was based on his perception of world politics, the Court nonetheless found that he was in fact religious so long as his beliefs were found to "stem from [his] moral, ethical or religious beliefs about what is right and wrong and that these beliefs [were] held with the strength of traditional religious convictions."<sup>69</sup>

The circular definition of religion under Title VII has also led the EEOC to define religious practices to include "moral or ethical beliefs as to what is right and wrong which are sincerely

---

61. See Donna D. Page, Comment, *Veganism and Sincerely Held 'Religious' Beliefs in the Workplace: No Protection without Definition*, 7 U. PA. J. LAB. & EMP. L. 363, 369 (2005) (stating that Congress's "broad definition [of 'religion'] is fundamentally flawed because it uses the word 'religious' to define 'religion'").

62. 380 U.S. 163, 165-66 (1965).

63. *Id.* at 184.

64. *Id.* at 185.

65. *Id.*

66. See 398 U.S. 333, 335 (1970).

67. *Id.* at 335-36.

68. *Id.* at 337.

69. *Id.* at 340-41.

held with the strength of traditional religious views.”<sup>70</sup> The standard formulated by the EEOC takes into account the Supreme Court’s interpretations of religion in both *Seeger* and *Welsh*.<sup>71</sup> Under the EEOC’s definition, “[t]he fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.”<sup>72</sup> Although the EEOC’s definition seems broad, it nevertheless excludes certain beliefs such as those based exclusively on “political, economic, or social ideology.”<sup>73</sup>

b. “Reasonable Accommodation” and “Undue Hardship”

In the seminal case *Trans World Airlines v. Hardison*, the plaintiff-employee claimed his employer (TWA) and its affiliated union had religiously discriminated against him in violation of Title VII by not allowing him Saturdays off to observe his Sabbath.<sup>74</sup> Hardison was subject to a collective-bargaining agreement between TWA and the union, whereby the most senior employees were allowed first choice for job and shift assignments.<sup>75</sup> When Hardison was not allowed Saturdays off to observe his Sabbath because he lacked sufficient seniority status, the union refused to violate the collective-bargaining agreement to make an exception for him.<sup>76</sup> TWA discharged Hardison after rejecting his proposal that he only work four days of the week in order to allow him to observe his Sabbath.<sup>77</sup>

The Supreme Court reasoned that TWA could not use the agreed-upon seniority system or bargaining agreement to bypass Title VII, but neither was TWA required to violate valid

---

70. 29 C.F.R. § 1605.1 (2006); see also Page, *supra* note 61, at 383 (quoting 29 C.F.R. § 1605.1).

71. Page, *supra* note 61, at 383.

72. 29 C.F.R. § 1605.1; see also Page, *supra* note 61, at 383 (quoting 29 C.F.R. § 1605.1).

73. Page, *supra* note 61, at 385.

74. 432 U.S. 63, 69 (1977). Plaintiff’s claim against his employer for religious discrimination was partially based on an alleged violation of the “1967 EEOC guidelines requiring employers ‘to make reasonable accommodations to the religious needs of employees’ whenever such accommodation would not work an ‘undue hardship . . . .’” *Id.* (quoting 29 CFR § 1605.1 (1968)).

75. *Id.* at 67.

76. *Id.* at 68.

77. *Id.* at 68-69.

agreements to accommodate religious observances.<sup>78</sup> “It would be anomalous to conclude that by ‘reasonable accommodation’ Congress meant that an employer must deny the shift and job preferences of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others . . . .”<sup>79</sup> The Court held that TWA’s seniority system, which included weekend work requirements as set out in the collective bargaining agreement, represented a sufficient accommodation for the religious needs of all of employees.<sup>80</sup>

The Court also held that requiring an employer to bear more than a “de minimis” cost in order to accommodate employees’ religious needs created an undue hardship.<sup>81</sup> Undue hardship exists when any financial loss is involved, regardless of whether it is a direct or indirect financial cost.<sup>82</sup> Courts now interpret the de minimis cost standard as a per se approach,<sup>83</sup> thus giving rise to a potential requirement of employers that any religious accommodation sought by an employee must be cost-free.

The Court’s de minimis cost standard benefits employers by providing a viable defense against any backlash religious discrimination claim. If the employer can point to any additional costs related to the accommodation, be it a direct financial cost (such as the loss in production due to the employee’s absence), or an indirect cost (such as the employee’s absence causing a lower work morale among other employees),<sup>84</sup> then an employer has a strong argument that the requested religious accommodation posed an undue hardship, thus relieving the employer of any liability.

Another seminal case involving a religious discrimination claim pursuant to Title VII is *Ansonia Board of Education v. Philbrook*.<sup>85</sup> The Supreme Court held that “where the employer

78. *Id.* at 79 (“Collective bargaining . . . lies at the core of our national labor policy, and seniority provisions are universally included in these contracts”).

79. *Id.* at 81.

80. *Id.* (discussing the extent of the employer’s obligation under Title VII to accommodate an employee’s religious observances).

81. *Id.* at 84 (“[T]o require [an employer] to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion”).

82. See Zablotsky, *supra* note 54, at 544-45.

83. *Id.* at 547.

84. *Id.* at 544-45.

85. 479 U.S. 60 (1986). Philbrook belonged to the Worldwide Church of God and requested to miss six days of work each year for religious observance purposes; however, a collective bargaining agreement between the school board and teacher’s federation only allowed accommodation for three days “for observance of mandatory religious holidays.”

has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship."<sup>86</sup> The Court reasoned that nothing existed in the statutory language of Title VII or in its legislative history that would "requir[e] an employer to choose any particular reasonable accommodation."<sup>87</sup> "By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation."<sup>88</sup>

Since these seminal cases, several courts of appeal have held that in order to establish a *prima facie* case of discrimination based on religious accommodation theory, a plaintiff must show "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; [and] (3) he or she was disciplined for failure to comply with the conflicting employment requirement."<sup>89</sup> After a *prima facie* case has been established, the burden shifts to the defendant employer to prove that any reasonable accommodation for the plaintiff's religious needs would result in undue hardship on the employer.<sup>90</sup> These burden of proof shifts mirror those applied in Title VII race and gender discrimination suits.<sup>91</sup>

Once the plaintiff's *prima facie* case is established as previously discussed, the employer may pull from its arsenal the "de minimis cost" defense.<sup>92</sup> The employer need only point to any additional cost borne as a result of the accommodation to relieve itself of any liability.<sup>93</sup> In the post-9/11 world, an analysis of each and every ramification which a religious accommodation request may have on a business should be one of the employer's top priorities in attempting to avoid any litigation stemming from a religious discrimination claim.

---

*Id.* at 64-65.

86. *Id.* at 68.

87. *Id.*

88. *Id.* ("The employer violates the statute unless it 'demonstrates that [it] is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business.") (quoting 42 U.S.C. § 2000e(j)).

89. *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 133 (3d Cir. 1986) (quoting *Turpen v. Mo.-Kan.-Tex. R.R.*, 736 F.2d 1022, 1026 (5th Cir. 1984)).

90. *Id.* at 134.

91. *Id.* at 133.

92. *See, e.g., id.* (quoting and reviewing the facts of *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)).

93. *See, e.g., id.* (quoting the Supreme Court in *Trans World Airlines*, 432 U.S. at 84 as stating that TWA's accommodation alternatives "would involve costs to TWA either in the form of lost efficiency in other jobs or higher wages.").

## 2. Claims Based on Hostile Work Environment

In *Harris v. Forklift Systems, Inc.*, the Supreme Court reaffirmed the standard that Title VII prohibits discrimination

against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . . [T]his language is not limited to 'economic' or 'tangible' discrimination. . . . [but] evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment.<sup>94</sup>

Specifically, an employer violates Title VII "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"<sup>95</sup> However, the "'mere utterance of an . . . epithet which engenders offensive feelings in a [sic] employee' does not sufficiently affect the conditions of employment to implicate Title VII."<sup>96</sup>

For a violation of Title VII to occur, the victim must "subjectively perceive the environment to be abusive" and the conduct must be deemed to have sufficiently "altered the conditions of the victim's employment."<sup>97</sup> It is not necessary that the victim suffer psychological injury to recover under Title VII.<sup>98</sup> Moreover, "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all of the circumstances."<sup>99</sup>

In 1993, prior to the Supreme Court's decision in *Harris*, the EEOC proposed rules in an attempt to provide employers with

---

94. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (internal citations and punctuation omitted).

95. *Id.* (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 67 (1986)).

96. *Id.* (internal citation and punctuation omitted) (quoting *Meritor Sav. Bank*, 477 U.S. at 67).

97. *Id.* at 21-22.

98. *See id.* at 22 (explaining that a plaintiff may have a Title VII cause of action without having experienced a nervous breakdown caused by the harassment).

99. *Id.* at 23. The circumstances that may be included in this determination are: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* In addition, the conduct need not "seriously affect psychological well-being." *See id.* The Court further noted that while all of these factors "may be taken into account, no single factor is required." *Id.*

guidance on what conduct constituted race, color, religion, gender, age, or disability harassment under Title VII.<sup>100</sup> The EEOC reemphasized that “an employer has a duty to maintain a working environment free of harassment based on race, color, religion, . . . [and] national origin, . . . and that the duty requires positive action where necessary to eliminate such practices or remedy their effects.”<sup>101</sup> The proposed rules also set forth the criteria to be used in determining whether an action violates the law.<sup>102</sup> Harassment based either on an individual’s race or religion or on the race or religion of the individual’s friends, relatives, or associates is actionable.<sup>103</sup> Thus, employers must beware not only of post-9/11 backlash discrimination claims that may be brought by employees who are of Muslim or Arab descent, but they must also be cautious of backlash discrimination claims that may be brought by any employee, regardless of his race or religion, who feels harassed based on his spouse’s or friend’s religion or national origin.

Examples of harassing conduct set forth by the EEOC include “[e]pithets, slurs, negative stereotyping, or threatening, intimidating, or hostile acts, that relate to race, color, religion, . . . [or] national origin, . . . includ[ing] acts that purport to be ‘jokes’ or ‘pranks.’”<sup>104</sup> The EEOC’s standard for determining whether the alleged harassing conduct does in fact alter the conditions of employment while creating a hostile work environment is “whether a reasonable person in the same or similar circumstances would find the challenged conduct intimidating, hostile, or abusive.”<sup>105</sup>

The EEOC’s proposed rules also provided that employees

---

100. See generally Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Sex, Age, or Disability, 58 Fed. Reg. 51,266 (proposed Oct. 1, 1993) (to be codified at 29 C.F.R. pt. 1609).

101. *Id.* at 51,266.

102. *Id.* at 51,267 (listing the criteria as follows: “that the conduct: (i) [h]as the purpose or effect of creating an intimidating, hostile, or offensive work environment; (ii) has the purpose or effect of unreasonably interfering with an individual’s work performance; or (iii) otherwise adversely affects an individual’s employment opportunities.”).

103. *Id.*

104. *Id.* at 51,269. Other examples listed include “[w]ritten or graphic material that denigrates or shows hostility or aversion toward an individual or group because of race, color, religion . . . [or] national origin . . . and that is placed on walls, bulletin boards, or elsewhere on the employer’s premises, or circulated in the workplace.” *Id.*

105. *Id.* at 51,267. When determining if the conduct constitutes a form of illegal harassment, the EEOC will take into account the perspective of those individuals of the same race, color, or religion of the plaintiff. *Id.* The EEOC will also, on a case-by-case basis, review the “record as a whole and the totality of the circumstances, including the nature of the conduct and the context in which it occurs.” *Id.* at 51,268.

have standing to bring a cause of action under Title VII even when the harassment is targeted specifically at another person: “an employer is responsible for acts of harassment in the workplace by an individual’s co-workers where the employer, its agents, or supervisory employees knew or should have known of the conduct, unless the employer can show that it took immediate and appropriate corrective action.”<sup>106</sup>

In November 1993, following the Supreme Court’s decision in *Harris*, the EEOC released a notice entitled “Enforcement Guidance on *Harris v. Forklift Systems, Inc.*”<sup>107</sup> The EEOC found that the Court’s unanimous decision in *Harris* was “consistent with existing [EEOC] policy on hostile environment harassment,” and thus the EEOC would not alter its investigation procedure pertaining to hostile environment harassment claims.<sup>108</sup>

The EEOC reiterated the procedural steps to be taken when conducting investigations relating to hostile environment harassment claims, consistent with its earlier designations and Supreme Court jurisprudence, directing harassment claims investigators to continue to consider the: (1) totality of the circumstances;<sup>109</sup> (2) perspective of a reasonable person in the same or similar circumstances;<sup>110</sup> and (3) perspective of the charging party.<sup>111</sup>

### C. *The Effects of the Civil Rights Act of 1991*

Many employers feared the enactment of the Civil Rights Act of 1991 (the “1991 Act”), specifically because of its potentially detrimental effect on the business sector.<sup>112</sup> The sudden influx in

106. *Id.* at 51,268.

107. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, NOTICE 915.002: ENFORCEMENT GUIDANCE ON HARRIS V. FORKLIFT SYS., INC. (1998), available at <http://www.eeoc.gov/policy/docs/harris.html> (last modified June 21, 1999).

108. *Id.* (acknowledging the Supreme Court’s holding in *Harris* that a violation of Title VII can be found without taking into account any psychological harm experienced by the plaintiff).

109. *Id.* (directing investigators to “[e]xamine, among other things, the nature of the conduct (i.e. whether it was verbal or physical), the context in which the alleged incident(s) occurred, the frequency of the conduct, its severity and pervasiveness, whether it was physically threatening or humiliating, whether it was unwelcome, and whether it unreasonably interfered with [the] employee’s work performance.”).

110. *Id.* (directing investigators to consider whether said reasonable person “would find the challenged conduct sufficiently severe or pervasive to create an intimidating, hostile or abusive work environment.”).

111. *Id.* (directing investigators to consider whether the charging party perceived the environment to be hostile or abusive, i.e., whether the conduct was unwelcome.”).

112. See Douglas M. Staudmeister, Comment, *Grasping the Intangible: A Guide to Assessing Nonpecuniary Damages in the EEOC Administrative Process*, 46 AM. U. L. REV. 189, 200 (1996).

discrimination complaints filed with the EEOC following the passage of the 1991 Act only served to assure employers that their dread of potential expanded liability costs was indeed well-founded.<sup>113</sup> The 1991 Act amended five statutes, including Title VII of the Civil Rights Act of 1964 (Title VII) and the Civil Rights Act of 1866 (42 U.S.C. § 1981).<sup>114</sup> Through the new legislation, Congress intended "to amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes."<sup>115</sup> The new amendments made compensatory and punitive damages available for intentional violations of Title VII, subject to certain limitations,<sup>116</sup> including a recoverable compensatory damage cap determined by the size of the employer.<sup>117</sup>

Another change to Title VII after the enactment of the 1991 Act affected the procedure of resolving claims.<sup>118</sup> After the amendments, in order for either party to gain entitlement to a jury trial, the plaintiff must seek compensatory or punitive damages.<sup>119</sup> Both changes (pertaining to jury trials and the enhanced remedies) are only triggered when the complainant cannot recover under 42 U.S.C. § 1981.<sup>120</sup> Although victims of discrimination in the workplace based on religion or national origin may not be able to find recourse under § 1981, they are able to take advantage of the 1991 Act's amendments.<sup>121</sup>

42 U.S.C. § 1981 provides:

---

113. *Id.* ("Title VII's equitable remedies reflected Congress'[s] intention to combat discrimination by encouraging fair employment policies based on individual qualifications rather than on the threat of punishment. . . . [while] the 1991 Act shift[ed] the emphasis of Title VII from conciliation with equitable remedies to litigation with tort-like damage awards.").

114. Donald R. Livingston, *The Civil Rights Act of 1991 and EEOC Enforcement*, 23 STETSON L. REV. 53, 54 (1993). The 1991 Act also amended the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, and the Civil Rights Attorney's Awards Act of 1976. *Id.*

115. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1071.

116. Livingston, *supra* note 114, at 58-59.

117. See 42 U.S.C. § 1981a(b)(3) (2000); Livingston, *supra* note 114, at 59-60 ("For employers with more than 500 employees . . . the enhanced damages 'for each complaining party' may total \$300,000; for employers with more than 200 but fewer than 501 employees, the cap is \$200,000; for those with more than 100 but fewer than 201 employees, the cap is \$100,000; and, for those with more than 14 but fewer than 101 employees, the cap is \$50,000.").

118. See *id.* at 60 (indicating a plaintiff suing under Title VII was not entitled to a jury trial until the 1991 Act was enacted).

119. *Id.*

120. *Id.* at 61.

121. See *id.* at 62; see also discussion *infra* Part III.B.1.



All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .<sup>122</sup>

The Supreme Court has interpreted § 1981 to forbid all racial discrimination in the making of private contracts.<sup>123</sup>

The Civil Rights Act of 1991 amended 42 U.S.C. § 1981 to clarify that “the term ‘make and enforce contracts’ includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”<sup>124</sup> It further expanded § 1981 to apply to both private and public contracts, thus increasing the scope of an employer’s potential liability for claims brought against it by alleged victims of discrimination.<sup>125</sup>

### III. A COMPARATIVE ANALYSIS OF EMPLOYMENT DISCRIMINATION CLAIMS

Title VII provides a vehicle for redress to employees discriminated on the basis of race, color, religion, sex, or national origin.<sup>126</sup> To be subject to liability under Title VII, an employer must have fifteen or more employees.<sup>127</sup> Employers having fewer than fifteen employees do not evade liability for discriminatory practices, but instead are subject to state and local fair employment practices (FEP) statutes.<sup>128</sup> Although federal legislation provides a basis for state legislatures in creating FEP statutes, such statutes differ by extending protection to higher numbers of employment discrimination victims than federal

---

122. 42 U.S.C. § 1981(a) (2000).

123. See *Runyon v. McCrary*, 427 U.S. 160, 168-70 (1976) (discussing previous and well-established jurisprudence reflecting the same interpretation).

124. Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1072 (codified as amended at 42 U.S.C. § 1981(b) (1991)).

125. See *id.* § 3, 105 Stat. at 1071 (indicating that another purpose for the 1991 Act was “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.”).

126. 42 U.S.C. § 2000e-2(a) (2000).

127. *Id.* § 2000e(b).

128. See Page, *supra* note 61, at 369-70 (noting that half of the states had already enacted FEP statutes prior to enactment of Title VII, and that a business with only one employee may even be subject to such statutes, depending upon the state).

legislation.<sup>129</sup> This produces different results in determining an employer's potential liability.

Under Title VII § 706(c), the charging party must begin his quest for relief from the alleged act of discrimination by filing a charge with a state or local agency that is authorized to grant or seek relief with respect to a discriminatory employment practice, if such agency exists.<sup>130</sup> The Supreme Court has held that although Title VII prohibits filing a charge with the EEOC prior to such charge being filed with the complainant's respective state or local agency, the EEOC may still "hold a complaint in 'suspended animation' [and] automatically fil[e] it upon termination of the state proceedings," without the need for any further action on the part of the complainant.<sup>131</sup>

Shortly after the 9/11 attacks, the EEOC released a statement warning employers of their vulnerability to religious, racial, and national origin discrimination claims and "encourage[d] all employers to do the following: [1] [r]eiterate policies against harassment based on religion, ethnicity, and national origin; [2] [c]ommunicate procedures for addressing workplace discrimination and harassment; [3] [u]rge employees to report any such improper conduct; and [4] [p]rovide training and counseling, as appropriate."<sup>132</sup> Unfortunately, many employers did not heed the EEOC's warnings, as evidenced by the dramatic increase in post-9/11 backlash discrimination claims filed with the EEOC.<sup>133</sup>

### A. *Claims Filed Based on Religious Discrimination*

Although the number of religious discrimination claims filed

129. *Id.* at 370 (stating that "FEP laws provide protection on a much broader scale" and may even extend protection to victims of sexual orientation discrimination—far beyond the limited scope of Title VII's protection against discrimination).

130. 42 U.S.C. § 2000e-5(d).

131. *See Love v. Pullman Co.*, 404 U.S. 522, 525-26 (1972) (stating that the Court's decision "complie[d] with the purpose both of [§] 760(b), to give state agencies a prior opportunity to consider discrimination complaints, and of [§] 706(d), to ensure expedition in the filing and handling of those complaints.").

132. EEOC Press Release, *supra* note 20. EEOC Chair Cari Dominguez stated:

We should not allow our anger at the terrorists responsible for this week's heinous attacks to be misdirected against innocent individuals because of their religion . . . or country of origin . . . In the midst of this tragedy, employers should take time to be alert to instances of harassment or intimidation against Arab-American and Muslim employees. Preventing and prohibiting injustices against our fellow workers is one way to fight back, if only symbolically, against the evil forces that assaulted our workplaces [on Sept. 11].

*Id.*

133. *See* EEOC Q&A ABOUT WORKPLACE RIGHTS, *supra* note 1.

with the EEOC have increased since the 9/11 attacks,<sup>134</sup> this class of claims remains comparatively lower than other employment discrimination claims. In 1992, the number of religious discrimination claims filed with the EEOC reached 1,388.<sup>135</sup> During the same year, 29,548 race-based,<sup>136</sup> 21,796 sex-based,<sup>137</sup> 19,573 age-based,<sup>138</sup> and 7,434 national origin-based claims of discrimination in the workplace were filed with the EEOC.<sup>139</sup> In the post-9/11 world in 2002, the number of religion-based discrimination claims filed reached 2,572.<sup>140</sup> During the same year, 29,910 race-based,<sup>141</sup> 25,536 sex-based,<sup>142</sup> 19,921 age-based,<sup>143</sup> and 9,046 national origin-based discrimination claims were filed.<sup>144</sup>

Notwithstanding the fact that religion-based discrimination is the least complained of in comparison to the other classes afforded protection under Title VII, the EEOC has consistently been able to obtain millions of dollars from employers for religion-based discrimination claims.<sup>145</sup> In 1992, the EEOC received \$1.4 million in monetary benefits through settlements and conciliations with employers who discriminated against employees based on religion.<sup>146</sup>

In 2001, the amount of monetary benefits obtained increased to \$14.1 million and has since remained well above \$4 million per year.<sup>147</sup> Thus, according to these statistics, the amount of monetary benefits obtained in 2001 from religious discrimination claims increased more than 907% from those received in 1992.

134. See EEOC RELIGION-BASED CHARGES, *supra* note 25.

135. *Id.*

136. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, RACE-BASED CHARGES: FY 1992 – FY 2005, <http://www.eeoc.gov/stats/race.html> (last modified Jan. 27, 2006) [hereinafter EEOC RACE-BASED CHARGES].

137. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, SEX-BASED CHARGES: FY 1992 – FY 2005, <http://www.eeoc.gov/stats/sex.html> (last modified Jan. 27, 2006) [hereinafter EEOC SEX-BASED CHARGES].

138. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) CHARGES: FY 1992 – FY 2005, <http://www.eeoc.gov/stats/adea.html> (last modified Jan. 27, 2006) [hereinafter EEOC AGE-BASED CHARGES].

139. EEOC ORIGIN-BASED CHARGES, *supra* note 29.

140. EEOC RELIGION-BASED CHARGES, *supra* note 25.

141. EEOC RACE-BASED CHARGES, *supra* note 136.

142. EEOC SEX-BASED CHARGES, *supra* note 137.

143. EEOC AGE-BASED CHARGES, *supra* note 138.

144. EEOC ORIGIN-BASED CHARGES, *supra* note 29.

145. EEOC RELIGION-BASED CHARGES, *supra* note 25.

146. *Id.* (specifying that this amount does not include monetary benefits obtained through litigation).

147. *Id.*

When compared to the other types of classes protected by Title VII, the amount recovered under religious discrimination claims is relatively small.<sup>148</sup> However, the claims filed after September 11, 2001 by victims alleging religious discrimination in the workplace have cost businesses hundreds of thousands of dollars.<sup>149</sup>

For example, in 2003 Herrick Corporation was forced to settle a claim of religious discrimination in the workplace to avoid the risk and costs of continuing litigation.<sup>150</sup> The four Pakistani-born victims claimed “they were abused by co-workers at a California steel plant who ridiculed their turbans and daily Muslim prayers and called them derogatory names.”<sup>151</sup> After “vigorously” denying the claims and calling them “concocted,” the corporation settled the lawsuit for \$1.1 million.<sup>152</sup>

Similarly, in 2002 Motorola was faced with a religious discrimination lawsuit filed by the EEOC on behalf of two Muslim workers.<sup>153</sup> The EEOC alleged Motorola had failed to reasonably accommodate the two complainants after they requested leave to attend prayer services.<sup>154</sup> It further alleged Motorola fired the two Muslim workers after they left work to attend the services anyway.<sup>155</sup> Motorola chose to enter a consent decree in U.S. district court to end the lawsuit, under which it agreed to pay both Muslim workers \$60,000.<sup>156</sup>

### B. *Claims Filed Based on National Origin*

Following the 9/11 attacks, the backlash discrimination claims filed with the EEOC dramatically increased in volume, with complainants most commonly alleging harassment and discharge based on national origin and religion.<sup>157</sup> In the years

148. See EEOC RELIGION-BASED CHARGES, *supra* note 25; EEOC ORIGIN-BASED CHARGES, *supra* note 29; EEOC RACE-BASED CHARGES, *supra* note 136; EEOC SEX-BASED CHARGES, *supra* note 137; EEOC AGE-BASED CHARGES, *supra* note 138.

149. See EEOC RELIGION-BASED CHARGES, *supra* note 25.

150. Kirstin Downey, *Muslim Men Settle Suit over Workplace Abuse; 4 Said Other Employees Ridiculed Them*, WASH. POST, Mar. 20, 2003, at E02 (quoting a spokesman for the corporation: “[w]e believe none of these claims are true’ . . . ‘We believe we got caught up in an inappropriate government-and-lawyer crusade.’”).

151. *Id.*

152. *Id.*

153. *EEOC Suit Settled*, CHI. TRIB., Jan. 11, 2002, at N2.

154. *Id.*

155. *Id.*

156. *Id.*

157. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, QUESTIONS AND ANSWERS ABOUT EMPLOYER RESPONSIBILITIES CONCERNING THE EMPLOYMENT OF MUSLIMS, ARABS, SOUTH ASIANS, AND SIKHS, <http://www.eeoc.gov/facts/backlash-employer.html> (last

preceding the terrorist attacks, the number of claims filed with the EEOC based on national origin never rose above 7,800.<sup>158</sup> However, in each year since the number of national origin discrimination claims has been well above 8,000.<sup>159</sup>

Although the significance cannot be readily seen by reviewing the number of claims filed,<sup>160</sup> employers have been dramatically impacted by the increase in national origin discrimination claims.<sup>161</sup> For instance, the most monetary benefits received in a single year by the EEOC prior to the attacks was \$19.7 million in 1999, when 7,108 national origin claims were filed.<sup>162</sup> In comparison, the EEOC obtained over \$48 million in monetary benefits in 2001 alone, when only 8,025 claims were filed.<sup>163</sup> The amount of monetary benefits received per year post-9/11 continues to exceed previous amounts obtained per year prior to the attacks, with the exception of 2005 which was slightly lower than 1999.<sup>164</sup>

### 1. Recovery Under § 1981 for National Origin Discrimination

The Supreme Court has interpreted “national origin” as used in Title VII to refer to the “country where a person was born, or, more broadly, the country from which his or her ancestors came.”<sup>165</sup> In *Saint Francis College v. Al-Khazraji*, the Supreme Court held that persons of Arabian ancestry may be protected

---

modified Mar. 21, 2005) [hereinafter EEOC Q&A ABOUT EMPLOYER RESPONSIBILITIES].

158. EEOC ORIGIN-BASED CHARGES, *supra* note 29.

159. *Id.* Note that in 2002, the number of national origin claims filed exceeded 9,000.

160. *See id.* The increase in claims filed based on national origin relative to the total number of such claims seems minor compared to the increase in claims filed based on religious discrimination relative to the total number of those claims. *Compare id. with* EEOC RELIGION-BASED CHARGES, *supra* note 25.

161. *See generally* EEOC ORIGIN-BASED CHARGES, *supra* note 29 (showing a sharp increase in claims and monetary benefits after 2001 and remaining steadily higher than in the years prior to the 9-11 attacks).

162. *Id.* (noting that these monetary benefit figures do not include any monetary benefits obtained through litigation).

163. *Id.*

164. *Id.* Note that in 2002, 9,046 claims were filed based on national origin discrimination and the EEOC obtained \$21 million. *Id.* In 2003, 8,450 claims were filed and \$21.3 million was obtained. *Id.* In 2004, 8,361 claims were filed and \$22.3 million was obtained. *Id.* In 2005, 8,035 claims were filed and \$19.4 million was obtained. *Id.* Compare these figures to those from a decade earlier: in 1992, 7,434 claims were filed with only \$9.7 million obtained; in 1993, 7,454 claims were filed with only \$8.8 million obtained; in 1994, 7,414 claims were filed with only \$15.5 million obtained; with in 1995, 7,035 claims were filed with only \$10.5 million obtained. *Id.*

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

from racial discrimination under 42 U.S.C. § 1981.<sup>166</sup> Al-Khazraji, a U.S. citizen born in Iraq, was a professor who brought a discrimination action against his former employer university and its tenure committee, alleging he had been denied tenure due to his Arab race and Muslim religion in violation of § 1981.<sup>167</sup> The district court “construed the pleadings as asserting only discrimination on the basis of national origin and religion, which § 1981 did not cover.”<sup>168</sup> The district court further held that claims of employment discrimination based on Arabian ancestry were not covered under § 1981.<sup>169</sup>

The Supreme Court disagreed with the district court; relying on the legislative history of § 1981, the Court stated that the congressional intent of the statute was 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.”<sup>170</sup>

At issue in the case was the widespread concept that there are three major human races—Caucasian, Mongoloid, and Negroid<sup>171</sup>—and the possibility that the Caucasian race now encompasses Arabs.<sup>172</sup> The petitioners argued that Al-Khazraji had no recourse under § 1981 as a Caucasian because that section does not extend to “claims of discrimination by one Caucasian against another.”<sup>173</sup> The Court reasoned that plaintiffs can bring discrimination claims under § 1981 based on Arab ancestry because all those who “might be deemed Caucasian today were not thought to be of the same race at the time § 1981 became law.”<sup>174</sup> After *Saint Francis College*, in order to have a § 1981 claim, a plaintiff need only prove that discriminatory actions were taken against him because he was born an Arab.<sup>175</sup>

Some courts have interpreted the Supreme Court’s *Saint Francis College* decision as holding that § 1981 protects

---

166. 481 U.S. 604, 613 (1987).

167. *Id.* at 606.

168. *Id.*

169. *Id.*

170. *Id.* at 613.

171. *Id.* at 610 n.4.

172. *Id.* at 610.

173. *Id.* at 609-10.

174. *Id.* at 610.

175. *Id.* at 613.

employees from discrimination based on national origin as well as race.<sup>176</sup> Courts falling into this category reason that the congressional intent of the statute was to afford protection to “all persons,” thus extending protection broadly.<sup>177</sup> Another rationale is that “the line between national origin and race is so thin as to preclude any reasonable basis upon which a proper determination could be made.”<sup>178</sup>

However, there are many courts which hold that § 1981 only protects against racial discrimination and does not extend to discrimination based on national origin.<sup>179</sup> Such courts hold that a claim based on discrimination against a person for being Hispanic<sup>180</sup> or Slavic<sup>181</sup> is not a cognizable cause of action under § 1981. Nevertheless, the Supreme Court has declared that a cause of action potentially exists under § 1981 for discrimination based on being Arab.<sup>182</sup>

According to the EEOC:

National origin discrimination means treating someone less favorably because he or she comes from a particular place, because of his or her ethnicity or accent, or because it is believed that he or she has a particular ethnic background. [It] also means treating someone less favorably at work because of marriage or other association with

---

176. See e.g., *Local 749 v. Ment*, 945 F. Supp. 30, 35 (D. Conn. 1996) (granting defendant's motion to dismiss because plaintiff did not allege discrimination based on race or national origin in violation of § 1981); see also *Alizadeh v. Safeway Stores, Inc.*, 802 F.2d 111, 114 (5th Cir. 1986) (holding that a spouse could state a claim under § 1981 for the discrimination she faced due to her marriage to a person of Iranian descent).

177. See *Malik v. Combustion Eng'g, Inc.*, 647 F. Supp. 113, 115 (D. Conn. 1986).

178. *Id.* at 116.

179. See e.g., *Von Zuckerstein v. Argonne Nat'l Lab.*, 984 F.2d 1467, 1472 (7th Cir. 1993) (holding that § 1981 only protects against discrimination based on race or ethnicity, and therefore the employees' claims that they were discriminated against because they were foreign-born were not cognizable under the statute); *Rawlins-Roa v. United Way of Wyandotte County, Inc.*, 977 F. Supp. 1101, 1106 (D. Kan. 1997) (“[T]o prove racial discrimination within the meaning of [§] 1981, a plaintiff must prove that she was discriminated against on the basis of her ancestry or ethnic characteristics and not solely on the place or nation of her origin.”).

180. See *Martinez v. Hazelton Research Animals, Inc.*, 430 F. Supp. 186, 187-88 (D. Md. 1977) (holding plaintiff's claim that he was discriminated against because he was Hispanic insufficient to support a claim of racial discrimination under § 1981 because “many people of Hispanic origin cannot be classified as ‘non-whites.’”).

181. See *Budinsky v. Corning Glass Works*, 425 F. Supp. 786, 788-89 (W.D. Pa. 1977) (dismissing plaintiff's case of discrimination based not on race, but solely on his Slavic national origin, for failure to state a cause of action under § 1981, and noting in dicta that discrimination grounded on anything but “race” is not cognizable under § 1981).

182. See *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987); see also *supra* text accompanying notes 171 and 175.

someone of a particular nationality.<sup>183</sup>

The EEOC lists harassment based on national origin as one of the violations covered under Title VII.<sup>184</sup> In an attempt to minimize the frequency of discrimination in the workplace, the EEOC requires that all employers take preventive measures to combat harassment, while also entrusting employees with the responsibility to report any discriminatory behavior.<sup>185</sup>

#### IV. POTENTIAL DOUBLE RECOVERY AGAINST EMPLOYERS

Based on the above discussion, post-9/11 employers are vulnerable to causes of action under both Title VII and 42 U.S.C. § 1981 for claims arising out of backlash discrimination in the workplace based on race or national origin. The inquiry then becomes whether or not an employer can be vulnerable to double recovery based on the same alleged discriminatory actions via these statutes. The remainder of this comment will focus primarily on answering this inquiry in hope of shedding light on the extent of an employer's potential liability for post-9/11 backlash discrimination.

Under Title VII:

If within thirty days after a charge is filed with the Commission . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.<sup>186</sup>

As mentioned above, the Civil Rights Act of 1991 amended Title VII by affording punitive and compensatory damages for victims of intentional discrimination.<sup>187</sup> However, an exclusionary provision of the 1991 Act provides that such enhanced remedies are only available under Title VII if the complaining party cannot recover under § 1981.<sup>188</sup>

The EEOC has construed Title VII as granting it authority

---

183. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, NATIONAL ORIGIN DISCRIMINATION, <http://www.eeoc.gov/origin/index.html> (last modified Aug. 31, 2006).

184. *Id.*

185. *Id.*

186. 42 U.S.C. § 2000e-5(f)(1) (2000).

187. See Livingston, *supra* note 114, at 58.

188. See 42 U.S.C. § 1981a(a)(1) (2000).



to bring a suit against an employer on behalf of a victim of racial discrimination who could have otherwise brought a § 1981 suit privately:<sup>189</sup>

The EEOC reasons that since it has no jurisdiction to sue under [§] 1981, and since it sues as a “complaining party” under Title VII, it is a “complaining party” who cannot recover under [§] 1981, and thus not limited by [§] 1981a’s exclusionary provision. Consequently, the EEOC believes that it is eligible to seek damages under Title VII where it sues in its own right.<sup>190</sup>

It has “vigorously argued that preclusion doctrines do not bar EEOC litigation or recovery of additional monetary relief by the [EEOC] on behalf of an individual.”<sup>191</sup> The agency’s rationale is founded on the notion that it vindicates the broader public interest by enforcing antidiscrimination laws in individual settings.<sup>192</sup> In addition, some courts have held that when the EEOC does not agree to a settlement entered into by the employer and complainant, it is not barred by the doctrine of res judicata from basing its complaints on the same charges of discrimination.<sup>193</sup>

“The Commission’s stance thus permits double recovery for ‘multiple discrimination [e.g., disparate treatment on the grounds of both race and sex] based on the same acts’ where a plaintiff sues under [§] 1981 and Title VII.”<sup>194</sup> Scholars have argued that such interpretation ignores Congress’s “clear intent to permit recovery for multiple discrimination under both statutes only if the plaintiff can demonstrate that each form of discrimination injured him in a different manner.”<sup>195</sup> This

189. See Livingston, *supra* note 114, at 63.

190. *Id.* (footnotes omitted).

191. *Id.* at 95.

192. *Id.* The Supreme Court has agreed. See *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980) (“When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.”). Moreover, the EEOC does not act solely as a proxy for aggrieved individuals, but instead has an interest in determining the legality of employer conduct. *Id.* at 326 n.8 (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977)).

193. See, e.g., *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1361 (6th Cir. 1975) (stating that the EEOC did not enter into previous settlement agreements and was not barred by collateral estoppel or res judicata); *EEOC v. McLean Trucking Co.*, 525 F.2d 1007, 1010-11 (6th Cir. 1975) (refusing to bar the EEOC’s cause of action based on the individual’s previous settlement with his employer and acceptance of an arbitration award).

194. Staudmeister, *supra* note 112, at 221.

195. *Id.*

interpretation leaves open the potential for double recovery for multiple-type discrimination based on national origin and race.

For example, where an Arab employee ("Employee Z") has been subjected to harassment in the workplace by repeatedly being referred to as a "camel jockey" and "local terrorist," and his employer has been notified but fails to take action to rectify the discriminatory practice, Employee Z can file a charge with the EEOC under Title VII claiming hostile work environment based on national origin.<sup>196</sup> Because § 1981 is an "independent remedy and is not confined by the procedural or substantive limitations of Title VII,"<sup>197</sup> Employee Z could also file a cause of action in federal court alleging racial discrimination under § 1981, specifically that he was discriminated against for being Arab.<sup>198</sup> The § 1981 suit could be filed in any federal district court, since the Supreme Court has held that being Arab equates to a race for purposes of § 1981, regardless of whether that jurisdiction allows recovery under § 1981 based on national origin.<sup>199</sup>

If Employee Z prevailed in federal court under § 1981, he could potentially recover punitive and/or compensatory damages against his employer, including but not limited to damages for "emotional distress, pain or suffering, and other non-pecuniary damages . . ."<sup>200</sup> After having already paid Employee Z punitive and/or compensatory damages for the discriminatory practices, the employer could still be subject to another suit brought by the EEOC, even if Employee Z requests dismissal of the charge he filed.<sup>201</sup> In the subsequent suit brought by the EEOC, "the court may order injunctive relief and such remedies as the reinstatement or hiring of employees, back pay, and compensatory and punitive damages."<sup>202</sup>

---

196. EEOC Q&A ABOUT WORKPLACE RIGHTS, *supra* note 1. The EEOC website provides employers with examples of actions taken by employees against fellow coworkers for which the employer may be held liable. *See id.*

197. *Hearn v. R.R. Donnelley & Sons Co.*, 460 F. Supp. 546, 548 (N.D. Ill. 1978).

198. *See Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

199. *See id.*

200. *See Roxanne S. Marenberg, Jury Instructions and Evidence Issues: Damages, in EVIDENCE ISSUES AND JURY INSTRUCTIONS IN EMPLOYMENT CASES 531, 533 (ALI-ABA Continuing Legal Education, Course of Study, 2005), LEXIS SK055 ALI-ABA; see also 42 U.S.C. § 1981a(b)(3) (2000).*

201. *See EEOC v. United Parcel Serv.*, 860 F.2d 372, 374 (10th Cir. 1988) ("[T]he EEOC has standing by itself to challenge a policy that represents ongoing discrimination.")

202. *See EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 455 (6th Cir. 1999); *see also Marenberg, supra* note 200, at 538 ("Appellate courts are split on the issue of whether punitive damages are available under Title VII in the absence of an award of compensatory damages."); *see, e.g., Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 357 (2d Cir. 2001) (affirming, in a Title VII hostile environment claim, an award of the

The potential impact such double recovery could have on employers is evident from judgments rendered in discrimination cases post-9/11. For example, a U.S. district court jury awarded \$1.56 million in damages to a native of Lebanon who brought a race discrimination case against his former employer, Nicolet Biomedical.<sup>203</sup> The plaintiff alleged he was fired because he was Arab and Muslim.<sup>204</sup> Nicolet Biomedical was forced to pay \$160,000 in compensatory damages and \$1.4 million in punitive damages to the employee.<sup>205</sup> This case exemplifies a jury's ability to award an excessive amount of punitive damages against an employer for acts committed against a single employee.<sup>206</sup>

#### A. *True Extent of Liability Under Compensatory Damages Cap*

Although the amendments to Title VII under the 1991 Act include a limitation on the amount of compensatory damages available for recovery, the EEOC has interpreted the damages provision to apply on an individual basis to each complainant involved in a particular suit.<sup>207</sup>

Applying the "Employee Z" example above, the EEOC could potentially bring an action against the employer if, after its investigations, it had reasonable cause to suspect there was ongoing discrimination, and the employer failed to conciliate.<sup>208</sup> The EEOC could also attempt to recover compensatory damages on behalf of the other employees similarly situated to Employee Z.<sup>209</sup> If the employer employed over five hundred employees, ten of whom were of the same race as Employee Z, the EEOC could seek damages up to the statutory maximum of \$300,000 for each

---

statutory maximum of \$100,000 in punitive damages even though the jury failed to award any compensatory or nominal damages); *see also* *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1352 (7th Cir. 1995) ("Nothing in the plain language of [42 U.S.C.] § 1981a conditions an award of punitive damages on an underlying award of compensatory damages."); *but see* *Kerr-Selgas v. Am. Airlines, Inc.*, 69 F.3d 1205, 1215 (1st Cir. 1995) (vacating an award of punitive damages and holding that Title VII precludes punitive damages absent an award of compensatory damages "or a timely request for nominal damages").

203. Judy Newman, *Worker Wins Race Discrimination Case*, WIS. ST. J., June 30, 2005, at C1.

204. *Id.* (stating that the employee was told by his supervisor to take a demotion in light of 9/11, and, after reporting the remarks to the human resources department, he was fired).

205. *See id.*

206. *See id.*

207. Livingston, *supra* note 114, at 69-70.

208. *See* *EEOC v. United Parcel Serv.*, 860 F.2d 372, 374 (10th Cir. 1988) (citing Civil Rights Act of 1964 § 706(f)(1)).

209. *See id.* at 374-75.

of the ten victims, rendering the total potential liability to be up to \$3,000,000.<sup>210</sup>

In addition to adopting compensatory damages provision of the 1991 Act, the EEOC has also recognized several other forms of compensable intangible injuries.<sup>211</sup> For example, the EEOC has awarded nonpecuniary losses for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health,"<sup>212</sup> as well as for "embarrassment, humiliation, loss of consortium, and harm to the complainant's marital and family relationships."<sup>213</sup>

### B. *Potential Recovery Against Employer Post-Settlement*

Several courts have affirmed the EEOC's stance that it is not barred from litigation even where the challenged employment action has already been subjected to a private suit or settlement.<sup>214</sup> When a complainant who filed a charge with the EEOC settles her own claim with the employer, often as a condition of the settlement the individual must withdraw her complaint with the EEOC or request that the EEOC dispense with the suit.<sup>215</sup> The EEOC requires that "[a] charge filed by or on behalf of a person claiming to be aggrieved . . . be withdrawn only by the person claiming to be aggrieved and only with the consent of the Commission."<sup>216</sup> However, the EEOC's authority permits it to proceed to prosecute a Title VII suit on its own initiative if it does not consent to the complainant's withdrawal of the charge.<sup>217</sup>

Courts have held that the EEOC has standing, in itself, to

210. See Livingston, *supra* note 114, at 70.

211. See Staudmeister, *supra* note 112, at 223.

212. *Id.* (quoting Rountree v. Glickman, No. 01941906, 1995 WL 413533, at \*6 (E.E.O.C. Doc. 01941906, July 7, 1995)).

213. *Id.* (citing Carpenter v. Glickman, No. 01945652, 1995 WL 434072, at \*8 (E.E.O.C. Doc. 01945652, July 15, 1995)).

214. See EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1542-43 (9th Cir. 1987) (holding that an employee's settlement with employer did not render moot the EEOC's right of action); EEOC v. McLean Trucking Co., 525 F.2d 1007, 1010 (6th Cir. 1975) (holding that the EEOC could proceed with a suit despite the employee's acceptance of an arbitration award and settlement of a separate action brought by him against the company); see also Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 692 (7th Cir. 1986); Donovan v. Cunningham, 716 F.2d 1455, 1462 (5th Cir. 1983).

215. EEOC v. Walner & Assoc., 91 F.3d 963, 969 (7th Cir. 1996).

216. 29 C.F.R. § 1601.10 (2006).

217. *Cf.* Walner, 91 F.3d 963 at 971 ("We hold that the EEOC's consent to a withdrawal of a charge pursuant to § 1601.10 precludes EEOC from asserting that charge as a basis for a civil action pursuant to [42 U.S.C.] § 2000e-5.").

challenge an ongoing discriminatory practice, even if the named plaintiff settles his case with the employer.<sup>218</sup> The Supreme Court has held “the EEOC is not merely a proxy for the victims of discrimination,’ and that the EEOC may proceed with a suit in its own name without seeking class certification on behalf of a class of individuals in order to protect the public interest in ending discriminatory practices.”<sup>219</sup> Furthermore, when bringing an action on its own initiative, the EEOC may still rely on the same facts pertaining to a complainant who has already settled.<sup>220</sup>

#### V. TIPS AND SUGGESTIONS ON HOW EMPLOYERS CAN MINIMIZE BACKLASH

Immediately following the 9/11 attacks, the EEOC “launched a vigorous national enforcement, education and outreach campaign to address harassment and discrimination against individuals who are or are perceived to be Arab, Muslim, Afghani, Middle Eastern, South Asian or Sikh . . . .”<sup>221</sup> Employers should heed this campaign as a warning that the EEOC will not tolerate discrimination in the workplace and will hold them liable for their employees’ discriminatory practices against others.<sup>222</sup> To reduce the likelihood of a backlash discrimination claim being brought against it, an employer should adhere to the following suggestions.

An employer should first assess its company policy regarding workplace harassment and discrimination.<sup>223</sup> If the employer has no policy, it should immediately draft and implement a written one.<sup>224</sup> An anti-discrimination policy should, at a minimum, include:

---

218. See *EEOC v. United Parcel Service*, 860 F.2d 372, 374 (10th Cir. 1988) (“The fact that a particular plaintiff settles his or her claim does not require the EEOC, in a case of ongoing discrimination, to abandon suit under [§] 706 and reinstate the same suit under [§] 707 as a commissioner’s charge.”).

219. *Id.* (citation omitted) (quoting *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980)).

220. *EEOC v. United Parcel Serv., Inc.*, No. 90 C 3862, 1995 WL 715828, at \*6 (N.D. Ill., Dec. 4, 1995).

221. News Release, U.S. Equal Employment Opportunity Comm’n, *EEOC To Receive ‘Friend in Government’ Award from American-Arab Anti-Discrimination Committee*, (OCT. 1, 2004), available at 2004 WL 2212953, at \*1-2 (stating that, among other things, the EEOC translated its brochures into Arabic, gave presentations at mosques and businesses regarding “employee rights and employer responsibilities under the federal antidiscrimination laws,” and issued information in English and Arabic explaining how Title VII and § 1981 apply to post-9/11 backlash discrimination).

222. See *id.* at \*1-2; Kelly & Lee, *supra* note 47, at 1038.

223. See Kelly & Lee, *supra* note 47, at 1030.

224. *Id.*

- A clear explanation of prohibited conduct;
- Assurance that employees who make complaints of [discrimination] or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of discrimination complaints to the extent possible;
- A complaint process that provides a prompt, thorough and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that [discrimination] has occurred.<sup>225</sup>

The employer should next assure that each employee obtains a copy of the policy and clearly understands its provisions.<sup>226</sup> Training and education should be provided to all employees regarding the policy and exactly what constitutes discrimination, with training specifically for managers and employees acting in any supervisory capacity on termination procedures, conflict resolution, and observation skills.<sup>227</sup> Periodic training reflects well upon an employer in a discrimination case, specifically because the EEOC has stressed that “periodic training of employees and managers can help ensure the employer is exercising good faith efforts to prevent harassment in the workplace.”<sup>228</sup>

Since the 9/11 attacks, employers have begun performing background checks on employees more frequently.<sup>229</sup> To avoid the high costs of litigation associated with a claim of religious, racial, or national origin discrimination, employers should caution against “singling out” Muslim or Arab applicants for background checks not otherwise performed during the normal

---

225. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, NOTICE 915.002: ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999), available at <http://www.eeoc.gov/policy/docs/harassment.html> (last modified June 21, 1999).

226. See Kelly & Lee, *supra* note 47, at 1030.

227. See *id.* at 1030-31.

228. *Id.* at 1110.

229. See Eve Tahmincioglu, *Tense Employers Step up Background Checks*, N.Y. TIMES, Oct. 3, 2001, at C9 (“While few employers think they are harboring terrorists, many are intensifying their scrutiny of employees and job applicants for any evidence of a criminal past.”).

course of business.<sup>230</sup> In an effort to avoid being accused of racial profiling, employers should inform all applicants of their standardized practices of background checks and require applicants to sign a consent form prior to the checks.<sup>231</sup> Furthermore, employers should also instruct and train interviewers to refrain from asking applicants information regarding their nationality or ethnic or religious background.<sup>232</sup> Employers should engage in good faith efforts to eliminate any improper personal biases in the hiring decision-making process.<sup>233</sup>

Where an employer has implemented a system of email and Internet monitoring, the employer also has the “responsibility to enforce Internet usage policies aimed at eliminating hostile work environments.”<sup>234</sup> Following the 9/11 attacks, an influx of data containing anti-Arabic and anti-Islamic content has been transmitted via the Internet.<sup>235</sup> If an employer monitoring the transmission of such data fails to remedy the discriminatory practice, he may be held liable under Title VII or 42 U.S.C. § 1981.<sup>236</sup> To avoid such liability, employers should periodically reiterate their anti-discrimination policy and warn employees that it will be enforced under all circumstances.<sup>237</sup>

Employees are not entitled to choose which religious accommodations they are to receive.<sup>238</sup> Therefore, to avoid liability based on religious discrimination, when an employee requests a religious accommodation, an employer should “ask[] detailed questions about the request in order to separate religious practice from personal preference. . . . Ask questions like, ‘Can you work on your Sabbath, or do you merely need time off to go to church?’”<sup>239</sup> Furthermore, all requests should receive consideration and documentation.<sup>240</sup> When deciding which

230. See Victor Schachter & Trey Wichmann, *Employee Privacy in the Workplace*, in THIRD ANNUAL INSTITUTE ON PRIVACY LAW: NEW DEVELOPMENTS & ISSUES IN A SECURITY-CONSCIOUS WORLD 621, 628 (PLI Corp. Patents, Copyrights, Trademarks, and Literary Property Course, Handbook Series No. G0-00W2, 2002) WL 701 PLI/Pat 621.

231. *Id.*

232. *Id.* at 635 (“[I]t is unlawful [for an employer] to ask applicants about their citizenship prior to making an offer of employment . . .”).

233. See *id.* at 636 (“Employers must carefully avoid profiling applicants based on Middle Eastern or Arabic names, or other such distinguishing indicators on resumes.”).

234. *Id.* at 645.

235. *Id.* at 646.

236. See *id.* at 645-46.

237. *Id.* at 646.

238. INST. OF MGMT. & ADMIN. INC., *Dealing with Religion in the Workplace*, COMPENSATION & BENEFITS FOR LAW OFFICES, June 2005.

239. *Id.*

240. *Id.* (stating that employers should “have a ‘request for religious accommodation

accommodation to choose, employers should be mindful of all options available to them, such as requiring employees to use their own vacation or personal days or to take unpaid leave to fulfill their religious needs.<sup>241</sup>

Employers should also be aware that commercial general liability (CGL) policies do not cover claims brought against employers under an administrative proceeding under Title VII.<sup>242</sup> The rationale is that under a CGL policy, an insurer's duty to defend extends only to lawsuits in which covered damages are sought.<sup>243</sup> Under CGL policies, a "suit" is defined as a "civil proceeding in which damages because of bodily injury, property damage, personal injury, or advertising injury to which this insurance applies are alleged."<sup>244</sup> Several courts have held that the EEOC administrative proceedings do not fall within the CGL's definition of "suit," and therefore are not covered by CGL policies.<sup>245</sup> Thus, an employer accused of discrimination in the workplace faces a potentially devastating blow to her business's finances if she must pay hundreds of thousands of dollars to one or more employees and cannot rely on her general liability policy.

## VI. CONCLUSION

More than five years after the September 11, 2001 terrorist attacks, the chilling after-effects continue to linger in American workplaces today. It behooves employers to become aware of the potential causes of actions under Title VII and 42 U.S.C. § 1981 that an employee can bring when alleging backlash discrimination and how to minimize their occurrences. As is evidenced in the discussion above, failure to do so could lead to a double recovery against an employer, potentially costing millions of dollars in punitive damages alone.<sup>246</sup>

*Cassandra M. Gandara*

---

form,' which creates a written record, helps channel it to the appropriate decisionmaker, and eliminates frivolous requests.").

241. *Id.*

242. Richard L. Suter, *Insurance Coverage of Discrimination, Sexual Harassment and other Employment-Related Claims*, 11 ME. B.J. 82, 84-85 (1996).

243. *Id.* at 84.

244. *Id.* at 84-85 (quoting a CGL policy).

245. *Id.* at 85.

246. *See* Newman, *supra* note 203.