



Chapter Eighteen

**Chapter Eighteen**  
**RELIGIOUS DISCRIMINATION AND NATIONAL  
ORIGIN DISCRIMINATION**

**Religious Discrimination  
and National Origin  
Discrimination**



# RELIGIOUS DISCRIMINATION AND NATIONAL ORIGIN DISCRIMINATION

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# RELIGIOUS DISCRIMINATION AND NATIONAL ORIGIN DISCRIMINATION

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## I. RELIGIOUS DISCRIMINATION

**A. Introduction and Definitions.** Title VII prohibits discrimination against an individual on the basis of religion. 42 U.S.C. § 2000e-2(a)(1) (2006).

**1. Religion.** Under Title VII, “[t]he term ‘religion’ includes all aspects of religious observance and practice, as well as belief.” *Id.* § 2000e(j). Religion is defined broadly to include organized religions, as well as the sincerely held religious beliefs of an individual. *Frazee v. Ill. Dep’t of Empl. Sec.*, 489 U.S. 829 (1989); 29 C.F.R. § 1605.1 (2011). Religion also includes moral or ethical beliefs about what is right or wrong “which are sincerely held with the strength of traditional religious views.” 29 C.F.R. § 1605.1. In *Chenzira v. Cincinnati Children’s Hosp. Med. Ctr.*, 2012 U.S. Dist. LEXIS 182139 (S.D. Ohio Dec. 27, 2012), the plaintiff claimed veganism is protected by Title VII’s prohibition on religious discrimination because it “constitutes a moral and ethical belief which is sincerely held with the strength of traditional religious views”; the court did not rule on the substantive validity of her claim, but denied the employer’s motion to dismiss, permitting the plaintiff’s claim to proceed.

Courts have interpreted Title VII’s prohibition on religious discrimination to preclude employers from discriminating against an employee because of the employee’s religion as well as because the employee fails to comply with the employer’s religion. *See, e.g., Pedreira v. Ky. Baptist Homes for Children, Inc.*, 579 F.3d 722 (6th Cir. 2009) (analyzing plaintiff’s state law claim under Title VII precedent because the state law was patterned after Title VII; acknowledging that Title VII’s scope “include[s] the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer”), *cert. denied*, 131 S. Ct. 2143 (2011); *Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) (explaining that Title VII’s scope “include[s] the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer”).

In *Pedreira*, the Sixth Circuit rejected the plaintiff’s religious discrimination claims. In that case, the plaintiff was fired after her employer discovered she was a lesbian. Her termination notice stated that she was fired “because her admitted homosexual lifestyle is contrary to Kentucky Baptist Homes for Children’s core values.” After her termination, the employer announced as official policy that “[i]t is important that we stay true to our Christian values. Homosexuality is a lifestyle that would prohibit employment.” In rejecting the plaintiff’s claim that she was discharged because she did not hold the employer’s religious belief that homosexuality is sinful, the Sixth Circuit found that the plaintiff failed to explain how the fact that she was discharged because of her sexuality constitutes religious discrimination. According to the court the plaintiff did not allege any particulars about her religion that would allow an inference that she was discriminated against on account of her religion, or more particularly, her religious differences with her employer. Additionally, the court held that the plaintiff did not allege that her sexual orientation was premised on her religious beliefs or lack thereof, nor did she state whether she accepts or rejects Baptist beliefs. “While there may be factual situations in which an employer equates an employee’s sexuality with her religious beliefs or lack thereof,” the court found that in this case, the plaintiff failed to state a claim upon which relief could be granted. *See also Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009) (dismissing plaintiff’s religious discrimination claim



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which was based on his status as a gay man; “Because Prowel’s claim was a repackaged claim for sexual orientation discrimination – which is not cognizable under Title VII – we hold that the District Court did not err in granting Wise summary judgment on that claim.”); *Chikuri v. St. Vincent New Hope, Inc.*, 2011 U.S. Dist. LEXIS 41473 (S.D. Ind. Apr. 15, 2011) (granting summary judgment in favor of employer on employee’s religious discrimination claim where plaintiff failed to identify a bona fide religious practice but merely alleged that she was “exploring” becoming a Muslim and was in the process of learning Islam; the plaintiff’s complaint that she was made uncomfortable by her patient’s religious practice of attending the Church of the Nazarene did not support a claim of religious discrimination).

**2. Sincerely Held.** Title VII only requires an employer to accommodate a religious belief that is “sincerely held.” However, whether a belief is sincerely held is relevant only to the issue of accommodation, not to claims of disparate treatment or harassment based on religion. See *EEOC Compliance Manual*, § 12-1, available at: <http://www.eeoc.gov/policy/docs/religion.html>. Although the sincerity of a religious belief is not usually disputed, the EEOC Compliance Manual has identified some factors that – either alone or in combination – might undermine an employee’s assertion that he sincerely holds the religious belief at issue:

- whether the employee has behaved in a manner markedly inconsistent with the professed belief;
- whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons;
- whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and
- whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

*Id.* § 12-1(A)(2). Note that although religious beliefs must be sincerely held, there is no requirement that such beliefs be long held. *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1379 (6th Cir. 1994).

**3. Religious Accommodation.** Under Title VII, if an employee requests religious accommodation, an employer must provide “reasonable accommodation” for the religious beliefs or practices of the employee, unless doing so would create an “undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j). The EEOC has defined “undue hardship” as imposing “more than a *de minimis* cost” upon an employer. *EEOC Compliance Manual*, 29 C.F.R. pt. 12 (B)(2). In determining whether a proposed accommodation constitutes an undue hardship, the EEOC will consider factors including “the type of workplace, the nature of the employee’s duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation.” *Id.*

**B. Burden of Proof.** The employee has the burden of proving that she or he was subjected to discrimination on the basis of religion.

**1. Prima Facie Case – Failure to Accommodate.** An employee may make a prima facie showing of discrimination based on a failure to accommodate by showing that: (1) the employee has a bona fide religious belief, the practice of which conflicted with an employment duty; (2) the employee informed the employer of this belief and conflict; and (3) the employer engaged in or threatened discriminatory treatment of the employee based on the employee’s failure to comply with the conflicting requirements. See, e.g., *Lubetsky v. Applied Card Sys., Inc.*, 296 F.3d 1301, 1307 (11th Cir. 2002) (“It is necessary for a plaintiff attempting to establish a prima facie case of intentional religious discrimination under Title VII to demonstrate the challenged employment decision was made by someone who had knowledge of the plaintiff’s religion.”); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993).



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**2. Employer's Defense.** Once the employee has made a prima facie showing, an employer must produce evidence to show that it either attempted to reasonably accommodate the employee's religious beliefs, or that reasonable accommodation would cause undue hardship on the employer's business. *See, e.g., Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 n.1 (1986) (Title VII imposes on an employer the obligation to make reasonable accommodation for the religious observances of its employees, but the employer is not required in doing so to incur undue hardship.) *But see Peterson v. Wilbur Communs., Inc.*, 205 F. Supp. 2d 1014 (E.D. Wis. 2002) (An employer cannot use reasonable accommodation to avoid liability for religious discrimination based purely on a religious belief (as opposed to a religious practice) where that belief is not accompanied by an act.) The issue of reasonable accommodation of religious beliefs is discussed in more detail below.

**3. Prima Facie Case – No Failure to Accommodate Claimed.** A plaintiff may state a prima facie case of religious discrimination that does not allege failure to accommodate by following the traditional disparate treatment analysis: (1) he or she is a member of a protected class; (2) he or she was qualified for his or her position; (3) he or she experienced an adverse employment action; and (4) similarly situated individuals outside the protected class were treated more favorably or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. *See, e.g., Bodett v. Coxcom, Inc.*, 366 F.3d 736, 743 (9th Cir. 2004) (finding no religious discrimination in termination of born-again Christian who was discharged for violating the company's policy prohibiting harassment based on sexual orientation; the plaintiff failed to show that the reason for her discharge, violation of the company's antiharassment policy, was pretext for religious discrimination).

**C. Reasonable Accommodation.** A reasonable religious accommodation is any adjustment to the work environment that will allow the employee to comply with his or her religious beliefs. However, a reasonable accommodation must not impose more than a *de minimis* cost or burden upon the employer. An applicant or employee who seeks religious accommodation must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work. The employee is obligated to explain the religious nature of the belief or practice at issue, and cannot assume that the employer will already know or understand it. *EEOC Compliance Manual* § 12-IV(A)(1). Similarly, the employer should not assume that a request is invalid simply because it is based on religious beliefs or practices with which the employer is unfamiliar, but should ask the employee to explain the religious nature of the practice and the way in which it conflicts with a work requirement. *Id.*

Employers often face conflicts between an employee's religious practices and the employer's work schedule. Reasonable accommodations in such circumstances may include: (1) voluntary shift swapping by employees; (2) flexible scheduling, including flexible arrival times, floating holidays, or permitting an employee to make up lost time due to a religious need; or (3) a lateral transfer and change of job assignment. 29 C.F.R. § 1605.2(d)(1). The Seventh Circuit Court of Appeals has held that Title VII does not require employers to deny the shift preferences of some employees in order to favor the religious needs of others. *Adams v. Retail Ventures, Inc.*, 325 F. App'x 440, 443; 2009 U.S. App. LEXIS 9222 (7th Cir. 2009).

In *EEOC v. Universal Mfg.*, 914 F.2d 71, 73 (5th Cir. 1990), the Fifth Circuit noted that the question of reasonableness under Title VII:

seems to focus more upon the cost to the employer, the extent of positive involvement which the employer must exercise, and the existence of overt discrimination by the employer. For example, both unpaid leave and voluntary rather than mandatory shift swaps ordinarily would be reasonable; but discriminating between religious and non-religious paid personal leave would not.

*See also EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307 (4th Cir. 2008) (upholding discipline



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of employee who refused to work on his Sabbath and fourteen other religious holidays, finding that the employer provided a reasonable accommodation since it had a seniority-based bidding system for shifts, provided fifteen vacation days and three floating holidays, allowed employees to swap shifts, and provided sixty hours of unpaid leave; rejecting as unreasonable EEOC's argument requiring total accommodation); *EEOC v. Thompson Contr., Grading, Paving, & Utils., Inc.*, 2012 U.S. App. LEXIS 25635; 116 Fair Empl. Prac. Cas. (BNA) 1419 (4th Cir. Dec. 14, 2012) (affirming summary judgment in favor of employer; rejecting the EEOC's proposed accommodation that the plaintiff, who objected to working on Saturdays for religious reasons, be excused from work on Saturdays because such an accommodation would be an undue hardship on the employer; similarly, creating a pool of substitute drivers to replace the plaintiff on Saturdays would be more than a *de minimis* cost, which would impose an undue hardship on the employer; finally, the employer was not required to offer the plaintiff an accommodation (transfer to a different position) that the employer reasonably believed the plaintiff would not accept); *EEOC v. Aldi, Inc.*, 2009 U.S. Dist. LEXIS 91554; 107 Fair Empl. Prac. Cas. (BNA) 714 (W.D. Pa. Sep. 30, 2009) (affirming jury verdict in favor of the employer; based on the facts of the case, the jury could reasonably have found that the employer's pre-existing swap policy, which the plaintiff had utilized in the past, was a sufficient reasonable accommodation for her request not to work on Sunday); *but see Slater v. Douglas County*, 743 F. Supp. 2d 1188, 1190 (D. Or. 2010) (denying employer's motion for summary judgment on plaintiff's claim that employer failed to accommodate her request to be excused from doing any work related to domestic partnerships because doing such work would be contrary to her religious belief that homosexuality is a sin; holding that the employer's "relatively vague promise to assist plaintiff to transfer if a position became available during a very short window of time" was not a reasonable accommodation).

The Seventh Circuit has held that a police officer's request that he not be assigned to work in a gambling casino because his religious beliefs prohibit gambling and aiding others in gambling was not a reasonable accommodation. *See Endres v. Ind. State Police*, 349 F.3d 922 (7th Cir. 2003) ("Endres has made a demand that would be unreasonable to require any police or fire department to tolerate.") If a variety of accommodations are available, and they do not cause undue hardship on the employer, the EEOC recommends that an employer provide the accommodation that will least disadvantage the employee's employment opportunities. 29 C.F.R. § 1605.2(c)(2)(ii). The U.S. Supreme Court has stated, however, that an employer is obligated only to provide a reasonable accommodation; the employer is not obligated to provide the accommodation that is favored by the employee. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68-69, n.6 (1986). *See also Cosme v. Henderson*, 287 F.3d 152, 158 (2d Cir. 2002) ("To avoid Title VII liability, the employer need not offer the accommodation the employee prefers. Instead, when any reasonable accommodation is provided, the statutory inquiry ends.")

### Case Examples

1. In *Sánchez-Rodríguez v. AT&T Mobility P.R., Inc.*, 673 F.3d 1 (1st Cir. 2012), the First Circuit held that an employer made a reasonable effort to accommodate an employee's request to take Saturdays off to observe his Sabbath. The court held that when the employer's series of attempts to accommodate the plaintiff were considered together, they constituted a reasonable effort to accommodate the plaintiff's request.
2. In *Schwartzberg v. Mellon Bank*, 2008 U.S. Dist. LEXIS 1180 (W.D. Pa. 2008), the court granted summary judgment on a plaintiff's claim that his employer failed to accommodate his religious beliefs, finding no conflict between the employer's policies and the plaintiff's religious beliefs. In this case, the plaintiff claimed that as a Hasidic Jew, he believed that members of the same sex should not have sex with each other. The court found that this belief did not conflict with the employer's policy, which prohibited "verbal or physical conduct that denigrates or shows hostility on the [basis] of sexual orientation," among other characteristics. Additionally, the court found no conflict between the employee's beliefs and the employer's encouragement of em-



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ployees to attend a luncheon supporting the company's gay, lesbian, bisexual and transgender affinity network, where employees' attendance at the luncheon was voluntary. Because there was no conflict between the employer's policies and the employee's beliefs, the employer had no obligation to reasonably accommodate the employee's beliefs. The Third Circuit subsequently affirmed the trial court's grant of summary judgment. *Schwartzberg v. Mellon Bank*, 307 F. App'x 676 (3d Cir. 2009).

**3.** In *EEOC v. Alamo Rent-A-Car L.L.C.*, 432 F. Supp. 2d 1006 (D. Ariz. 2006), the court granted summary judgment on the issue of liability in favor of the EEOC on behalf of a Muslim employee who was fired after she refused to take off her headscarf during Ramadan. The company's dress code did not specifically prohibit scarves but barred the wearing of any garments "not specifically mentioned in the policy." The employer's offered compromise to allow the employee to wear the headscarf in the back office but not at the front counter when she was helping customers was rejected by the court as an unacceptable accommodation. A year later, in June 2007, the jury awarded the employee \$287,640.

**4.** The EEOC announced that it settled a failure to accommodate claim with Red Robin Gourmet Burgers, in which the restaurant agreed to pay the plaintiff \$150,000 and make substantial policy and procedural changes. See *Burger Chain to Pay \$150,000 to Resolve EEOC Religious Discrimination Suit*, <http://www.eeoc.gov/press/9-16-05.html>. The plaintiff in this case practiced the Kemeti religion, an ancient Egyptian faith. As part of his practice, the plaintiff received tattoos of Egyptian scripture in his wrists. The plaintiff's beliefs made it a sin to intentionally conceal the tattoos. The employer's dress code prohibited employees from having visible tattoos. The plaintiff claimed he had several conversations with his managers explaining his faith and asking for an exemption from the dress code, but these requests were denied. The plaintiff was fired when he refused to cover the tattoos.

**D. Continuing Violation.** In *Elmenayer v. ABF Freight Systems, Inc.*, 318 F.3d 130, 134-35 (2d Cir. 2003), the Second Circuit held that an employer's rejection of an employee's proposed accommodation for religious practices does not give rise to a continuing violation. Instead, the rejection is the sort of discrete act that must be the subject of a complaint to the EEOC within 300 days.

**E. Undue Hardship.** As previously stated, an employer may refuse to provide reasonable accommodation if it can show that it would be subject to undue hardship as a result of the accommodation. 42 U.S.C. § 2000e(j). The employer must demonstrate that an undue hardship would, in fact, result. *EEOC v. Townley Engineering & Mfg.*, 859 F.2d 610, 615 (9th Cir. 1988). Speculation that undue hardship would result is not sufficient. See *Jackson v. Longistics Transp., Inc.*, 2012 U.S. Dist. LEXIS 52398 (W.D. Tenn. Apr. 13, 2012) ("an employer must present evidence to establish otherwise 'speculative' or 'hypothetical hardships' that could result from accommodations never attempted"). An employer is not required, however, to demonstrate undue hardship if the employee's actions show that the employee will refuse any reasonable accommodations. *Wisner v. Truck Cent., Subsidiary of Saunders Leasing Sys.*, 784 F.2d 1571 (11th Cir. 1986). See also *EEOC v. AutoNation U.S.A. Corp.*, 52 F. App' x, 327 (9th Cir. 2002) (unpublished decision).

**1. Cost.** Undue hardship includes financial costs to the employer, as long as it is more than a *de minimis* cost. 29 C.F.R. § 1605.2(e)(1). In assessing whether an accommodation would cause more than a *de minimis* cost and thus subject an employer to undue hardship, the EEOC will examine the cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will need the accommodation. *Id.* Whereas administrative costs incurred to change schedules may be considered *de minimis*, having to pay premium wages regularly for substitute employees will likely not be considered *de minimis*. *Id.*

In *Webb v. City of Phila.*, 562 F.3d 256 (3d Cir. 2009), the court noted that the cost does not have to be economic. In this case the plaintiff claimed the city police department discriminated against her based on her religion by refusing to permit her to wear a khimar (a traditional head



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covering worn by Muslim women) while in uniform. The Third Circuit affirmed the trial court's grant of summary judgment based on undue hardship. The police department's policy was based on the need for the appearance of neutrality, which was "vital in both dealing with the public and working together cooperatively." The court found the police department's reasons for its uniform policy "sufficient to meet the more than *de minimis* cost of an undue burden."

**2. Seniority System.** An employer may also show that an accommodation creates undue hardship when the accommodation requires variance in a bona fide seniority system. 42 U.S.C. § 2000e-2(h); 29 C.F.R. § 1605.2(e)(2); *Stolley v. Lockheed Martin Aero. Co.*, 2007 U.S. App. LEXIS 7303 (5th Cir. March 28, 2007) (unpublished decision) (An employer is not required to make an accommodation that would "deny the shift and job preferences of some employees," or "deprive them of their contractual rights, in order to accommodate . . . the religious needs of others." (quoting *Trans World Airlines v. Hardison*, 432 U.S. 63, 81 (1977) (holding that employer did not fail to provide a reasonable accommodation for employee who requested a shift change because of his religious beliefs where the collective bargaining agreement governing the employee's job prohibited such a change and the union refused to waive this prohibition)).

**3. Employer's Public Image.** In *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004), the First Circuit held that it was an undue hardship for an employer to exempt an employee from a provision in its dress code prohibiting facial piercings. The employee had several facial piercings, including eyebrow piercings, and claimed that her religion, the Church of Body Modification, required that her facial piercings be visible at all times. The district court granted summary judgment in favor of the employer on the grounds that the employer had offered the plaintiff a reasonable accommodation – permitting her to either cover the piercings temporarily or wear a clear retainer during work hours. The First Circuit affirmed, but on different grounds. The First Circuit held that the only accommodation the plaintiff considered acceptable, a blanket exemption from the no-facial-jewelry policy, would impose an undue hardship on the employer. The court noted that in determining whether a requested accommodation would impose more than a *de minimis* cost on an employer, the calculus must include both economic costs and non-economic costs. Here, the court held that granting the plaintiff's requested exemption from the no-facial-jewelry policy would be an undue hardship because it would "adversely affect the employer's public image."

**4. Discrimination or Harassment against Co-Workers.** In *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004), the Ninth Circuit held that an employer was not required to permit an employee to post Biblical passages condemning homosexuality, which the employee claimed he was obligated by his religious beliefs to do in response to the employer's workplace diversity posters encouraging tolerance of homosexuals. The court held that an employer is not required to accommodate an employee's religious beliefs if "doing so would result in discrimination against his co-workers or deprive them of contractual or other statutory rights." *Id.* at 607.<sup>1</sup> The court also held that the employee's other requested accommodation, removal of the posters that included homosexuals in its message encouraging diversity, would be an undue hardship "because it would have infringed on the company's right to promote diversity and encourage tolerance and good will among its workforce." *Id.* at 608. The court further held that requiring the employer to exclude homosexuals from its voluntarily adopted diversity policy would create an undue hardship for the employer. *Id.* Thus, the court rejected the employee's failure to accommodate claim and affirmed dismissal of the case. See also *EEOC v. Serrano's Mexican Rests., L.L.C.*, 2007 U.S. Dist. LEXIS 25693 (D. Ariz. 2007) ("it is important to note that defendant was entitled to restrict workplace proselytizing. Even if active recruitment was a tenet of Naeve's religious beliefs, defendant would not have been required to allow Naeve to impose her

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<sup>1</sup> The court's decision is interesting since Title VII does not specifically prohibit discrimination based on sexual orientation.





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beliefs upon her co-workers.”), *aff'd* 306 Fed. Appx. 406 (9th Cir. 2009); *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1021 (4th Cir. 1996) (upholding termination of employee who claimed her religion required her to send harassing letters to her co-workers in which she expressed religious judgment of them based on their personal conduct).

**5. Security Concerns.** In *EEOC v. Geo Group, Inc.*, 616 F.3d 265 (3d Cir. 2010), the Third Circuit upheld an order granting summary judgment to the employer, a private company that managed prisons. Prior to 2005, Geo had permitted female Muslim employees to wear the traditional khimar head covering. In 2005, the deputy warden undertook to reinforce the facility's uniform policy, which prohibited the wearing of non-Geo-issued hats and head coverings. Three female Muslim employees – a nurse, an intake clerk, and a corrections officer – objected to the newly enforced requirement. The nurse refused to remove her khimar at work and her employment was terminated as Geo deemed her to have effectively abandoned her job by refusing to abide by the dress code. The other two employees reluctantly removed their khimars at work. The EEOC brought a civil action on behalf of the class of female Muslim employees, claiming that Geo failed to accommodate their religious beliefs by prohibiting the wearing of khimars at work. The District Court granted summary judgment, and the Third Circuit upheld the ruling, finding that to permit employees to wear unauthorized head coverings at work would impose an undue hardship on Geo for three primary reasons. First, head coverings such as khimars could be used to conceal small weapons or contraband. Second, khimars cast a shadow around the wearer's face, making identification difficult and creating the possibility that a prisoner could take a khimar from an employee and use it to walk out of the facility. Third, due to the excess fabric around the neck of the wearer, a khimar presented an opportunity for an inmate to grab the garment from behind and use it to strangle the guard. Accordingly, the Third Circuit deemed the dress code enforceable under Title VII as it addressed a genuine safety or security risk. The court noted that “a prison should not have to wait for a khimar to actually be used in an unsafe or risky manner, risking harm to employees or inmates, before this foreseeable risk is considered in determining undue hardship.”

**F. Harassment.** Under Title VII, a plaintiff establishes a prima facie case of hostile work environment based on religion by demonstrating the following five elements: (1) that s/he was a member of a protected class; (2) that s/he was subjected to unwelcome religious harassment; (3) that the harassment was based on religion; (4) that the harassment had the effect of unreasonably interfering with the plaintiff's work performance by creating an intimidating, hostile, or offensive work environment; and (5) that the employer was liable for the harassment. *See e.g.*, *Jones v. United Space Alliance*, 170 F. App'x, 52 (11th Cir. Feb. 3 2006) (unpublished decision); *Bourini v. Bridgestone/Firestone N. Am. Tire, L.L.C.*, 136 F. App'x 747 (6th Cir. 2005) (the plaintiff failed to state a claim of religious harassment because the eight alleged incidents were spread out over a period of five years and collectively did not rise to the threatening or humiliating level of severe conduct required to create an objectively hostile or abusive work environment under Title VII); *Sprague v. Adventures, Inc.*, 121 F. App'x 813 (10th Cir. 2005) (affirming summary judgment on plaintiff's religious hostile work environment claim where the plaintiff worked for the allegedly harassing supervisor for only one week and never complained of the harassment); *Favors v. Ala. Power Co.*, 2010 U.S. Dist. LEXIS 69268 (S.D. Ala. 2010) (five comments/incidents relating to religion were “far too innocuous and benign to satisfy the ‘severe or pervasive’ prerequisite for a hostile work environment claim”); *see also Prowel*, 579 F.3d at 292 (plaintiff's religious harassment claim failed because the evidence showed he was harassed because of his homosexuality, not because of his religion); *but see Johnson v. Spencer Press of Me., Inc.*, 364 F.3d 368 (1st Cir. 2004) (denying motion for new trial on plaintiff's religious discrimination claim, finding inappropriate comments by plaintiff's supervisor calling plaintiff a “religious freak,” among other things, and threatening the plaintiff with violence were sufficient to support jury verdict of \$400,000 in compensatory damages and \$750,000 in punitive damages – however, damages amount was reduced to \$300,000 statutory cap).



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**G. Employment Selection Practices.** The EEOC takes the position that the use of pre-selection inquiries that determine an applicant's availability for work (e.g., asking an employee whether he or she is available to work weekends) has an exclusionary effect upon employment opportunities and will be considered to violate Title VII unless the employer can show that such inquiries: (1) did not have an exclusionary effect, or (2) were otherwise justified by business necessity. 29 C.F.R. § 1605.3(b)(2). Employers that want to determine an applicant's availability for work should consult legal counsel regarding appropriate reasons for and the proper form of such questions.

**H. Exemption for Religious Institutions.** Title VII has expressly exempted religious organizations from the prohibition against discrimination on the basis of religion. See 42 U.S.C. § 2000e-1(a) ("This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.") The religious organization exemption applies to all activities of the organization, both secular and non-secular. See *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (holding the exemption permitted a church to fire an employee for religious reasons, even though the employee worked in a secular capacity); *Feldstein v. Christian Sci. Monitor*, 555 F. Supp. 974 (D. Mass. 1983). See also *EEOC Compliance Manual* § 12-1(C) (1) (noting that the exception does not allow religious organizations otherwise to discriminate in employment on protected bases other than religion, such as race, color, national origin, sex, age, or disability). The Fourth Circuit Court of Appeals has held that the exemption includes claims of harassment and retaliation, as well as hiring and firing. See *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 193-94 (4th Cir. 2011) (unpublished decision).

Although Title VII does not define what constitutes "a religious corporation, association, educational institution, or society," courts have looked at the following factors: (1) whether the entity operates for a profit; (2) whether it produces a secular product; (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose; (4) whether it is owned, affiliated with, or financially supported by a formally religious entity such as a church or synagogue; (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees; (6) whether the entity holds itself out to the public as secular or sectarian; (7) whether the entity regularly includes prayer or other forms of worship in its activities; (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution; and (9) whether its membership is made up by coreligionists. See *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217 (3d Cir. 2007) (finding a Jewish Community Center's primary purpose to be religious and dismissing the plaintiff's claim of religious discrimination based on the religious institution exemption).

Additionally, 42 U.S.C. § 2(e)2 permits "school[s], college[s], universit[ies], or other educational institution[s] . . . to hire an employee of a particular religion" if the educational institution is wholly or partially owned, supported, controlled, or managed by a specific religion or religious corporation or if the curriculum of the school is directed towards the propagation of a particular religion. See *Hall*, 215 F.3d at 623-24 (holding that a college that was a subsidiary of a religious organization was exempt from Title VII's prohibition on religious discrimination and did not waive that exemption by holding itself out as an equal opportunity employer); *Ginsburg v. Concordia Univ.*, 2011 U.S. Dist. LEXIS 1098 (D. Neb. 2011) (holding that university affiliated with Lutheran church fell within exemption, noting that "the founding and operation of Concordia is nearly indistinguishable from the religious institutions deemed exempt from Title VII in *Hall*").

**I. Exemption for Ministerial Positions.** In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012), the Supreme Court, for the first time, recognized the existence of a "ministerial exception" to the application of employment discrimination laws. In *Hosanna-Tabor*, the Court held that a teacher at a Lutheran School could not maintain an action under the Americans with Disabilities Act (ADA) arising out of her discharge because she was a minister within the minis-



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terial exception. This concept has previously been uniformly recognized by federal appeals courts. The ministerial exception is grounded in the First Amendment and precludes application of such legislation as Title VII and other employment discrimination laws to claims concerning the relationship between a religious institution and its ministers. According to the Supreme Court, “such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.” See also *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church of N. Am.*, 344 U.S. 94, 116-17 (1952); *Skrzypczak v. Roman Catholic Diocese*, 611 F.3d 1238 (10th Cir. 2010) (concluding that “any Title VII action brought against a church by one of its ministers will improperly interfere with the church’s right to select and direct its ministers free from state interference . . . because Appellant is a minister for purposes of the exception, her Title VII hostile work environment claim is barred”); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 656 (10th Cir. 2002) (applying the church autonomy doctrine to analyze sexual harassment claims filed under Title VII by a homosexual former church employee and her partner and noting that this doctrine is broader than the ministerial exemption and does not require a determination of whether the plaintiff is a minister); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 800 (4th Cir. 2000) (holding that the ministerial exemption applied to the position of music minister and barred the EEOC’s claims of sex discrimination and retaliation on behalf of a female music minister). In *Bryce*, 289 F.3d at 657, the court held that the church autonomy doctrine does not apply to purely secular decisions, even when made by churches. (citing *Malicki v. Doe*, 814 So. 2d 347 (Fla. 2002) (holding that the First Amendment does not protect a church from a negligent hiring claim if the church’s actions were not motivated by sincerely held religious beliefs or practices)).

## II. NATIONAL ORIGIN DISCRIMINATION

**A. Introduction.** Title VII prohibits discrimination against an individual on the basis of race, color, or national origin. 42 U.S.C. § 2000e-2(a)(1). As with other claims under Title VII, an employee alleging race, color, or national origin discrimination must prove that the employer engaged in disparate treatment based on the employee’s race, color, or national origin, or that the employer utilized a facially neutral rule that adversely impacted employees based on one of these three protected characteristics. An employer may also be liable for harassment based on race, color, or national origin.

**B. National Origin Discrimination.** National origin means “the country where a person was born or, more broadly, the country from which his or her ancestors came.” *Espinoza v. Farah Mfg.*, 414 U.S. 86, 88 (1973). National origin discrimination includes discrimination based on the place of origin of an individual’s ancestor, or because the individual possesses the physical, cultural, or linguistic characteristics of a national origin group. 29 C.F.R. § 1606.1. See also *Salas v. Wis. Dep’t of Corr.*, 493 F.3d 913 (7th Cir. 2007) (determining that a plaintiff alleging that he is Hispanic sufficiently identifies his national origin to survive summary judgment).

Some courts have held that “comments about a person’s accent may be probative of discriminatory intent.” See *Thelusma v. N.Y. City Bd. of Educ.*, 2006 U.S. Dist. LEXIS 64855, at \*6 (E.D.N.Y. 2006); see also *Fragante v. City of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989), amended by 51 Fair Empl. Prac. Cas. (BNA) 190 (9th Cir. 1989); but see *Meng v. Ipanema Shoe Corp.*, 73 F.Supp. 2d 392, 399 (S.D.N.Y. 1999) (“[A]n adverse employment decision may be predicated upon an individual’s accent when – but only when – it interferes materially with job performance.” (quoting *Fragante v. City of Honolulu*, 888 F.2d 591, 596-97 (9th Cir. 1989))).

An employee’s subjective belief as to his or her national origin is not necessarily controlling; rather an employee’s objective appearance can form the basis for an unlawful discrimination claim. *Bennun v. Rutgers State Univ.*, 941 F.2d 154, 175 (3d Cir. 1991) (employee discriminated against as Hispanic even though employee regarded himself as a Sephardic Jew).

The EEOC will investigate any claim of national origin discrimination based on the individual’s: (1)



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marriage or association with others of a national origin group; (2) membership in or association with an organization identified with a national origin group; (3) attendance at or participation in schools or religious facilities used by a national origin group; or (4) individual's or spouse's name that is associated with a national origin group. 29 C.F.R. § 1606.1.

**1. EEOC Guidance on National Origin Discrimination.** The EEOC has issued guidelines for employers to help them avoid national origin discrimination and harassment claims, which have doubled over the past decade. Although making no drastic changes in policy, the EEOC has set forth helpful guidance to clarify the extent to which certain acts of discrimination by the employer are permissible. The EEOC's guidance addresses several issues: (1) whether an employer may base an employment decision on an individual's foreign accent or language proficiency; (2) whether an employer may adopt an English-only rule in the workplace; and (3) whether an employer may have a dress code prohibiting certain kinds of ethnic dress.

First, the EEOC states that an employer may consider an employee's foreign accent or language proficiency when deciding whether an individual is qualified for the position for which he or she is applying. For instance, if an applicant applies for a sales position, but the applicant has difficulty speaking English, the employer may exclude the applicant from consideration if this difficulty "materially interferes with the individual's ability to perform his job duties." This may be the case where the customer base is almost exclusively English speaking and communication with those customers is an important job function. The employer should be careful, however, to distinguish between a mere discernible accent and an accent or language difficulty that materially interferes with an employee's ability to perform the job duties. In the latter situation, failing to hire an individual may be a permissible form of discrimination. In the former situation, where the individual merely has a discernible accent, such discrimination is impermissible.

Second, with regard to English-only rules, the EEOC states that such a rule is permissible where the employer needs such a rule to operate safely or efficiently.

Finally, with regard to dress codes, the EEOC notes that an employer may not treat certain employees less favorably because of their national origin. This may apply to dress codes where an employer prohibits certain forms of ethnic dress, such as traditional African or Indian attire, but otherwise permits casual dress. An employer may implement a uniform dress code, however, even when such a dress code conflicts with some individuals' ethnic beliefs or practices. The EEOC warns that if a dress code conflicts with an employee's religious practices, the employer must modify the dress code unless it can show that such a modification would result in an undue hardship for the employer.

Questions and answers relating to the guidance are available at the EEOC's web site, <http://www.eeoc.gov/policy/docs/qanda-nationalorigin.html>.

**2. English-Only Rules.** English-only rules, when enforced at all times at work, may constitute unlawful discrimination when the rules are used as a proxy for national origin discrimination. See *id.* § 1606.7.

**a. EEOC Guidelines.** The EEOC has attempted to outlaw rules that require employees to speak English at all times. According to the EEOC, prohibiting employees from speaking their primary language across the board negatively impacts an employee's employment opportunities on the basis of national origin and may create an atmosphere of inferiority, isolation, and intimidation resulting in a discriminatory work environment. *Id.* § 1606.7(a). Hence, the EEOC presumes that English-only rules applied at all times violate Title VII. *Id.* As noted above, the EEOC's recent Guidance on this issue states that an English-only rule is permissible where the employer needs such a rule to operate safely or efficiently. The words "safely" and "efficiently" are somewhat vague terms.

To protect against a national origin discrimination claim, the EEOC states that employers



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should be prepared to point to specific reasons for maintaining such a policy – such as the need to communicate with customers, co-workers, or supervisors who speak only English and the need to have all employees speaking a common language in order to respond quickly and efficiently in emergency situations. Some courts have followed the EEOC guidelines, although others have not. See e.g., *Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006) (plaintiffs, a group of bilingual, Hispanic employees, should be permitted to go to trial on the issue of whether the employer’s English-only policy was discriminatory even though the terms of the policy limited the use of English to work-related communications during working hours; there was evidence the employees were told the policy applied to all communications regardless of whether they were work related), *overruled in part on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); but see *EEOC v. Sephora USA, LLC*, 419 F. Supp. 2d 408 (S.D.N.Y. 2005).

In *Sephora*, the court granted summary judgment to the employer on the issue of whether its policy requiring employees to speak English only in certain circumstances was permissible. The court found the policy permissible under Title VII and that the employer had a legitimate business reason for adopting it – the desire to make customers coming into their stores feel welcome. The court did not address whether the defendant’s managers properly followed the policy. See also *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160 (10th Cir. 2007) (employer’s policy, which was narrowly tailored to require employees speak only English while in the operating room department for job-related discussions and was required by business necessity, did not violate Title VII); *Rivera v. Coll. of DuPage*, 445 F. Supp. 2d 924 (N.D. Ill. 2006) (granting summary judgment on plaintiff’s discrimination claim, holding that instructing an employee eight times not to speak Spanish to co-workers did not constitute an “English-only” rule; noting that neither the plaintiff nor any other employee suffered any disciplinary action as a result of speaking Spanish).

**b. Courts’ Partial Rejection of EEOC Guidelines.** Some courts have rejected the EEOC’s prior blanket prohibition of absolute English-only rules, particularly with regard to bilingual employees. For example, the Ninth Circuit rejected the EEOC guidelines and held that English-only rules do not necessarily violate Title VII. *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993). In *Garcia*, a disparate impact case, two of the workers spoke no English and twenty-two others spoke English with varying degrees of proficiency. Based on complaints from two non-Spanish-speaking employees, the employer adopted the following rule:

[I]t is hereafter the policy of this Company that only English will be spoken in connection with work. During lunch, breaks, and employees’ own time, they are obviously free to speak Spanish if they wish. However, we urge all of you not to use your fluency in Spanish in a fashion that may lead other employees to suffer humiliation.

*Id.* at 1483.

The court distinguished bilingual employees from non-English speakers and those with limited English fluency. For bilingual employees, the court held that “[t]here is no disparate impact’ with respect to a privilege of employment ‘if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference.’” *Id.* at 1487. For employees who did not speak English, however, the court found that “an English-only rule might well have an adverse impact.” *Id.* at 1488. See also *Gonzalez v. Salvation Army, No. 89-1679-CIV-T-17(B)* (M.D. Fla.), *aff’d without op.*, 985 F.2d 578 (11th Cir. 1993) (dismissing bilingual plaintiff’s Title VII claim based on an English-only rule; English-only rule served a legitimate need because supervisors who speak English must know what is being said in the workplace); *EEOC v. Beauty Enters.*, 2005 U.S. Dist. LEXIS 25869 (D. Conn. 2005) (refusing to defer to the EEOC guidelines regarding English-only policies, noting that the Ninth Cir-



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cuit and three out of five district courts also have declined to give deference to the EEOC's guidelines, and instructing the jury that plaintiff was required to establish a prima facie case of discrimination from English-only policy); *Cosme v. Salvation Army*, 284 F. Supp. 2d 229, 240 (D. Mass. 2003) (noting that the EEOC's regulations are not binding on the court and holding that, even if the regulations were binding, the "mere existence of [an English-only policy] does not necessarily" violate the regulations when employees had notice of the policy and the policy furthered a legitimate business interest); *Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730, 733 (E.D. Pa. 1998) (noting that the Ninth and Fifth Circuits have passed on the validity of English-only rules and the Fourth and Eleventh Circuits have issued unpublished decisions affirming district court decisions on the question; "[a]ll of these courts have agreed that – particularly as applied to multi-lingual employees – an English-only rule does not have a disparate impact on the basis of national origin, and does not violate Title VII.")

Rules or procedures that require the use of English by bilingual employees in customer areas have also been found not to constitute national origin discrimination. In *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), the employer prohibited employees from speaking Spanish on the job in the sales area unless they were waiting on Spanish-speaking customers. The rule did not apply to employees working outside in the lumberyard, away from the customer area. The rule also did not apply to conversations between employees during work breaks. The company advanced several business reasons for the rule: English-speaking customers objected to communications between employees that they could not understand; pamphlets and trade literature were only available in English; employees would improve their English; and the rule would permit supervisors who did not speak Spanish to better oversee the work of subordinates. The plaintiff was fully bilingual, yet he deliberately chose to speak Spanish in the customer areas in violation of the rule. The court stated "if the employer engages a bilingual person, that person is granted neither right nor privilege by the statute to use the language of his personal preference." *Id.* at 269. The court found that although the rule required persons capable of speaking English to do so while on duty, there was no evidence that the rule was discriminatory. See also *Pacheco v. N.Y. Presbyterian Hosp.*, 593 F. Supp. 2d 599, 613 (S.D.N.Y. 2009) (upholding requirement that employees speak English when in the vicinity of patients, where employees were permitted to speak Spanish to assist Spanish-speaking patients, the complaining employee was bilingual, and there was no evidence that the employer intended to discriminate on the basis of race or national origin; noting that courts have distinguished between various types of language-restriction policies, being more forgiving of those that apply only to work-related communication and to bilingual employees). In *Pacheco* the court noted that the plaintiff "failed to identify a single case in which a court upheld a Title VII claim in the face of a summary judgment motion where the language policy involved work related communications by bilingual employees and the policy was found to further a legitimate business purpose." *Id.* at \*613.

**c. Rejection of Harassment Claim Based on Co-Workers Speaking Spanish in the Workplace.** In *Webb v. R&B Holding Co., Inc.*, 992 F. Supp. 1382 (S.D. Fla. 1998), the court granted summary judgment on an African-American plaintiff's claims she was subject to a hostile work environment based on her co-workers' use of Spanish in the workplace. The court held that the allegation that certain employees spoke Spanish in her presence, even if assumed to be true, did not rise to the level of a hostile work environment. There was no evidence that the speaking of Spanish constituted harassment sufficiently severe or pervasive to alter the conditions of plaintiffs' job. *Id.* at 1389. The court also dismissed the plaintiff's claim of retaliation based upon her complaints about the speaking of Spanish in the workplace. The court noted that when making a claim of retaliation, the plaintiff must have communicated her belief that discrimination is occurring – it is not enough merely to complain about a certain policy or behavior of co-workers. *Id.* Additionally, the court found it highly unlikely that the employer would have assumed the plaintiff's efforts to eliminate Spanish speaking in the workplace



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came under the protection of Title VII “in light of the fact that Title VII prohibits employers from denying employees the right to speak Spanish to other employee’s [sic] in the workplace.” *Id.* The court further held that “Plaintiff’s claimed ‘protected activity’ amounts to an effort to make Defendant institute a policy which, in all likelihood, would violate Title VII.” *Id.* at 1390.

**d. Other Requirements Necessary to Utilize English-Only Rules.** According to the EEOC, if an employer believes it has a business necessity for an English-only rule at certain times, the employer should clearly inform its employees of the following: (1) “the general circumstances when speaking only in English is required,” and (2) “the consequences of violating the rule.” 29 C.F.R. § 1606.7(c).

**(1) Business Necessity.** To establish business necessity, the EEOC requires an employer to show that the rule is necessary for the safe and efficient operation of its business. For example, in the EEOC’s Compliance Manual discussing national origin discrimination, the EEOC noted that business necessity could exist where a petroleum company adopted a rule requiring English to be spoken by refinery employees who work in laboratory and processing areas where the potential of fire and explosion existed, and by all employees during emergencies, because the rule was narrowly drawn to accomplish the specific purpose of assuring effective communication among employees during specified times and in specific areas. <http://www.eeoc.gov/policy/docs/national-origin.html>. In *Marquez v. Baker Process, Inc.*, 42 F. App’x 272 (10th Cir. 2002) (unpublished decision), the court held that an employer showed a business necessity in prohibiting an employee from using a Spanish word in the workplace, where the employer believed the word was profane.

**(2) Notice to Employees.** The EEOC considers use of English-only rules evidence of national origin discrimination if an employer fails to effectively notify its employees about the rule and makes an adverse employment decision against an employee based on a violation of the rule. 29 C.F.R. § 1606.7(c). See also *Saucedo v. Bros. Well Serv., Inc.*, 464 F. Supp. 919 (S.D. Tex. 1979) (holding that notice of English-only rule based on informal discussion with co-employee was insufficient).

In addition, the rule or procedure must be applied to all employees. A rule that denies any class of employees a term, condition, or privilege of employment enjoyed by other employees is a violation of Title VII and the EEOC’s National Origin Discrimination Guidelines unless a business necessity is shown for the rule.

**e. State Laws Pertaining to English-Only Rules.** Some states have passed laws that provide that it is not a discriminatory practice for an employer to implement an English-only policy when certain conditions are met. See, e.g., Tenn. Code Ann. § 4-21-401(d).

**3. Employment Selection Practices.** Unlawful discrimination based on national origin may also occur when an employer utilizes selection practices based upon factors closely associated with national origin. For example, height and weight requirements may create an adverse impact on individuals of particular national origins. See 29 C.F.R. § 1606.6(a)(2). Similarly, national origin discrimination may arise when an employer utilizes particular training or education requirements that effectively discriminate against individuals based upon their foreign training or education. See *id.* § 1606.6(b)(2). Alternatively, selection practices focusing on English fluency, foreign accents, or ability to communicate in English might be discriminatory towards individuals belonging to a particular national origin group. *Id.* § 1606.6(b)(1). But see *Fragante v. Honolulu, as amended*, 888 F.2d 591 (9th Cir. 1989) (holding that an employer may make an adverse employment decision based on accent if “it interferes materially with job performance”).

In *Raad v. Fairbanks N. Star Borough*, 323 F.3d 1185 (9th Cir. 2003), *clarified*, 2003 U.S. App. LEXIS 8688 (9th Cir. 2003), the court held that it would be reasonable for a fact-finder to determine that the defendant used the plaintiff’s accent as pretext to deny her a full-time position because of her national origin, where there was evidence that the plaintiff’s accent did not impair



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her performance as a teacher. However, in *Velasquez v. Goldwater Mem'l Hosp.*, 88 F. Supp. 2d 257, 263 (S.D.N.Y. 2000), the court noted that classification on the basis of language does not, by itself, “identify members of a suspect class and would not support an inference of intentional national origin discrimination. In *Velasquez*, the court held that even if the plaintiff raised a material issue of fact regarding whether the company had an English-only policy and that she was discharged for violating the policy, such issue would not constitute sufficient evidence by itself to raise an inference of discriminatory animus on the basis of national origin.

Employers with questions regarding their selection criteria should consult legal counsel for advice.

**4. Discrimination in Favor of Bilingual Employees.** In *Church v. Kare Dist.*, 2006 U.S. App. LEXIS 30382 (5th Cir. Dec. 11, 2006), the Fifth Circuit affirmed dismissal of a Caucasian male's race and national origin discrimination claims filed under the Texas state law prohibiting discrimination. In affirming the trial court's decision dismissing the claims, the court relied, in part, on Title VII and decisions interpreting that statute. In this case, the plaintiff claimed the employer discriminated against him when it fired him (a non-Spanish speaking employee) and replaced him with a bilingual English-Spanish speaking employee. The court held that the employer's decision was justified by business necessity – the majority of its customer base was composed of mostly Spanish-speaking households. The court held that the plaintiff failed to offer any evidence that the employer implemented its bilingual language requirement as a pretext for unlawful discrimination. “To the contrary, Kare provided company sponsored Spanish courses. And under the new policy, everyone, no matter what their race, ethnicity, or national origin, needed to know Spanish to fulfill the job requirements; and native Spanish speakers needed to know English to fulfill the job requirements.”

**C. Citizenship Requirements.** Despite prohibitions against race, color, and national origin discrimination, Title VII does not prohibit discrimination based on citizenship status. *Espinoza*, 414 U.S. 86; *Guimaraes v. SuperValu, Inc.*, 674 F.3d 962 (8th Cir. 2012) (affirming summary judgment on plaintiff's national origin discrimination claim, noting that the plaintiff “conflate[d] citizenship or immigration status with national origin” and that an alleged comment regarding the plaintiff's efforts to obtain a “green card” were related to her citizenship status, not direct evidence of national origin discrimination); *Nair v. Nicholson*, 464 F.3d 766 (7th Cir. 2006) (noting, but not deciding, that “discrimination on the basis of unspecified foreign origin conceivably might” violate Title VII; affirming dismissal of plaintiff's national origin claim because there was no evidence that co-workers harassed her because of her national origin but instead because they disliked her) (emphasis in original).

However, the Immigration Reform & Control Act (IRCA), which requires employers to employ only those individuals authorized to work in the United States, does prohibit discrimination on the basis of citizenship status. Moreover, the EEOC will investigate an employer's citizenship requirements to determine whether they are being used for the purpose of, or create the effect of, discriminating against individuals based on national origin. 29 C.F.R. § 1606.5(a).

The Seventh Circuit has held that neither Title VII nor the IRCA protect an individual against discrimination based upon that person's marriage to an unauthorized alien. See *Cortezano v. Salin Bank & Trust Co.*, 680 F.3d 936, 937 (7th Cir. 2012) (affirming summary judgment on plaintiff's national origin discrimination claim, finding that any discrimination that led to the plaintiff's firing was based on her husband's status as an unauthorized alien who lacked permission to be in the country; “Because alienage is not a protected classification under Title VII, Kristi has no claim for relief, and so we affirm.”)

**D. Use of Discovery to Obtain Information Regarding Immigration Status.** The Ninth Circuit has held that an employer involved in a national origin discrimination claim cannot use the discovery process to determine the plaintiff's immigration status. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057





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(9th Cir. 2004). In *Rivera*, the trial court issued a protective order precluding the employer from inquiring into the plaintiffs' immigration status. The Ninth Circuit affirmed the trial court's order, finding that the protective order was justified because the "substantial and particularized harm of the discovery – the chilling effect that the disclosure of the plaintiffs' immigration status could have upon their ability to effectuate their rights – outweighed the defendant's interest in obtaining information regarding the plaintiffs' immigration status at this early stage of the litigation." *Id.* at 1064. In *Rivera*, the defendant argued that since the U.S. Supreme Court has held that illegal aliens are not entitled to back pay under the National Labor Relations Act, the plaintiffs' immigration status was discoverable because it was directly relevant to the plaintiffs' potential remedies. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). The Ninth Circuit rejected this argument, noting that regardless of whether *Hoffman* applies to a Title VII claim, the plaintiffs had proposed several options for ensuring that no award of back pay was given to an undocumented alien, thus there was no need for the discovery requested by the defendant. The court also held that the after-acquired evidence doctrine did not require the district court to grant the defendant's discovery request. *Id.* at 1072. See also *EEOC v. First Wireless Group, Inc.*, 225 F.R.D. 404, 2004 U.S. Dist. LEXIS 24089 (E.D.N.Y. Nov. 19 2004) (holding that a magistrate judge properly denied the defendant employer's request for discovery of the charging parties' immigration status, relying on *Rivera*).