

NATIONAL ORIGIN DISCRIMINATION ENGLISH-ONLY AND DOCUMENTATION ISSUES



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2013 EXCEL Conference

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MARCH ON WASHINGTON FOR JOBS AND FREEDOM

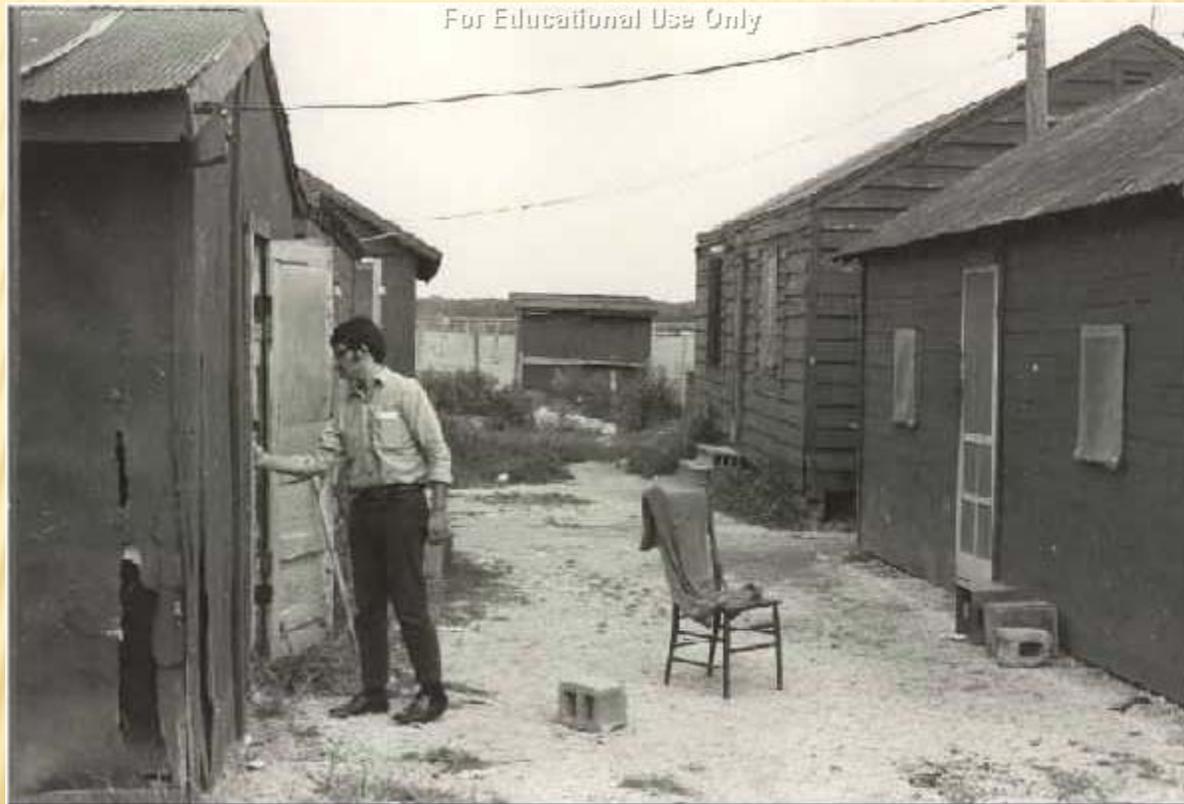


PRESIDENT LYNDON JOHNSON SIGNING THE CIVIL RIGHTS ACT OF 1964





CALIFORNIA MIGRANT CAMP



Dr King

Telefax

WESTERN UNION
SENDING BLANK

Telefax

↑

CALL LETTERS	GMS	CHARGE TO	SCLC
Mr. Cesar Chavez United Farm Workers P. O. Box 130 Delano, California 93215			
I am deeply moved by your courage in fasting as your personal sacrifice for justice through nonviolence. Your past and present commitment is eloquent testimony to the constructive power of nonviolent action and the destructive impotence of violent reprisal. You stand today as a living example of the Gandhian tradition with its great force for social progress and its healing spiritual powers. My colleagues and I commend you for your bravery, salute you for your indefatigable work against poverty and injustice, and pray for your health and your continuing service. (More)			

3-5-68

Send the above message, subject to the terms on back hereof, which are hereby agreed to
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1249—(R 4-53)

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CALL LETTERS	GMS	CHARGE TO	SCLC
Continuation as one of the outstanding men of America. The plight of your people and ours is so grave that we all desperately need the inspiring example and effective leadership you have given.			
Martin Luther King Jr. President, Southern Christian Leadership Conference			

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➤ “My colleagues and I commend you for your bravery, salute you for your indefatigable work against poverty and injustice, and pray for your health and continuing service as one of the outstanding men in America.”

➤ March 6, 1968 Telegram from Martin Luther King to Cesar Chavez

EEOC'S CURRENT EFFORTS REGARDING IMMIGRANT WORKERS

- EEOC's Strategic Enforcement Plan FY 2013 - 2016: Establishes Six Enforcement Priorities including: "protecting immigrant, migrant and other vulnerable workers."
- Immigrant Worker Team (IWT) was established to examine the EEOC's enforcement, litigation and outreach efforts on cross-cutting issues affecting workers of foreign national origin.

DISCRIMINATORY PRACTICES ADDRESSED BY IMMIGRANT WORKER TEAM (IWT)

- National Origin Discrimination and Document Abuse (e.g. Cannon and Wendt, Express Services, Inc., EEOC-DOJ Office of Special Counsel for Unfair Immigration-Related Unfair Employment Practices MOU)
- Harassment
- Intersection of National Origin Discrimination and Human Trafficking (e.g. John Pickle, Trans-Bay, etc.)
- Restrictive Language Policies
- Intimidation, Access, and Documentation Issues

NATIONAL ORIGIN DISCRIMINATION

- Title VII of Civil Rights Act of 1964 prohibits discrimination in the workplace based on a person's race, color, national origin, religion and sex.
- Approximately 11 % of EEOC charges received in FY 2012 alleged national origin discrimination.

NATIONAL ORIGIN DISCRIMINATION IS PROHIBITED BY TITLE VII

- Discrimination resulting because of an individual's:
 - birthplace, ancestry, culture or
 - linguistic characteristics common to a specific ethnic group or
 - accent or
 - appearance or is perceived to be from a particular ethnic background or country (even if he is not) or
 - association with another individual from a particular national origin group.

BASIC THEORIES OF DISCRIMINATION FOR NATIONAL ORIGIN CASES

- Disparate Treatment
 - Person is treated differently because of national origin.
- Disparate Impact
 - Although policy is neutral, it has a disparate impact on a particular ethnic group.
 - Practice is not justified by business necessity.
- Harassment
 - Intimidating, hostile or offensive work environment because of national origin. Must be unwelcome and severe or pervasive.

NATIONAL ORIGIN DISCRIMINATION

EXAMPLES:

- Supervisor refers to employee as “monkey,” “gorilla,” and tells him “go back to your cage” and “do you want a banana?” on a regular basis. EEOC v. New York University, (S.D.N.Y.) settled for \$210,00 and injunctive relief.
- Manager tells employee that he cannot promote him to finance manager until he takes speech classes to get rid of his African accent. EEOC v. Brown & Brown Chevrolet, Inc., (D. Ariz.) settled for \$99,000 and injunctive relief.
- Hispanic employees are mocked for speaking with an accent and told to speak English only at all times, including during breaks. EEOC v. Sephora USA, LLC, (S.D.N.Y.) settled for \$565,000 and injunctive relief.

“ENGLISH-ONLY” POLICIES

- Prohibit employees from speaking other languages at various work times.
- EEOC Guidelines presume that EO policies have an adverse impact. (29 C.F.R. 1606.7)
- Burden shifts to employer to prove that policy was job related and consistent with business necessity.

GARCIA v. SPUN STEAK, 998 F. 2d 1480 (9TH CIR. 1993)

- Rejects EEOC Guidelines. Charging Parties must show that policy has an adverse impact.
- Bilingual employees could not show actual harm from EO policy adopted to address complaints from non-Spanish speakers that (bilingual) Spanish-speakers were speaking derogatorily about them.
- No “cultural right” to speak Spanish under Title VII.

LANGUAGE RESTRICTIONS

➤ *EEOC v. Premier Operator Services, Inc.*, 113F.Supp.2d 1066 (N.D. Tex. 2000)

Class of Hispanic employees were prohibited from speaking Spanish on company premises at all times (e.g., during lunch, between calls, in the break room, when making personal calls). EEOC argued “Speak English Only” policy enacted by employer was national origin discrimination. Court held employer did not present credible evidence to establish business necessity or job related. Judgment for EEOC - \$650,000.

➤ *Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006)

10th Circuit, on appeal from summary judgment in favor of the City of Altus, held consistent with the EEOC Guidelines that a genuine issue of material fact existed as to the presence of a hostile work environment based solely on the employer’s adoption of an English-only policy in the workplace.

LANGUAGE RESTRICTIONS (CONT'D)

➤ *EEOC v. Mesa Systems, Inc.*, (D. Utah 2011) Phoenix District Office

EEOC alleges Hispanic warehouse workers were subjected to hostile work environment based on national origin (i.e. “(expletive deleted) Mexicans,” “(expletive deleted) you, *mojado*” [wetback]) and retaliation. Employer also implemented restrictive language policy which disparately impacted Hispanics and Asian/Pacific Islanders.

EEOC v. DELANO REGIONAL MEDICAL CENTER



THANK YOU!

**Thank you to our outstanding partners, the Asian Pacific
American Law Caucus (APALC)**

***EEOC v. CENTRAL CALIFORNIA FOUNDATION FOR HEALTH
d/b/a DELANO REGIONAL MEDICAL CENTER
(E.D. Cal.)***

- EEOC alleged that since at least 2006, the Filipino-American hospital workers, mostly nursing staff, were targets of harassing comments, undue scrutiny and discipline when speaking with a Filipino accent or speaking Tagalog or Ilocano.
- Supervisors, staff and volunteers were allegedly encouraged to act as vigilantes, berated and reprimanded Filipino-American employees on a regular basis. They subjected workers to threats of arrest and discipline.
- Staff made fun of their accents, ordered them to speak English even when they were already speaking in English and told them to go back to the Philippines, among other things.
- Case settled for \$975,000 and injunctive relief.

INTIMIDATION, ACCESS, AND DOCUMENTATION ISSUES

IMMIGRANT WORKERS AND EMPLOYMENT DISCRIMINATION

- Title VII applies to all individuals, regardless of immigration status.
 - *EEOC and Castrejon v. Tortilleria La Mejor*, 758 F. Supp. 585 (E.D. Cal. 1991): Despite the passage of IRCA in 1986, undocumented workers are covered by Title VII. Title VII makes no exception based on immigration status for workers in the U.S. and its territories.
 - EEOC does not inquire into charging party's immigration status.

REMEDIES

- Title VII: backpay, frontpay, reinstatement and other injunctive relief.
- §102 and §103 of Civil Rights Act of 1991: Amends Title VII to permit jury trials and compensatory and punitive damage awards in intentional discrimination cases.
- *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002): Under NLRA, undocumented worker not entitled to back pay. NLRB had no authority to interpret Immigration & Nationality Act.
- *Rivera v. NIBCO*, 364 F.3d 1057 (9th Cir. 2004)(dicta): Does *Hoffman* even apply to power of federal judge under Title VII?

DOCUMENTATION ISSUES – DURING INVESTIGATION

While EEOC does not consider immigration status during an investigation, investigators may come into contact with information that raises questions or directly implicates individual's immigration status.

Examples

- Investigator gets information from a U or T visa request
- Documents from the employer that raise questions about immigration status
- Defense raised by employer
- Person voluntarily self-discloses status
- Non profits or representatives from non-governmental organizations (NGO's) reveal information

IMPLICATIONS AND THINGS TO CONSIDER DURING INVESTIGATION:

- If information regarding immigration status is contained in the investigative file, it may be subject to disclosure under FOIA or Section 83 or third party subpoenas
 - Unless there is an exemption to disclosure such as under FOIA exemption “where disclosure is otherwise prohibited by law,” (i.e. federal regulations and/or state privacy laws).

DOCUMENTATION ISSUES DURING LITIGATION

- Defendant will seek information pertaining to individual's immigration status during discovery.
 - Defendant argues it is relevant to credibility and damages, including emotional distress damages.
- Plaintiff should seek protective order to prevent disclosure of immigration information.

PROTECTIVE ORDERS TO STOP IMMIGRATION STATUS INQUIRY

- Rivera v. NIBCO, (9th Cir. 2004): In national origin, termination case, court issued protective order to bar company lawyer's inquiry into immigration status, place of birth, place of education. 9th Circuit affirmed.
- EEOC v. First Wireless, (E.D.N.Y. 2004): In class case alleging national origin and retaliation discrimination, Court denies defendant pre-trial access to CPs' immigration status and tax returns. (Key: Does it chill out charging party? *In terrorem* effect?)

DISCOVERY – PROTECTIVE ORDERS, CONT'D

EEOC has been successful in protecting inquiry into immigration status but Courts are increasingly hostile.

➤ *EEOC v. Koch Foods of Mississippi*, (S.D. Miss. 2011) (Nov. 2012 Order): Court granted protective order as to immigration status information citing the *in terrorem* effect of inquiries into immigration status, and barred inquiries into tax returns, social security numbers, aliases, etc. absent Defendant's compelling need for such information.

➤ Defendant's argument that immigration status was relevant to emotional distress damages not sufficient.

DISCOVERY – PROTECTIVE ORDERS CONT'D

- *EEOC v. DiMare Ruskin Inc.*, (M.D. Fla. 2011) (Feb. 2012 Order)
In case alleging sexual harassment and retaliation of farmworker women, Court granted EEOC's request for Protective Order holding that immigration status was irrelevant for liability and damages purposes.
 - Court held: "EEOC's mission ...hampered if potential victims are unwilling to come forward and cooperate because of fear of removal or other immigration consequences."

- *EEOC v. Fair Oaks Dairy Farms, LLC*, (N.D. Ind. 2011) (Aug. 2012 Order)(Sexual Harassment of Hispanic female dairy worker):
Court granted protective order with respect to Defendant's discovery request pertaining to charging party's visa, passport and birth certificate.

U VISAS

- Victims of Trafficking and Violence Protection Act (October 2000) - established the U visas as means of enabling undocumented crime victims to assist law enforcement agencies without fear of deportation.

- Eligibility Requirements:
 1. Victim of “qualifying” crime
 2. Suffered mental or physical abuse
 3. Has information regarding criminal activity and
 4. Willing to assist government officials in the investigation.

U VISA – EXAMPLES OF “QUALIFYING CRIME”

- Includes: murder, rape, torture, sexual exploitation, extortion, witness tampering, false imprisonment, obstruction of justice, sexual abuse, trafficking, etc.
- Often allegations in harassment cases include conduct that is considered a “qualifying crime” such as sexual assault, rape, sexual exploitation.

U VISAS CONT'D

- Criminal activity violates U.S. laws or occurred in U.S. (or territories).
- Requires certification from law enforcement agency (federal, state and/or local).
- EEOC is certifying agency.

U VISA BENEFITS

- A person receiving a U visa can remain legally in the United States for up to 4 years, and after 3 years can apply for permanent residency.
- U visa recipients are given work authorization.
- Close family members of U visa recipients also will be permitted to remain and work in the United States.

QUESTIONS!