



Federal Laws Prohibiting Employment Discrimination – Application To Immigrant Workers

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What is the EEOC?



- Federal Government agency
- Enforces federal laws against job discrimination
- **Only** federal agency that obtains compensatory and punitive \$\$\$ damages for victims of discrimination including trafficking; has recovered \$\$\$ millions for victims

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EEOC Enforces Five Laws



- Title VII of the Civil Rights Act | 1964
- Equal Pay Act | 1963
- Age Discrimination in Employment Act | 1967
- Americans With Disabilities Act | 1990
- Genetic Information Nondiscrimination Act | 2008

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Title VII of the Civil Rights Act of 1964 (Title VII)

- Prohibits employment discrimination (including harassment) based on race, color, religion, sex (including pregnancy), or national origin
- Enforced in **all aspects of employment:** Recruiting, hiring, terms and conditions, promotions, termination, retaliation

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Who is protected by Title VII?

- Employee
- Temporary worker
- Job applicant
- Former employee
- Undocumented workers
- Witnesses are protected against retaliation

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Who is protected by Title VII?

- For coverage under Title VII a company must have 15 or more employees for 20 calendar weeks
- Charge must be filed within 180 days of the act of discrimination (or 300 days if there is state or local agency)
- Normally, charge filed by the victim or a third party, e.g., church, union, advocacy group
- Filing by EEOC commissioner or office director

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Foreign Workers Are Covered by U.S. Labor and Employment Laws

- *Sure-Tan v. NLRB*, 467 U.S. 883 (1984)
Undocumented workers = "employees" under NLRA
- *EEOC v. Tortilleria "La Mejor"*, 758 F. Supp. 585 (E.D. CA 1991) (Farmersville, CA) Undocumented workers are protected by Title VII irrespective of Immigration Reform and Control Act
- *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988) Undocumented are "employees" under FLSA

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Certification for U-Visa

- Non-immigrant visa (not permanent) for victims of crimes who suffered mental or physical abuse
- Have information regarding the activity
- Are willing to assist government officials, **including EEOC**, in the investigation of the activity
- Criminal activity violates U.S. laws or occurred in U.S.
- Other certifiers who might assist: U.S. Department of Labor; federal, state or local law enforcement, prosecutor, judge; Child Protective Services

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EEOC Investigation Procedure

- Company receives copy of charge in 10 days
- EEOC can obtain statements, interview witnesses, visit the facility, review documents
- Employer has opportunity to present its side of the story. Investigation is **confidential**
- EEOC can seek **temporary restraining order** to "maintain status quo", see *EEOC v. Sako Corporation (D.N.M.I.)*; *EEOC v. Evans Fruit (E.D. WA)*; court filing makes public the existence of federal civil rights investigation

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EEOC Investigation

- **Are there other victims?**
- EEOC can also investigate whether there are other "similarly situated" victims of discrimination or harassment and obtain \$\$\$ for them
- If you believe that other individuals have been harassed and/or retaliated against, alert the EEOC

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Filing Lawsuit

- If conciliation fails, then EEOC can sue company in federal court
- EEOC files suit against the employer in the public interest
- Settlement authority rests with the EEOC (what \$\$\$ serves the public interest and makes victim "whole")

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Remedies under Title VII

Injunctive Relief

- Reinstatement
- Training for company officials
- Back pay with interest
- Front pay
- Attorney's fees
- Compensatory damages
- Punitive damages

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Monetary Damages

- **Backpay**
- **Frontpay**
- **Compensatory damages:** emotional distress or out of pocket losses
- **Punitive damages:** Punishing the employer for reckless disregard of law

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Hoffman Plastics Compound, Inc. v. NLRB

- Supreme Court held that undocumented workers can recover wages for work performed and compensatory or punitive damages. 122 S.Ct. 1275 (2002)
- Also, *Zavala v. Wal-Mart Stores, Inc.*, 393 F.Supp. 2d 295 (D. N.J. 2005); *Singh v. Jutla & C.D.R.'s Oil, Inc.*, 214 F.Supp. 2d 1056 (N.D. Cal. 2002) (Undocumented worker is entitled to compensatory and punitive damages after employer turned him into the INS in retaliation for making a claim for unpaid wages); *Enteria v. Italia Foods, Inc.*, 2003 WL 21995190 Not Rept'd in F.Supp.2d (N.D. Ill. 2003) (Compensatory damages available for retaliatory discharge)

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National Origin Discrimination

National origin discrimination involves treating applicants or employees unfavorably because

- they or their ancestors are from a particular country or part of the world
- they have an accent or are not fluent in English
- they appear to be of a certain ethnic background, even if they are not
- they are married to, or associated with, a person of a certain national origin
- They are connected to a particular organization affiliated with a national origin

Forms of National Origin Discrimination

- Any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term, condition or privilege of employment.
- Discrimination can occur when the victim and the person who inflicted the discrimination are the same national origin
- Harassment includes offensive or derogatory remarks about a person's national origin, accent or ethnicity.

National Origin & Employment Policies/Practices

- It is illegal to use an employment policy or practice that has a negative impact on people of a certain national origin and is not job-related or necessary to the operation of the business.
- An employer can only require an employee to speak fluent English if fluency in English is necessary to perform the job effectively.
- An employer may not base an employment decision on an employee's foreign accent, unless the accent seriously interferes with the employee's job performance.
- An "English-only rule" is only allowable if it is needed to ensure the safe or efficient operation of the employer's business and is put in place for nondiscriminatory reasons.

Chellen and EEOC v. John Pickle Co., 344 F.Supp.2d 1278 (N.D. Okla. 2004) and *Chellen and EEOC v. John Pickle Co.*, 446 F.Supp.2d 1247 (N.D. Okla. 2006) (Tulsa, OK)

- Court applies **Title VII** and other civil laws and remedies to case of foreign worker exploitation which is typically considered a criminal matter of human trafficking and involuntary servitude



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Chellen and EEOC v. John Pickle Co.

- Company tried to **shortcut immigration laws** by use of wrong visas for highly skilled steel workers
Got B1 "visitors visas" for alleged "training" and lied to U.S. consulates that no work for pay was involved
- Class of skilled craftsmen from India made to work on production for **less than minimum wage** (\$1-\$3.17 hr.) and restrained in **substandard** living conditions
- Company **profited** and displaced its American workers

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Employer in a Pickle Jarred by Judge's Ruling

- Judge issued 100 pages of published law
- Final judgment Oct. 16, 2006 for EEOC and plaintiffs on **all** claims; award of \$1.3 million. (Finding Supreme Court in *Hoffman* **did not** preclude monetary award for wages for work performed, emotional harm, or punitive damages)

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National Origin Discrimination Despite Work Visas

- *EEOC v. Trans Bay Steel, Inc.* (L.A., CA, Dec. 2006). Thai nationals contracted under H2B visas held against their will and forced to work without pay. Human trafficking and involuntary servitude. Some confined to apartments without electricity, water, or gas. Threatened with arrest and deportation. (Settled for \$1 million, housing, and legitimate work opportunities)
- *EEOC v. Woodbine Memorial Hospital* (D. MO 1999) (Filipino nurses on H-1 visas paid less than white U.S. born nurses for same work, and different terms and conditions. (Settled for \$2.1 Million)



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Sex Discrimination

- Treating employees differently on the basis of sex is prohibited
- Includes sex stereotyping cases
- Includes pregnancy and caregiver discrimination
- Sexual harassment is prohibited (unwelcome sexual advances-verbal, physical, pictorial)
- Trafficking cases often egregious sexual harassment including physical advances and rape

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Sex and National Origin Harassment

- Victim or harasser may be man or woman
- Victim and harasser may be of same sex or same national origin
- Harasser can be supervisor, agent of employer, co-worker, or third party
- Victim can be someone not directly targeted but nevertheless affected by the hostile work environment

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Harassment

- Sexual - unwelcome verbal or physical sexual conduct, including rape, assault, battery, grabbing, touching, fondling, sexual advances, requests for sexual favors, demeaning terms
- National Origin - unwelcome verbal or physical conduct relating to national origin, including offensive or derogatory remarks about a person's national origin, accent or ethnicity.
- Must be **severe or pervasive** so as to alter working conditions to create intimidating, hostile, or offensive work environment

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EEOC v. Harris Farms (E.D. Cal) Coalinga, CA

- Immigrant farm worker from Mexico, mother of five; long-time permanent resident
- Raped at gunpoint three times by supervisor in the fields and home; constant propositions for sex; threats to kill husband if she reported rapes
- Deputy sheriff found CP **incredible** after **short interview** without **qualified interpreter**
- 6-week jury trial in Fresno, California
- Verdict for farm worker, nearly \$1 million; found that worker was sexually harassed and retaliated against; upheld on appeal (2008)

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EEOC v. Tanimura & Antle (N.D. Cal.) (Yuma, AZ; Salinas, CA)

- Single mother forced to have sex with hiring official in order to pick crops in the beginning of each season so that she could feed 3-year-old daughter
- Consensual versus non-consensual?
- Motel, ATM
- Friend's corroboration, breakdown in describing details of harasser's home
- \$1.855 million settlement (1999)

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Retaliation

- 37% of all charges in FY2011
- Over 25% of all charges contain a retaliation allegation
- Issue: Does the adverse action, e.g. termination, demotion, threats to harm or other activity, discourage a reasonable employee in regard to filing a claim?

Retaliation

1) **Protected activity**

- Opposed to a practice reasonably believed to be unlawful discrimination, e.g., complaining, threatening to file a charge, picketing in opposition, refusing to obey discriminatory order; refusing sexual advances
- See *EEOC v. Tanimura & Antle* (refused further advances and was fired; boyfriend opposed employee's harassment and was fired)

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Retaliation

- 2) **Participation** in proceedings related to employment discrimination complaint; investigations, trials, interviews, etc.
- Includes filing a charge with EEOC, filing internal complaint, cooperating with EEOC investigation, testifying in depositions, etc.
 - Any person with an interest arguably sought to be protected by the statute.
 - See *EEOC v. Harris Farms* (filed charge; further harassed; rumors of affair)

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Threats of Deportation as Retaliation

- If employer uses threats of reporting or actually reports workers to DHS after complaint or opposition to employment practices believed to be unlawful, such conduct = **Retaliation**
- *EEOC v. Quality Art LLC and Plestra Capital* (D. AZ, 2002)
Fired and reported some workers to INS for deportation after complaints of sex harassment and national origin discrimination (Settled for \$3.5 million)

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Threats of Deportation as Retaliation

- *EEOC v. Queen's Medical Center* (D. Hawaii, 2002)
Employer contacted INS to try to end own sponsorship of Sri Lankan who complained about discrimination, but not for others who did not complain. (Settled for \$150,000)
- *EEOC v. Holiday Inn Express* (D. Minn., Jan. 2000)
Company reported employees who complained about terms and conditions who tried to exercise rights under NLRB. Settlement after INS deferred deportation action to allow the workers time to be witnesses for their own case

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Conclusion

- Abuse of Immigrant Workers is a priority issue for EEOC
- Government, non-profits, lawyers, medical doctors, counselors, and others play important part to protect workers
- Let's share resources, research, information and ideas
- We look forward to working together

Thank you!

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