**National Origin Discrimination**

**Chapter Objective:**

The purpose of this chapter is to identify the different forms of discrimination on the basis of national origin. As this type of discrimination does not receive the "press" that do other areas such as race or gender, students may be more confused as to what actually is meant by national origin. For instance, everyone has a national origin, an ancestry and a citizenship. What is the difference? As the student will find later in the chapter, the EEOC has issued guidelines in these areas. In addition, the relevance of the Immigration Reform and Control Act will be discussed.

**Scenarios** - Points for discussion

***Scenario One:*** This scenario allows you to explore national origin discrimination in the context of the post-September 11 workplace. This scenario is based on an incident in Fontana, California that was reported in the *Los Angeles Times* on February 10, 2002. See Eric Lichtblau, *“Bias Against U.S. Arabs Taking Subtler Forms*,” Los Angeles Times (February 10, 2002 p. A20). McDonald’s is the employer at issue. McDonald’s management maintains that Muhammed El-Nasleh was terminated for “performance deficiencies.” This also serves to accentuate the importance of early intervention on harassment based on membership in a group under any of the protected classes – to avoid a harassment claim as well as the appearance of pretextual reasons behind a subsequent adverse employment action.

***Scenario Two:*** A worker must be qualified for the position which she or he holds. If the worker cannot perform the essential functions of that position, then the worker is not qualified. In this situation, it would appear likely that speaking to customers on the phone is an essential element of the new manager's positions and, consequentially, the manager is not qualified for the position. In lieu of termination, however, perhaps the owner could suggest English lessons which would allow the worker to remain in his present position.

**LECTURE NOTES**

I. Chez/Casa/Fala/Wunderbar Uncle Sam

**Lecture Note:** It would be interesting to discuss at the outset how students feel when the federal government requires certain federal documents to be in two languages; for instance, the IRS now publishes income tax returns in Spanish and English. "English First," a political action group, however, argues that by doing this, we are discouraging immigrants from learning English, this country's first language. What do your students think?

A. The introduction discusses the status of the United States as a melting pot. In the United States, it is unlikely that one would find themselves in a workplace which is completely devoid of individuals of other national origins. On the other hand, individuals from other countries have also paid the price of discrimination because of their differences. As a result, national origin was included in the list of Title VII's protected classes in order to insure that employers did not base employment decisions on preconceived notions about employees or applicants based upon their country of origin.

B. Background and Prima Facie Case

1. Protection offered is through Title VII: it is an unlawful employment practice for an employer to limit, segregate or classify employees in any way which would deprive them of employment opportunities because of national origin. An employer may not group its employees on the basis of national origin, make employment decisions on that basis, or implement policies or programs which, though they appear not to be based on an employee or applicant's country of origin, actually effect those with one national origin differently than those of a different group.

2. Prima Facie Case of National Origin Discrimination:

a. Employee must be a member of a protected class (i.e., articulate the or employee's national origin)

b. Employee must show that she was qualified for the position for which she applied or in which she was employed;

c. Employee must show that the employer made an employment decision against this employee or applicant; and

d. that the position was filled by someone who was not a member of the protected class (can show that this person is a member of any other national origin).

C. **Member of the Protected Class**

1. "National Origin" definition: "including, but not limited to, the denial of equal employment opportunity because of [an applicant or employee's] or his or her ancestor's place of origin; or because an applicant has the physical, cultural or linguistic characteristics of a national origin group." (EEOC Guidelines)

a. also includes ethnic **characteristics** or origins. [has been held that Cajuns, Gypsies and Ukrainians are protected under Title VII.]

b. It may also serve as the basis for a national origin discrimination claim if the employee:

1) is identified with or connected to a person of a specific national origin, such as where someone suffers discrimination because they are married to a person of a certain ethnic heritage

2) is a member of an organization which is identified with a national group

3) is a participant in a school or religious organization which is affiliated with a national origin group, or

4) has a surname which is generally associated with a national origin group.

2. Protects only based on origin, not **citizenship** (See IRCA discussion, later).

3. Note that American-born employees are also protected against discrimination on the basis of their *American* origin (i.e. they could state a cause of action by satisfying the first prong: they are American).

D. Employee is **Qualified** for the Position

1. After the employee shows that she or he is qualified for the position, i.e. meets the job's standard requirements, the employer will be able to come back and prove that the employee failed to meet a BFOQ: bone fide occupational qualification.

2. A BFOQ must be a legitimate component necessary to the job. This is a narrowly construed defense; the employer may not use it as a way of refusing to hire employees of certain origins, merely because they are of that origin.

**Lecture Note:** Note that the text offers the example of an Italian or Chinese server in an ethnic restaurant. The legislative history of the Act offers this as an example of what would be considered a BFOQ. What do your students think? What if the restaurant wants to maintain an ethnic atmosphere? Should the restaurant be able to refuse me a position because I am not of their ethnicity? Some will say absolutely yes, but you may have a few that will say that this obviously has nothing to do with my cooking abilities and is not a legitimate BFOQ.

Does the wait staff lend ambiance to the restaurant? How would your students feel if they walked into a Chinese restaurant but were served by individuals who did not look Asian but instead appeared Greek, or Haitian, or Italian? Would they think something different about the quality of the food or not. You'll get some discussion on this point.

a. **English fluency requirements**: If the employer desires to use English fluency as a BFOQ and hire on that basis, the employer must show that such fluency is an **actual** requirement of the position. In many situations, understanding or communicating in English may be the BFOQ but complete proficiency is not required.

**Lecture Note:** If you care to go into a bit more depth in this area, the case of *Carino v. University of Oklahoma* is interesting. In that case, the issue of whether firing someone because she or he has an accent is discussed. The court concludes that a language accent that does not impair the employee's abilities is not an acceptable LNDR (legitimate non-discriminatory reason) for demoting the individual.

**Lecture Note**: Ask students to discuss how multilingualism contributes positively to organizations today. As the text notes: Diversity in the workplace brings many benefits, including a greater breadth of skills and life experiences represented in the workforce. It may also present unique challenges to employers, particularly in the form of poor communication among those who may prefer to speak in their native tongue, which might not be English but Spanish, Hindi, or Tagalog. While such communication problems may cause confusion, severe English-only restrictions may create frustration and resentment among employees for whom English is a second language. To avoid alienating these employees and to decrease the risk of litigation, employers should not permit managers to arbitrarily impose language restrictions. (See “English-Only Rules May Spell Trouble for Employers,” October 11, 2001, “special to law.com [www.law.com](http://www.law.com) ).

You may want to use the statistics given below under “Workforce 2000” to begin this discussion.

b. **English-only rules:** Some employers attempt to implement rules in the work place which require that employees speak only English in the work place. Courts have gone both ways on this.

1) Some courts hold that this is discriminating against anyone for whom English is not the first language and therefore prohibited.

2) Other courts hold that the prohibition does not discriminate on the basis of national origin as all employees, regardless or origin, are required to speak only English. Challenges to the rules have increased dramatically in recent years.

1. In 1996, the EEOC received 77 complaints regarding English-only rules, while in 1998 there were 146 complaints.
2. In October 2000, the EEOC reported 365 such complaints thus far for that year.
3. The EEOC has taken the position that English-only rules *applied at all times* are presumptively discriminatory, although the courts have not always agreed with this approach. Rules applied during work time *only* are less likely to be considered harassment and more likely to show a business purpose.
4. Employers considering an “English-only” rule should consider the legal considerations as well as the fact that such a rule can create an atmosphere of inferiority, isolation, and intimidation that may result in a discriminatory work environment.

3) Accordingly, an employer may properly enforce a limited, reasonable, and business-related English-only rule against an employee who can readily comply. However, if the practice of requiring only English on the job is mere pretext for discrimination on the basis of national origin , i.e., the employer imposes the rule *in order to* discriminate, or the rule produces an atmosphere of ethnic oppression, such a policy would be illegal.

\*This might be the case where an employer requires English to be spoken in all areas of the workplace, even on breaks or discussions between employees during free time.

1. In September 2000, a federal magistrate ruled that Dallas-based Premier Operator had illegally discriminated against 13 Hispanic employees in enacting and implementing a “Speak English-Only” rule. Some of the affected employees had been hired for their ability to speak both English and Spanish to customers. The court awarded the plaintiffs more than $700,000, the largest monetary award ever won by the EEOC for such a violation. Earlier in the same month, the EEOC won a $192,000 settlement for eight Hispanic employees in a lawsuit against Illinois-based Watlow Batavia, based on the company’s implementation of an English-only policy on its assembly line. [See Maria Shim, “English Only Employment Cases Quintuple in Four Years,” National Law Journal (October 17, 2000).]

**Case Example:**

**Garcia v. Spun Steak Co., 998 F. 2d 1480 (9th Cir. 1993)**

**Issue**: Discriminatory impact on Hispanic employees by enacting an English-only policy at Spun Steak Co: Is there a place for cultural expression at the workplace? Could the English-only policy create an intimidating work atmosphere?

**Facts**: Spun Steak Co. employs 33 workers, 24 of whom are Spanish-speaking. Two of the Spanish Speakers speak no English. Plaintiffs Garcia and Buitrago are production line workers for the defendant are both bilingual. After receiving complaints that some workers were using their second language to harass and to insult other workers, defendant enacted an English-only policy in the workplace in order to (1) promote racial harmony; (2) enhance worker safety because some employees who did not understand Spanish claimed that they were distracted by its use and (3) enhance product quality because the USDA inspector in the plant spoke only English. Plaintiffs

received warning notices about speaking Spanish during working hours and they were not permitted to work next to each other for two months. They filed charges with the EEOC who found reasonable cause to believe that the defendant had violated Title VII. District Court awarded summary judgment to the plaintiffs and Spun Steak appealed.

**Decision**: The ability to prohibit an employee to express their cultural identity in the workplace is not a violation of Title VII. Unfortunately, employees are often forced to sacrifice certain privileges (even self expression) during work hours. Taking away a privilege is at the discretion of the employer. Spun Steak did not violate Title VII with its policy. For those employees that are bilingual, the English-only policy does not deny them a privilege of employment. No prima facie case was proven, therefore, judgment was in favor for Spun Steak.

**Case Questions:**

*1. Do you agree with the contention that denying a group the right to speak their native tongue denies them the right to cultural expression?*

Discuss*.*

*2. Do employees have a “right” to cultural expression in the work place?*

Discuss.

*3. Do you agree with the court that an English-only rule is not per se abusive to those whose primary language is not English? Do you believe that it creates a “class system” of languages in the work place and therefore inherently places one group’s language above another’s?*

Discuss.

**Case Example:**

***Ruiz, et. al v. Hull, Governor of Arizona, 957 P.2d 984 (Ariz. 1998)***

**Issues:** First, whether the trial court erred by ruling that the Amendment did not violate the First

Amendment to the United States Constitution because it was content‑neutral, did not reach constitutionally‑protected free speech rights, and was thus not fatally overbroad. Second, whether the trial court erred by concluding that the Amendment did not violate the Fourteenth Amendment to the United States Constitution because there was no proof of discriminatory intent.

**Facts:** Elected officials, state employees and public school teacher brought action to challenge the constitutionality of Article XXVIII of the Arizona Constitution which was adopted in 1988 and which provides, that English is the official language of the State of Arizona and that the state and its political subdivisions‑‑including all government officials and employees performing government business‑‑must "act" only in English. The Amendment binds all government officials and employees in Arizona during the performance of all government business, and provides that any "person who resides in or does business in this State shall have standing to bring suit to enforce this article in a court of record of the State." The trial court upheld the constitutionality of amendment. The plaintiffs sought a declaratory judgment that the Amendment violates the First and Fourteenth Amendments of the United States Constitution.

**Decision:** The court held that the Amendment violates the First Amendment to the United States Constitution because it adversely impacts the constitutional rights of non‑English‑speaking persons with regard to their obtaining access to their government and limits the political speech of elected officials and public employees. The court also held that the Amendment violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it unduly burdens core First Amendment rights of a specific class without materially advancing a legitimate state interest.

**Case Questions**

*1. How would this case have been handled differently if it involved a private employer rather than a public entity?*

The Constitution would not apply.

*2. The EEOC has stated that an English-only speaking rule at a place of employment is unduly burdensome and a presumptively unnecessary condition of employment. Pursuant to EEOC guidelines, an employer may only establish such a rule where it can show business necessity as well as full and fair notice given to its employees. What type of policy would satisfy this requirement? Be specific*.

Discuss possibilities.

*3. The other states’ amendments withstood strict scrutiny because there were not as restrictive as the Arizona amendment. Discuss how the Arizona amendment could be changed to withstand the constitutional challenge. The Amendment states, “that English is the official language of the State of Arizona and that the state and its political subdivisions‑‑including all government officials and employees performing government business‑‑must "act" only in English. The Amendment binds all government officials and employees in Arizona during the performance of all government business, and provides that any "person who resides in or does business in this State shall have standing to bring suit to enforce this article in a court of record of the State.”*

Class discussion.

**LECTURE NOTES**

E. Adverse Employment Action and Dissimilar Treatment

1. **Adverse Action** may include any adverse treatment; demotion, removal of privileges or termination, and so on.

2. **Dissimilar Treatment**: employee must show that her position was filled by someone who is not in the same protected class or that she was treated differently than others not in the protected class.

a. This can occur with disparate treatment cases where an individual may be terminated for doing something that others have done, such as tardiness, but the others (not in the protected class) are not terminated, OR

b. This can occur with disparate impact such as a case where there is a minimum height requirement. In that case, individual groups (such as Asians) who may, on average, be shorter than other groups may be adversely affected by the rule to a greater extent than would other groups.

**Case Example:**

***Prudencio v. Runyon, Postmaster General, United States Postal Service, 986 F.Supp. 343 (Dist. Ct. W.D. Virginia 1997)***

**Issue:** Whether the defendant is entitled to summary judgement under the charge of national origin discrimination.

**Facts:** Job applicants of Philippine descent sued United States Postal Service (USPS) for discriminatory failure to hire, in violation of Title VII due to the fact that they were qualified and ranked higher than recently hired workers.

**Decision:** The court held that the Prudencios make out a classic prima facie case of employment discrimination under the McDonnell Douglas paradigm. The court stated that the U.S.P.S.'s concession that it did not know the reason for the exclusion of the plaintiffs from the employment candidates' list, “is the logical and legal equivalent of proffering no reason for the omission.” The court held, a matter of law, "no reason" cannot serve as a "legitimate, nondiscriminatory reason," and the plaintiffs' prima facie showing of national origin discrimination remains unrebutted. Under the McDonnell Douglas framework, the Prudencios are entitled to judgment as a matter of law.

**Case Questions**

*1. What evidence could the department have presented in order to better support its case and validation of the height requirement?*

If there were greater correlation between height and weight and the bona fide occupational qualifications of the position, the court would have allowed the requirement. Accordingly, if the department could have shown that individuals who were not of that height or weight were unable to perform certain essential functions, the court may have been more inclined to allow the requirements. Instead, all the department did was have people testify that the requirements were important to the position.

*2. How do you feel about female police officers in positions where physical contact may be necessary with suspects, etc.? Do you feel that a suspect might not give the same respect to a woman or a diminutive man in a challenging situation?*

The question should raise some important discussion points. We ask it here, in the national origin chapter, merely to drive home the point that a qualification must be *bona fide* and valid in order to be acceptable. Remind the class of *Dothard v. Rawlinson*, where the court decided that it was all right for a prison to hire only men for certain guard positions. The court held that the woman may disrupt the environment of a male prison merely because of her womanhood. The issue of maintaining control was involved in that case, as well.

*3. As an employer, what is the best way for you to protect the company from charges accusing the employer of hiring discrimination?*

Document all hiring decisions as to why the interview did not select the applicant. If the reason is discriminatory, it can not be a valid excuse and the applicant should be reconsidered

**LECTURE NOTES**

II. **Guidelines on Discrimination because of Religion or National Origin**

A. The Guidelines apply to contracts with federal agencies or contractors.

B. The Guidelines impose an **affirmative obligation** not to discriminate. This would be construed as a slightly greater burden that Title VII imposes.

C. Blacks, Spanish-surnamed Americans, Asians and native Americans are specifically excluded from the guidelines because they are covered elsewhere in the compliance rules applying to these contracts.

D. The Guidelines provide that the employer should engage in appropriate outreach and positive recruitment activities in order to remedy existing deficiencies. There are various approaches to this outreach requirement including the following:

1. Internal communication of the obligation to provide equal employment opportunity without regard to religion or national origin;

1. Development of reasonable internal procedures to insure that the equal employment policy is fully implemented;
2. Periodically informing all employees of the employer's commitment to equal employment opportunity for all persons, without regard to religion or national origin;

4. Enlisting the support and assistance of all recruitment sources;

5. Reviewing employment records to determine the availability of promotable and transferable members of various religious and ethnic groups;

6. Establishing meaningful contacts with religious and ethnic organizations and leaders for such purposes as advice, education, technical assistance, and referral of potential employees many organizations send job announcements to these community groups when recruiting for positions;

7. Engaging in significant recruitment activities at educational institutions with substantial enrollments of students from various religious and ethnic groups; and

8. Using the religious and ethnic media for institutional and employment advertising.

E. **Middle Eastern Discrimination After September 11**

1. In the aftermath of September 11, hate crimes against individuals of Middle Eastern descent dramatically increased. Workplace discrimination complaints brought by Muslims and those of Middle Eastern descent also rose sharply. From September 11, 2001 to February 2002, the EEOC received 260 such claims, an increase of 168% over the same period a year earlier. The EEOC even created a special classification, “Code Z,” to designate complaints tied to September 11. See Eric Lichtblau, *“Bias Against U.S. Arabs Taking Subtler Forms*,” Los Angeles Times (February 10, 2002 p. A20).
2. Scenario 1 exhibits one post September 11 incident. Further examples include: A California employee who was allegedly fired without explanation after being told by her boss not to reveal to anyone that her husband is Palestinian. A New York City nurse was ordered to take some time off and then given a lesser position “for her own safety” after she reports that a co-worker threatened to “kill Muslims.” (Id.)
3. In the post-September 11 era, employers actually have a unique opportunity to raise awareness of and sensitivity to cultural diversity in the workplace. Elmer Johnson, head of the Aspen Institute that seeks to improve corporate leadership, has stated that corporate leaders should inspire employees and inculcate a sense of shared values. [See “CEOs: Human and Humane,” Corporate Counsel (October 19, 2001).] Perhaps this can be achieved by reaching out to employees of Middle Eastern descent who may be experiencing fear of discrimination. Jaffe Dickerson, a partner of the Littler, Mendelson law firm, had a client’s Middle Eastern employee confide that he no longer wants to travel by air or go out to clubs after work out of fear of being victimized by bias. (See: “Employment Counsel Tackle Anxieties and Problems After September 11,” National Law Journal (October 29, 2001).
4. Remaining sensitive to such employees’ concerns in job assignments and work-related activities is key to their effective resolution. “Quick fixes” such as compulsory transfer to another position must be avoided. To further promote a healthy environment at work, employers should also consider the post-September 11 issues in diversity training.

III. **Citizenship and the Immigration Reform and Control Act**

A. Title VII's protection does not prohibit discrimination on the basis of citizenship.

1. "Political Function" exception provides that a rule requiring citizenship was valid in connection with certain non-elected positions held by officers who participate directly in the formulation, execution or review of broad public policy is acceptable. Where a position satisfies this exception, discrimination is allowed.
2. The Immigration Reform and Control Act (IRCA) corrected an unfair double standard that prohibited unauthorized aliens from working in the United States but permitted employers to hire them. Among other things, IRCA makes it unlawful for any person knowingly to hire, recruit, or refer for a fee any alien not authorized to work.
3. Employers are required to verify all newly hired employees by examining documents that identify the individual and show authority to work in the United States. (See Exhibit 11-3). Further, employers, recruiters, and those who refer for employment individuals are required to keep records pertaining to IRCA requirements. (For a list of employer responsibilities under IRCA, see Exhibit 11-4).
4. IRCA also established civil and criminal penalties for hiring illegal aliens. Employers are selected at random for compliance inspections under a General Administrative Plan (GAP) developed by the Immigration and Naturalization Services (INS), the administrative agency charged with oversight of IRCA. Generally fines are not imposed for paperwork violations alone or for employment of aliens whose illegal status was unknown, unless the employer refused to comply or other egregious factors existed. However, employers who knowingly employed illegal aliens after receiving educational or visits or GAP inspections will receive Notices of Intent to Fine. See <http://www.ins.gov/graphics/aboutins/history/sanctions.htm>.

**Case Example:**

***Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973)***

**Issue:** Whether a requirement that an employee be of a certain citizenship, rather than national origin, violates Title VII?

**Facts:** Cecilia Espinoza, a lawful Mexican alien, applied for a position at Farah Manufacturing's San Antonio Division. She was denied the position, however, as a result of Farah's policy to hire only American Citizens. The issue to be decided by the court is whether Title VII's proscription against discrimination on the basis of national origin protects against discrimination on the basis of citizenship.

**Decision:** The court first defines national origin as referring to the country where a person was born, or, more broadly, the country from which his or her ancestors came. The court then discusses the why it appears compelling that Congress did not intent to include citizenship by that term. Congress, itself, engages in discrimination on the basis of citizenship. The court does, however, state that a citizenship requirement may be prohibited where it has the effect of discriminating on the basis of national origin (i.e. adverse impact). Farah's policy did not appear to do this.

**Dissent:** Justice Douglas, arguing for the dissent, claims that it is strange that a state cannot discriminate against a lawful alien in connection with practicing law but an employer is allowed to discriminate on the basis of citizenship. The important point raised by the dissent is that alienage results only from being born outside the united States so it is de facto discrimination against people on the basis of national origin where you discriminate on the basis of citizenship.

**Case Questions**

*1. Which argument, the majority's or the dissent, do you find more compelling?*

I believe that you will find students ultimately persuaded by the minority opinion; it simply seems to make sense. Then ask why they believe the majority went the other way.

*2. What implications does this case have for hiring practices in parts of the United States*

*where aliens are prevalent?*

It appears that an employer could simply exclude all aliens. On the other hand, the end of the majority opinion makes it clear that, where the citizenship requirement has an adverse impact on one group of national origin, then the requirement may be prohibited.

*3. If Espinoza could show that this policy, while arguably "facially neutral," actually impacts people of Mexican origin differently than people of American origin, wouldn't Espinoza*

*have a claim for disparate impact?*

Yes; that is the point of the end of the majority opinion.

**LECTURE NOTES**

F. IRCA does prohibit employers in certain circumstances from discriminating against employees on the basis of their citizenship or intended citizenship, and from hiring those not legally authorized for employment in the United States. (However, IRCA does allow discrimination in favor of United States citizens as against legal aliens.)

1. Employers which may not be subject to Title VII's prohibitions because of their small size, may still be sufficiently large to be covered by IRCA's anti-discrimination provisions; those employers with **four through fourteen employees** are prohibited from discriminating on the basis of national origin (Title VII), and employers with **four or more employees** may not discriminate on the basis of citizenship (IRCA).

2. There are two acceptable BFOQ's statutorily allowed under IRCA:

a. English-language skill requirements that are reasonably necessary to the normal operation of the particular business or enterprise; or

b. Citizenship requirements specified by law, regulation, executive order, or government contracts, along with citizenship requirements that the Attorney General determines to be essential for doing business with the government.

3. The main difference between a proof of discrimination under Title VII and IRCA is that, in proving a case of disparate impact, Title VII does not require proof of discriminatory intent, while IRCA requires that the adverse action be knowingly and intentionally discriminatory.

\*Therefore, innocent or negligent discrimination is a complete defense to a claim of discrimination under IRCA.

# G. Undocumented Workers

* 1. In its October 1999 Enforcement Guidance on Remedies Available to Undocumented Workers, the EEOC emphasized that workers’ undocumented status does not justify workplace discrimination. The EEOC also set forth that employers’ liability for monetary remedies irrespective of a worker’s unauthorized status promotes the goal of deterring unlawful discrimination without undermining the purposes of IRCA. The EEOC’s position on available remedies is that unauthorized workers are entitled to the same remedies as any other worker, including back pay and reinstatement. The National Labor Relations Board took a similar position with respect to discrimination based on union activity.
  2. However, in *Hoffman Plastic Compounds Inc. v. NLRB*, 122 S.Ct. 1275 (2002), the United States Supreme Court held that the NLRB could not award backpay to unauthorized workers who had been unlawfully discriminated against for engaging in union-organizing activities. According to the Court, to do so would contravene federal immigration policy embodied in IRCA. *Hoffman* opens the possibility that backpay will not be available to unauthorized workers who have been illegally discriminated against under Title VII, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA). [See Donna Y. Porter, “Undocumented Workers have NLRA Rights, but Not Monetary Remedies,” Employment Law Strategies, (June 6, 2002).
  3. Unauthorized workers are particularly vulnerable to threats to report them to the INS. In every case in which the employer asserts that the worker is unauthorized and appears to have acquired that information *after* the worker complained of discrimination, the EEOC will determine whether the information was acquired through a retaliatory investigation. If the investigation is retaliatory, the employer will be liable for equitable relief as well as monetary damages without regard to the worker’s actual work status.
  4. However, a worker’s unauthorized status may serve as a legitimate reason for an adverse employment action, although employers who knowingly employ unauthorized workers could not assert this defense in a discrimination claim. [See “Workforce Online,” CCH (November 1999), citing Policy Guidance: Remedies Available to Undocumented Workers under Federal Employment Discrimination Laws; October 26, 1999. Appendix B of Section 622, Volume II of the EEOC Compliance Manual.]
  5. The Fair Labor Standards Act also protects unauthorized workers from abuse. In a dramatic 2001 case, a group of mostly Mexican workers in New Jersey claimed that the operators of a bargain retail chain subjected them to “inhumane” working conditions and failed to pay them fair wages and overtime compensation in working to perform such tasks as building and stocking new stores. Workers generally received $230 for a seven-day workweek of about 12 hours a day, which amounted to $2.74 an hour. These workers were also often forced to work in stores without heat, access to meals, or adequate water, proper ventilation, or adequate bathroom facilities. Bosses also called workers derogatory names. (See “Mexican Workers Claim U.S. Bargain Store Chain Exploited Them,” Associated Press, January 10, 2001 at <http://www.law.com>)

**Lecture Note:**

Ask students whether they agree or disagree with the extension of rights to minimum wage and overtime pay, unionization, and freedom from harassment to undocumented workers. Ask a student who disagrees what he or she thinks would be the result if such rights were not recognized. The student might respond that the immigration wave of undocumented workers would be curtailed. Ask the student whether he or she thinks that it is the promise of work or the promise of workers’ rights that are driving the workers across the border. Ask the student again what would happen to the American workplace if employers were not required to pay undocumented workers’ overtime. The student should respond that the “market forces” would result in more hiring of undocumented workers, who would not be able to demand minimum wages, overtime, or to unionize. Thus, the protection of this group of workers protects all workers in the American workplace.

IV. **Alternate Basis for National Origin or Citizenship Discrimination**

A. In *St. Francis College v. Al-Khazraji*, the court held that one could pursue a claim for national origin discrimination under 42 USC section 1891 as well as under Title VII.

**Workforce 2000**

1. The past decade has seen a dramatic increase in the number of immigrants to the United States, particularly from Hispanic and Asian countries.
2. Census figures released in 2001 show that the number of Hispanics rose 60 percent since 1990, to 35.3 million people, creating a virtual tie between Hispanics and African-Americans as the nation’s largest minority group. [See “English-Only Rules May Spell Trouble for Employers,” special to law.com, (October 11, 2001), <http://www.law.com>.]

**Lecture Note:**

You may use these statistics to discuss workplace diversity in connection to the “English only rules” material.

**Chapter-End Questions**

1. Which, if any, of the following scenarios would support an employee's claim of discrimination on the basis of national origin?

a. A Dominican chambermaid in a hotel is denied promotion to front desk duties primarily because of her inability to clearly articulate and to make herself adequately understood in English. *Majia v. New York Sheraton Hotel, 459 F.Supp. 375 (S.D.N.Y. 1978)* [No.]

b. Individual with a "noticeable" Filipino accent is denied a position as supervisor of a medical laboratory because employees complained of his speaking abilities. *Carino v. Univ. of Oklahoma Bd. of Regents, 750 F.2d 815 (10th Cir. 1984)* [Yes.]

c. Applicant with a speech impediment is unable to pronounce the letter "r". The applicant therefore often has difficulty being understood when speaking and is denied a position. [Yes.]

d. The owner of a manufacturing facility staffed completely by Mexicans refuses employment to a white American manager because the owner is concerned that the Mexicans will only consent to supervision by and receive direction from another Mexican. [Yes.]

e. An Indian restaurant seeks to fill a wait staff position. The advertisement requests applications from qualified individuals of Indian descent in order to add to the authenticity of the restaurant. In the past, the restaurant found that its business declined when it used Caucasian waitresses as the atmosphere of the restaurant suffered. An Italian man applies for the position and is denied employment. [No.]

f. A company advertises for Japanese-trained managers as the employer has found that such individuals are much more likely to remain at the company for an extended period of time, to be loyal and devoted to the firm, and to react well to direction and criticism. An American applies for the position and is denied employment in favor of an equally qualified Japanese-trained applicant, who happens to also be Japanese. [Yes.]

2. Hector Garcia, a bilingual Mexican-American, is a salesperson at Gloor Lumber and Supply, Inc. in Brownsville, Texas. His job responsibilities included selling lumber, hardware, and supplies in addition to helping other salespeople and stocking his department. The management had complimented his work on several occasions, and he received a $250.00 bonus at the end of his first year. Even though most of the company's employees were bilingual, it had a rule that the employees could not speak Spanish on the job unless they were dealing with customers who could not speak English. (The rule did not apply to conversations held during breaks.) On one specific occasion, Garcia was asked a question on the job by another Mexican-American employee, and he replied in Spanish. One of the supervisors overheard the conversation, and Garcia was discharged. The company claims that Garcia's infraction of the English only rule was only one of the reasons for his discharge, and they offered evidence of Garcia's general failure to perform other aspects of his job. The company also claims that the compliments and bonus that Garcia received were motivational tools used by the company to encourage him to perform his duties better, not evidence that he was doing a good job. Garcia claims that the English only rule is discriminating against his national origin. ***Garcia v. Gloor, 618 F.2d 264 (1980)***

[The district court found that Gloor's reasons for the rule which included not wanting to offend English speaking customers and increasing the English fluency in the bilingual employees were valid business reasons, and the rule was not discriminating against national origin. Moreover, the court did find that there was sufficient evidence showing that Garcia was not discharged for breaking that specific rule alone.]

3. Calvin J. Roach, a native born American of Acadian descent, was fired by Dresser Industrial. Roach claimed that he was fired because of his "Acadian" national origin ("Cajun" descent) and his association with Dresser employees of the same origin, and Dresser claims that since there is not and never was such a country as Acadia, Roach's claim of national discrimination origin is not covered under Title VII, and the case should not even go to trial. ***Roach v. Dresser Ind. Valve & Instrument Division, 494 F.Supp. 215 (1980)***

[The court denied the defendant's motion and granted that even though there was never a country of Acadia, there was a French Colony of "Acadia" in 1604, and King James I renamed as Nova Scotia in 1620. The plaintiff was able to prove that he had ancestors in the French Colony of 1604, and the court ruled that the case would be heard on its merits.]

4. Valentine Jurado, of Mexican-American and Native-American descent, was a disc jockey for KIIS radio station. After broadcasting in English only for several years, Jurado was asked by the program director to incorporate some "street" Spanish words into the program to attract more Hispanic listeners. A consultant was hired by the radio station to analyze the effects of Jurado's bi-lingual broadcasting on the listening audience. The consultant concluded that the attempt to increase the Hispanic audience had actually resulted in hurting the overall ratings of the station because it confused many of the listeners, and there was no quantifiable rise in the station's Hispanic audience. Jurado was told to stop speaking Spanish on the air, and he was fired the very next day for refusing to comply with this order. Jurado claims that the English-only order was disproportionately disadvantaging Hispanic people, and that he was also fired before being given a chance to even attempt to comply. ***Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987)***

[The court ruled that Jurado was not discriminated against on the basis of his national origin because the radio station did have the right to determine which market segment to which it would target its program. Jurado was bi-lingual so the court ruled that the English-only rule was not disadvantaging him in any way because he was as equally fluent in English as he was in Spanish.]

5. Ray Wardlewas police officer for the Ute Indian Tribe in Utah for more than seventeen years; he was not a member of this tribe. After seventeen years of service, he was discharged because the tribe was hiring a tribal member to fill his position. Wardle filed an action against the tribe claiming that he was fired based purely on the basis of his national origin. ***Wardle v. Ute Indian Tribe, 623 F.2d 670 (10th Cir. 1980)***

[The court ruled for the Ute Indian Tribe because the term "employer" does not include an Indian tribe; therefore, the defendants were protected by sovereign immunity, and their status as a non-employer cleared them of any wrongful discharge charges.]

6. Frontera, a Spanish-speaking man, applied for a full-time position as a carpenter at the Cleveland airport. He had been hired as a temporary carpenter before for the airport and had demonstrated that he was capable of sufficiently performing his duties as a carpenter. He also had not had any trouble communicating on the job. When he applied for the full-time position, he was required to take a test that was advertised and administered in English. He failed the test and filed suit against the Civil Service Commission of Cleveland and the Commissioner of Airports on the basis that the test discriminated against Spanish-speaking individuals. The Civil Service Commission claims that because of a lack of training programs for carpenters, it needs to ensure proficiency, and the test is only designed to test knowledge of words and terms that a carpenter should definitely know. ***Frontera v. Sindell, 522 F.2d 1215 (6th Cir. 1975)***

[The court ruled that the test was rationally based, and the city could not be reasonably held responsible for translating the test into every language for all languages represented in Cleveland. The court found for the defendants.]

7. Mr. Carino, born in the Republic of the Philippines and naturalized as a U.S. citizen, was hired by the University of Oklahoma College of Dentistry as the supervisor of the dental lab. Even though Carino was hired as a supervisor, his job consisted more of technical expertise than supervisory skills. About a year after his employment began, the University changed his title from supervisor to lab technician (there was no change in his salary or responsibilities), but Carino was not informed of this title change. After another year, the College of Dentistry hired a new supervisor, Mr. Wimpy, and changed Carino's title to senior maxillofacial technician. This change was labeled a promotion, and Carino received a raise in pay, but he was not informed of his second title change either. Soon after this change took place, the faculty member who required maxillofacial products left the school, and Carino's position became obsolete. Carino finally consulted the Dean of the College of Dentistry and discovered that he had been demoted and replaced as supervisor. Carino filed suit claiming national origin discrimination. The College claims that Carino was hired primarily for his technical skills and was awarded the supervisory position to start him off at a higher salary, and that he was not qualified to be a supervisor because of his inability to effectively communicate due to his native accent. ***Carino v. University of Oklahoma Board of Regents, 750 F.2d 815 (10th Cir. 1985)***

[The court ruled for the plaintiff because his accent did not hinder him from effectively performing his supervisory duties. Carino was qualified for the position so his demotion was unwarranted, and he was not notified of his demotion or change in title. The court found that the University of Oklahoma's actions were based on national origin discrimination.]

8. In 1979, Xieng, a Cambodian, began working at Peoples National Bank in its management training program for minorities. The program involved a great deal of customer contact and, in 1981, Xieng was awarded a certificate of successful completion of the program, and received consistently positive performance appraisals. At the Bank's suggestion, Xieng received English language training and his tutor viewed his ability to communicate in English as "dramatically improved." However, in each of his reviews, Xieng's supervisors noted that his communication skills needed future improvement. In 1986, Xieng was passed over for promotion in favor of a white woman with no previous experience in that position. What does the Bank need to show in order to establish that the promotion decision was acceptable and not in violation of Title VII? *Xieng v. Peoples National Bank, 821 P.2d 520 (Wa. 1991)*

[The court held that failure to promote because of a foreign accent would NOT be national origin discrimination if: (1) the ability to speak English is a job requirement, (2) the employee has documented difficulty with the English language, and (3) the lack of communication skills materially interferes with job performance.]

9. Rush Presbyterian requires that individuals in all job classifications be able to speak and write English. Garcia, a Latino, contends that this rule discriminates against individuals for whom English is not a first language. The court held that, because there was no evidence that Latinos had been excluded from Rush's work force in greater numbers than people of other origins, there was no adverse impact on Latinos. Is this true? Couldn't Latinos have been discouraged from even applying and therefore those non-applicants do not appear in the numbers presented to the court? Can you imagine that a rule requiring proficiency in English does not have an adverse effect on minorities? *Garcia v. Rush Presbyterian, 660 F.2d 1217 (7th Cir. 1981)*.

[The court did hold that there was no adverse effect, but this point begs the question asked herein: is it possible that such a rule does not have an adverse impact? Wouldn't many potential minority applicants merely refrain from applying and are therefore not counted in the numbers of minorities rejected for the position as a result of the requirement? The court did discuss the business necessity of such a rule and determined that "English is a necessary, job-related requirement for every job in this highly sophisticated medical care institution."]