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The National Pulse

Tongue Ties

National origin discrimination suits are making waves—and law

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By Brendan L. Smith

Juan Estenos may have been a highly educated accountant in Peru, but when he immigrated to the United States the best job he could find was as a clerk at an employee credit union for the Pan American Health Organization and World Health Organization in Washington, D.C.

Estenos spoke little English but was hired in January 2000, though the job's description required "very good knowledge of English and Spanish." He was interviewed for the job in Spanish by the credit union's financial officer and CEO, both of whom are bilingual.

After he was hired, the credit union's management changed.

And after only eight months on the job—and despite positive performance evaluations—Estenos was fired. The reason? His lack of English language skills.

While Estenos might not have spoken the language of the land, he had acclimated to the United States well enough to hire a lawyer. In September 2001 he sued, claiming that his firing was discriminatory based on national origin under Title VII of the Civil Rights Act of 1964—even though the credit union staff was primarily Latin American in origin.

AN APPEALING SURPRISE

The case was dismissed at the trial court but reinstated by the U.S. Court of Appeals for the District of Columbia Circuit—a surprise, even to Estenos' attorney, Mindy Farber.

"I was a little surprised because it does present at first blush an issue that seems a little counterintuitive," says Farber, a solo practitioner in Rockville, Md. "It's somewhat counterintuitive for people that you could have a decision like this when there are other Spanish [speakers working at the credit union], including Peruvians."

“There is some resistance from people when I talk about it,” Farber adds. “I think this is an unusual case. It makes it less obvious which side you should be on.”

Estenos’ case represents a growing trend of litigation over national origin discrimination in an area of civil rights law that is still developing.

Many immigrants haven’t pursued claims because they don’t know their rights or can’t afford to hire an attorney. Some immigrants also fear retaliation from employers or deportation of relatives who are undocumented if they speak up about discrimination, immigrant advocates say.

The case was one of first impression in the D.C. Court of Appeals, but the issue of national origin discrimination is one showing up with increasing frequency in federal courts around the country—a result, some argue, of the economy and anti-immigrant sentiment coalescing against immigrants.

While there is ample case law about discrimination based on race or gender, national origin is a hazier subject.

In general, national origin discrimination is an illegal act of bias based on a place or culture of origin, as opposed to one of race or religion. Title VII protects individuals who are excluded or discriminated against because of their language, culture or customs.

Marielena Hincapie, executive director of the National Immigration Law Center in Los Angeles, says anti-immigrant sentiment could deepen as more unemployed people compete for low-wage jobs that have typically been filled by immigrants. “History shows us when there is an economic downturn, there often is scapegoating of particular groups—and immigrants are one of those groups,” Hincapie says.

Over the past decade, complaints about national origin discrimination have increased almost 30 percent at the U.S. Equal Employment Opportunity Commission, up to about 9,400 complaints in fiscal 2007 (the latest statistics available). And more employers are settling complaints to avoid costly, potentially embarrassing litigation. In 2007, the EEOC settled 11 percent of its national origin complaints, up from 3 percent in 1997. B & H Foto and Electronics Corp. agreed to a \$4.3 million settlement in 2007 in an EEOC lawsuit alleging that Hispanic warehouse employees were paid less and weren’t promoted or given health benefits. The EEOC settled a similar suit in 2006 against Qwest Communications International Inc. for \$400,000 after alleging that Hispanic employees were denied promotions to management jobs at the company’s Portland, Ore., offices.

In the case of Estenos, the D.C. Court of Appeals reversed a summary judgment order for the credit union, finding that an employee can raise a claim of national origin discrimination based on an English proficiency requirement.

Courts haven’t had much guidance in deciding such cases since the U.S. Supreme Court first addressed the meaning of national origin in 1973 in *Espinoza v. Farah Manufacturing Co. Inc.* The 8-1 ruling found that Farah’s refusal to hire a lawfully admitted Mexican resident because

she was not a U.S. citizen didn't constitute national origin discrimination, in part because the company's workforce in San Antonio was almost entirely Mexican-American.

Citizenship requirements can be part of a wider scheme of unlawful discrimination based on national origin, the majority opinion stated, but Congress itself has required U.S. citizenship for many federal government jobs.

“To interpret the term *national origin* to embrace citizenship requirements would require us to conclude that Congress itself has repeatedly flouted its own declaration of policy,” wrote Justice Thurgood Marshall in *Farah*. “The court cannot lightly find such a breach of faith.”

REVERSE ISSUES IN LOUISIANA

The growth in national origin complaints also has included allegations of reverse discrimination, namely that American citizens have lost jobs because of preferences given to foreign nationals. In a case of first impression in Louisiana, the state's 3rd Circuit Court of Appeal issued a 2-1 decision in July finding that Omega Protein Inc. hadn't discriminated against American fishermen who were fired by the company, which had to fulfill obligations under a federal visa program for hiring and retaining Mexican nationals.

Because of the costs involved with the visa program, the court found that Omega had a legitimate business necessity for retaining Mexican nationals as employees. Judge Sylvia R. Cooks dissented. “I am firmly convinced Title VII's protections should extend to native-born U.S. citizens fighting employer preferences for alien workers,” she wrote.

In Estenos' case before the D.C. Court of Appeals, the majority found that the D.C. Human Rights Act offers greater protections than Title VII. EEOC regulations on national origin discrimination also have been incorporated into the district's regulatory law.

The EEOC has found that English-fluency and English-only workplace requirements can be discriminatory without a legitimate business necessity. In Estenos' complaint, the commission found reasonable cause to believe he suffered national origin discrimination in his firing from the credit union. When Estenos was fired, his position was not refilled. But a Filipino woman, the first of eight new employees hired by the new management, could not speak Spanish—a factor later cited by the EEOC in its review of the Estenos case.

Senior Judge Frank E. Schwelb of the D.C. Court of Appeals disagreed and delivered a sharply worded 11-page dissent, finding Estenos' claims “entirely without foundation.” Schwelb wrote that the majority opinion could produce counterintuitive and absurd results because almost all of the credit union's staff was from Latin America, including two new employees from Peru who were hired in 2000, the same year Estenos was fired. “Given this scenario, the ‘man on the Clapham bus’—the personification, in days gone by, of the reasonable person—would find startling indeed the suggestion that Estenos was fired because he comes from Peru,” Schwelb wrote.

F. Joseph Nealon, a partner at Ballard Spahr Andrews & Ingersoll in Washington who represents the credit union, declined to comment on the case. The D.C. Court of Appeals rejected an en banc petition, and Estenos' suit is proceeding in D.C. Superior Court.

Hincapie says she is hopeful that the Obama administration will commit more resources to the EEOC and other agencies to fight discrimination against immigrants. She says that the rhetoric of the Bush administration conflated terrorism with immigration, and that many Americans still don't believe discrimination against immigrants is as serious as racism or sexism. "You do have this kind of visceral impact that people just don't get why immigrants are complaining about workplace discrimination," she says.

In the Supreme Court's *Farah* decision, Justice William O. Douglas, son of an itinerant minister from Nova Scotia, issued the lone dissent in favor of Cecilia Espinoza, a Mexican national who was denied a job as a seamstress by Farah Manufacturing because she wasn't a U.S. citizen. "It could not be more clear that Farah's policy of excluding aliens is de facto a policy of preferring those who were born in this country," Douglas wrote.

"Espinoza is a permanent resident alien, married to an American citizen, and her children will be native-born American citizens. But that first generation has the greatest adjustments to make to their new country," Douglas wrote. "Their unfamiliarity with America makes them the most vulnerable to exploitation and discriminatory treatment."