

EEOC Issues Guidance on National Origin Discrimination & Mental Health Accommodations

by TYLER J. VOLM of BarranLiebman

Late in 2016, the Equal Employment Opportunity Commission ("EEOC") issued two separate guidance documents that should be on every employer's radar for 2017.



the guidance provide a useful tool that employers may adopt to reduce the risk of Title VII violations based on national origin discrimination, many of which are generally applicable to all types of discrimination claims. Those "promising practices" include:

- Using a variety of recruitment methods to attract as diverse a pool of job seekers as possible (avoid relying exclusively on word-of-mouth recruitment, which the EEOC says

may reinforce the existing racial or ethnic makeup of the workplace),

- Stating that the employer is an "equal opportunity employer,"

- Developing objective, job-related criteria for identifying the unsatisfactory performance or conduct that can lead to discipline, demotion, or discharge,

- Carefully recording the business reasons for disciplinary or performance-related actions and share these reasons with the affected employees,

- Clearly communicating to employees through policies and actions that harassment will not be tolerated and that employees in violation of these policies will be disciplined and

- Ensuring that policies are communicated effectively to all the employees (including non-English speaking employees).

2. Mental Health Accommodations

In December of 2016, the EEOC issued a publication on the rights of job applicants and employees with mental health conditions titled "Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights." This publication is part of an ongoing series intended to provide to employees with user-friendly explanations of their rights, and with information that they can provide their health care provider to explain how to provide appropriate medical documentation. The publication is also useful to employers as they grapple with the ever-expanding definition of a disability, which now includes many conditions that are

not always apparent to the naked eye.

Claims in this area are certainly on the rise. The EEOC reported that preliminary data indicated that the Commission resolved almost 5,000 charges of discrimination based on mental health conditions, and had obtained approximately \$20 million for individuals with mental health conditions who were unlawfully denied employment or a reasonable accommodation. In 2003, PTSD accounted for just 23 reported charges, but that figure increased to 941 in 2015. Similarly, anxiety disorders accounted for 544 charges in 2003, but those charges have nearly tripled in number by the end of 2016.

Generally, employers are prohibited from asking employees medical questions, including regarding their mental health. The publication notes the four exceptions to that general rule: (1) when the employee asks for a reasonable accommodation; (2) after the employer has made a job offer, but before employment begins, as long as everyone entering the same job category is asked the same questions; (3) as part of the employer's affirmative action plan for people with disabilities (but the employee still has the option not to respond); and (4) when there is objective evidence that the employee may not be able to do their job or that the employee's condition may pose a safety risk.

Employers can start 2017 off on the right foot by reviewing the guidance on national origin discrimination to ensure that proper mechanisms are in place at each phase of the employment process and to avoid claims of national origin discrimination, harassment, and retaliation. Employers should also review the publication on mental health accommodations to ensure that their reasonable accommodation assessment process properly accounts for mental health conditions. Both of these areas are sure to be high on the EEOC's enforcement priorities for this year and years to come.

Tyler Volm is an attorney with BarranLiebman. He works with business owners and managers to ensure compliance with changes in the law, and defends employers against complaints when they arise. Contact him at 503-276-2111 or tvolm@barran.com.

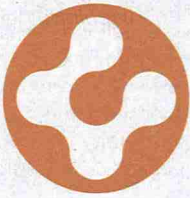
1. National Origin Discrimination

Just before Thanksgiving, the EEOC issued Enforcement Guidance on National Origin Discrimination, a topic that had not been addressed in detail by the EEOC since 2002. This new guidance replaces the 2002 guidance. Although the guidance is not subject to the same deference as case law, it does provide a glimpse into how the EEOC will investigate such claims.

National origin discrimination includes not only discrimination because of an individual's (or his or her ancestor's) country of origin, but also includes discrimination based on the physical, cultural, or linguistic characteristics of a particular national origin group. It can also include discrimination by a member of one national origin group against a member of the same group. Harassment and retaliation based on national origin are also prohibited.

The guidance discusses general issues concerning employment decisions like recruitment, hiring, and discipline, as well as harassment. Additionally, the guidance addresses workplace issues relating to different languages, reiterating long-standing EEOC positions on English-only rules and undocumented workers. The EEOC also uses the guidance to address accent discrimination and fluency requirements. The guidance also provides updates based on court decisions on new issues, including human trafficking (the use of force, fraud, or coercion to compel labor or exploit workers based on their national origin or other protected characteristics), job segregation, and intersectional discrimination. Notably, the guidance states that an employer may be liable for discrimination, even if the decision was made due to discriminatory preferences of clients, customers, or employees.

The "promising practices" contained within



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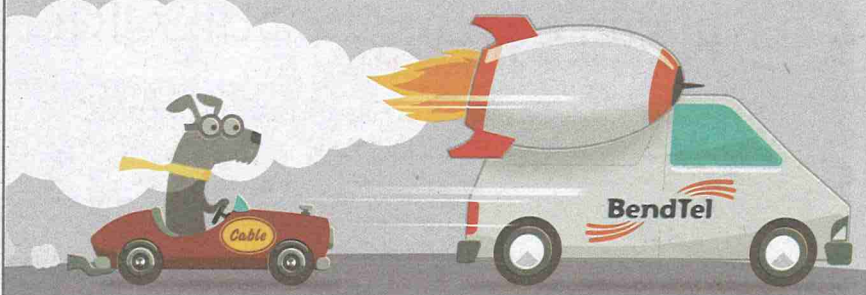
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