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Dear Reader,

The following article appeared in the February 2008 issue of *The Practical Lawyer*. We wanted to share this with you as it affects any company no matter how big or small. Linguistic characteristics are an important aspect of an individuals national origin. Discrimination based on national origin violates Title VII (Civil Rights Act, 42 U.S.C. §2000e et seq.). We have also included a practice checklist at the end of this article for your review and use.

Should you have any questions regarding its contents, you may contact me at 602.382.6362 or jmorales@swlaw.com.

Sincerely,
Gerard Morales
Partner, Snell & Wilmer L.L.P.

Does Foreign Accent Equal National Origin?

by Gerard Morales and Kate Hackett

While welcoming a group of new hires, a top executive of a large company stated: "Our employees are expected to be articulate in English because they must explain our products to the public. They are our ambassadors. English proficiency is a job requirement. We prefer no foreign accents." Ouch! The company better be prepared to prove a legitimate business need for preferring "no foreign accents." In today's work environment, such a burden may be very difficult to carry.

Title VII of the Civil Rights Act, 42 U.S.C. §2000e et seq., prohibits an employer from discriminating against any individual with respect to his or her compensation, terms, conditions, or privileges of employment because of that individual's national origin. 42 U.S.C. §2000e-2. Linguistic characteristics, such as an individual's accent or pattern of speech, are an important aspect of an individual's national origin. As such, before an employer makes any comments or employment decisions based on an individual's accent or pattern of speech, he or she must carefully scrutinize the decision to ensure that it complies with Title VII.

IS ACCENT OR PATTERN OF SPEECH A SURROGATE FOR NATIONAL ORIGIN?

The Equal Employment Opportunity Commission ("EEOC") defines national origin discrimination to include "the denial of equal employment opportunity because . . . an individual has the . . . linguistic characteristics of a national origin group." 29 C.F.R. §1606.1. In *Fragante v. City and County of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990), the Ninth Circuit elaborated: "Accent and national origin are obviously inextricably intertwined in many cases. It would therefore be an easy refuge in this context for an employer unlawfully discriminating against someone based on national origin to state falsely that it was not the person's national origin that caused the employment or promotion problem, but the candidate's inability to measure up to the communication skills demanded by the job." Consequently, the *Fragante* court "encourag[ed] a very searching look by the district courts at such a claim." *Id.*

How Does The Accent Relate To The Job Duties?

Courts generally find that a person's accent serves as a surrogate for national origin discrimination if the accent is not related to a legitimate feature of the employment. "A foreign accent that does not interfere with a Title VII claimant's ability to perform duties of the position he has been denied is not a legitimate justification for adverse employment decisions." *Carino v. University of Oklahoma Board of Regents*, 750 F.2d 815, 819 (10th Cir. 1984); *Raad v. Fairbanks*, 323 F.3d

1185, 1195 (9th Cir. 2003); *Fragante*, supra, 888 F.2d at 596 ("an adverse employment decision may be predicated upon an individual's accent when—but only when—it interferes materially with job performance"); *Altman v. New York City Dep't of Educ.*, 2007 WL 1290599, at *5 (S.D.N.Y., May 1, 2007); *Tekula v. Bayport-Blue Point School Dist.*, 295 F. Supp.2d 224, 230 (E.D.N.Y. 2003).

Communication With The Public

One significant factor in determining whether accent is a pretext for national origin discrimination is the nature of the employment, particularly when a job requires effective communication with the public. *Fragante*, supra, 888 F.2d at 597 (finding no discrimination in failing to hire an otherwise qualified Filipino because "the oral ability to communicate effectively in English is reasonably related to the normal operation of the clerk's office"); *Altman*, supra, at *5 (noting that plaintiff "is an English and ESL teacher, and her usage of proper English understandably bears some relationship to her job performance"); *Mejia v. New York Sheraton Hotel*, 459 F. Supp. 375, 376-77 (S.D.N.Y. 1978) (finding no discrimination in refusing to hire a Dominican immigrant for a hotel front desk position because the "requirement of the hotel for greater English proficiency than the plaintiff can exhibit was significantly related to successful job performance"); *Shieh v. Lyng*, 710 F. Supp. 1024, 1032-33 (E.D. Pa. 1989), *aff'd without opinion*, 897 F.2d 523 (3d Cir. 1990) (finding no discrimination in demoting a Taiwanese scientist because of poor writing because "plaintiff's difficulties went beyond mere superficial discomfort with the English language . . . and effective communication skills are indispensable to successful writing . . . ").

Good Faith Or Pretext?

Some courts have used accent as a surrogate for national origin when the evidence calls into question the good faith of an employer's claims. *See, e.g., Kyriazi v. Western Electric Co.*, 461 F. Supp. 894, 925 (D. N.J. 1978), *vacated on other grounds*, 473 F. Supp. 786 (D. N.J. 1979) ("[w]hile it is clear that plaintiff does speak with an accent, and that at times she is difficult to understand, this is principally because she is extremely soft spoken. Nonetheless, none of this stood in the way of her obtaining two graduate degrees at Columbia, more than satisfactory ratings from at least some Western supervisors and literally glowing endorsements from subsequent employers"); *Xieng v. Peoples National Bank of Washington*, 821 P.2d 520, 525 (Wash. Ct. App. 1991), *aff'd*, 844 P.2d 389 (Wash. 1993) (employer's reason for nonpromotion "not worthy of credence" because "Xieng had received many positive job performance evaluations and up until the time of filing his discrimination claim had been recommended for promotion").

Courts have also found that the use of accent was pretext when the record reveals discriminatory remarks about an employee's accent unaccompanied by any relationship to a business necessity or to the need for effective communication with the public. *In*

re Rodriguez, 487 F.3d 1001 (6th Cir. 2007); *Akouri v. State of Florida Dep't of Transp.*, 408 F.3d 1338, 1347-48 (11th Cir. 2005) (finding employer's statement "they are all white and they are not going to take orders from you, especially if you have an accent" sufficient by itself to establish discrimination).

REMARKS ABOUT AN EMPLOYEE'S ACCENT

Do remarks about an employee's accent constitute direct evidence of discrimination or must a plaintiff satisfy the *McDonnell Douglas* burden shifting analysis? A number of cases addressing accent-as-national origin claims apply the *McDonnell Douglas* burden shifting analysis. *Odima v. Westin Tucson Hotel Co.*, 991 F.2d at 599 (9th Cir. 1993); *Fragante*, supra, 888 F.2d at 595; *Carino*, supra, 750 F.2d at 818; *Altman*, supra, 2007 WL 1290599, at *4; *Poskocil v. Roanoke County School Division*, 1999 WL 15938, at *3 (W.D. Va. Jan. 11, 1999); *Shieh v. Lyng*, supra, 710 F. Supp. at 1030-31 (E.D. Pa. 1989); Mejia, supra, 459 F. Supp. at 377; *Xieng*, supra, 821 P.2d at 523. In these cases, the courts applied the *McDonnell Douglas* burden shifting test because the employer's comments about the employee's accent arose from good faith remarks in the context of an evaluation of the employee's qualifications for a particular job.

Prejudicial Remarks

A court, however, will find direct evidence of discrimination in a prejudicial comment regarding an employee's accent that does not concern his job performance. *In re Rodriquez*, supra; *Akouri*, supra, 408 F.3d at 1347-48 (finding that employer's statement was direct evidence of discrimination because it "is evidence that does not require an inferential leap between fact and conclusion"). If a comment appears to spring from simple prejudice, no inferential leap is required and the comment may constitute direct evidence of discrimination. Notably, "only the most blatant remarks, whose intent could be nothing other than to discriminate, constitute direct evidence of discrimination." *Hassan v. Auburn Univ.*, 833 F. Supp. 866, 871 (M.D. Ala. 1993), *aff'd without opinion*, 15 F. 3d 1097 (11th Cir. 1994).

When it cannot be shown that the employer's comment about the employee's accent arose from prejudice, the courts have found a prima facie case of national origin discrimination applying the *McDonnell Douglas* burden shift analysis. *In re Rodriguez* is instructive. There, Jose Antonio Rodriguez sued FedEx alleging discrimination on the basis of his race, Hispanic. Although Rodriguez' complaint alleged discrimination on the basis of race, the court found that such claim "overlapped" with a claim on the basis of national origin. Citing *Alonzo v. Chase Manhattan Bank*, 25 F. Supp.2d 455, 458 (S.D.N.Y. 1998), the court held that, "It is the substance of the charge and not its label that controls." Quoting from *St. Francis v. Al-Khazraji*, 481 U.S. 604, 614 (1987):

"It is true that one's ancestry—the ethnic group from which an individual and his or her ancestors are descended—is not

necessarily the same as one's national origin—the country where a person was born, or, more broadly, the country from which his or her ancestors came. Often, however, the two are identical as a factual matter: one was born in the nation whose primary stock is one's own ethnic group. Moreover, national origin claims have been treated as ancestry or ethnic claims in some circumstances. For example, in the Title VII context, the terms overlap as a legal matter."

Rodriguez had worked for FedEx for approximately four years as a delivery driver before he resigned his employment and filed the lawsuit. He had asked his supervisor, Atkinson, for a promotion to a supervisory position. Rodriguez had received training in FedEx's Leadership Apprentice Course and had been interviewed for several supervisory positions, but had not been promoted. Two supervisors provided affidavits that the reason why they had not promoted Rodriguez to a supervisory position was because Atkinson had expressed concerns regarding "how he speaks," and his "Hispanic speech pattern and accent."

The court denied FedEx's motion for summary judgment on the basis that the evidence provided in the affidavits was either direct or circumstantial. If it was not direct evidence, it still presented a prima facie case under the *McDonnell Douglas* analysis, because, "accent and national origin are inextricably intertwined." The court referred to the EEOC Guidelines which recognize "linguistic discrimination as national origin discrimination." It also relied on its own precedent for the proposition that, "discrimination based on manner of speaking can be national origin discrimination." *Berke v. Ohio Department of Public Welfare*, 628 F.2d 980, 981 (6th Cir. 1980).

CONCLUSION

Accent may serve as a surrogate for national origin discrimination under Title VII if an individual's accent is unrelated to his employment or if there is sufficient evidence that undermines the employer's claim. Furthermore, when a claim based on accent arises in the context of an evaluation of an employee's fitness for the job, the *McDonnell Douglas* burden shifting analysis will likely apply. If, however, the employer's remarks are not tied to any concern for the nature of the employment, and no inferential leap is required to find discrimination, courts will find a comment regarding accent to be direct evidence of discrimination.

The authors recognize the valuable contribution of summer associate Matt Emerson, a law student at Notre Dame Law School.

PRACTICE CHECKLIST

As the workplace continues to diversify, issues involving communications and accents will become more common. Employers should become accustomed to treating these matters with the same care that they would in other matters of discrimination avoidance.

- What level of English proficiency is legitimately required by the job? (Is it enough to say that effective communication with the public is necessary?)
- What comments have been made by management regarding the employee's foreign accent?
- Does the employee have difficulty with communicating in English generally or just an accent?
- How does the accent materially interfere with job performance?
- Is the speech difficulty an accent problem?
- Has the employer shown consistency with prior evaluations and reviews?

Gerard Morales
602.382.6362
jmorales@swlaw.com

Jerry is a partner at the Phoenix office of Snell & Wilmer, practicing labor and employment law.

Kate Hackett
khackett@swlaw.com

Kate is an associate at the Phoenix office of Snell & Wilmer. She practices primarily labor and employment law, and is currently on leave of absence, clerking for the Arizona Supreme Court.