WHAT DOES YOUR NAME SAY ABOUT YOU? THE EIGHTH CIRCUIT UNDERCUTS NAME ASSOCIATION DISCRIMINATION CLAIMS IN *EEOC V. TRANS STATES AIRLINES*.

Introduction

Who do you think of when you hear the names Mohammad or Hussein? If hearing the names Mohammad or Hussein made you think of Arabs or Muslims, or made you think that someone else might associate those names with being Arab or Muslim, then your reasoning is "not attractive," according to the Eighth Circuit.[1]

Title VII of the Civil Rights Act of 1965 prohibits employment discrimination against an individual because of the individual's race, color, religion, sex, or national origin.[2] Equal Employment Opportunity Commission (EEOC) regulations broadly define national origin discrimination to include "the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."[3] This definition extends to discrimination based on the perception that "an individual's name or spouse's name is associated with a national origin group."[4] The EEOC is entitled to "great deference" in promulgating regulations unless there are "compelling indications that it is wrong."[5]

In *EEOC v. Trans States Airlines*, the Eighth Circuit rejected the EEOC's argument that an airline fired an employee, Mohammad Shanif Hussein, as a result of stereotyping the employee as a Muslim and Arab—albeit inaccurately—shortly after the September 11 attacks. The Eighth Circuit held that (1) the timing of termination, (2) inferences to be drawn from Hussein's name being associated with a Muslim or Arab identity, (3) the employer's explanations for termination, (4) the employer's departure from usual progressive disciplinary policies and procedures outlined in the

1. EEOC v. Trans States Airlines, 462 F.3d 987, 992 (8th Cir. 2006) ("Plaintiffs' argument, therefore, is that it would "defy belief" and "ignore common sense" for a jury to conclude that Reed may *accurately* have declined to assume that a person with Hussein's name must be of Arabic descent. The contention that a jury necessarily would infer that Reed engaged in inaccurate stereotyping is not attractive.").

2. 42 U.S.C. § 2000e-2 (2000).

3. 29 C.F.R. § 1606.1 (2006).

4. *Id.*

5. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973).

employee handbook, and (5) the employers' allegedly atypical handling of Hussein's case compared to other employees in similar circumstances, were not enough to show that the employer fired Hussein with a discriminatory and unlawful motive based on Hussein's race, religion, or national origin.[6]

The Eighth Circuit's affirmation of the district court's decision to grant summary judgment to Trans States Airlines (TSA) serves as another barrier for potential meritorious Title VII claims based on proxy factors such as association of a name with a race, religion, or national origin. First, granting summary judgment cuts against established precedent. The court has cautioned against granting summary judgment in employment discrimination cases because they are "inherently fact based."[7] Second, by rejecting the concept of "name association" discrimination—that is, discrimination based on the perception that an individual's name is associated with a racial, religious or national origin group—the Eighth Circuit effectively denies potential meritorious Title VII claims that are protected under the EEOC guidelines.[8]

Factual Background

Mohammed Shanif Hussein is of Indian descent.[9] He was raised as a Muslim in Fiji and moved to the United States in 1997.[10] Hussein was hired by TSA as a pilot on February 26, 2001.[11] On September 13, 2001, Hussein returned to TSA's headquarters in St. Louis after commercial air travel suspension as a result of the September 11 attacks.[12] TSA Vice President Captain Daniel Reed claimed that he received an anonymous call reporting Hussein drinking in a bar while in uniform—a violation of company policy—between September 14 and September 17, 2001.[13] The anonymous caller, later identified as Trans World Airlines pilot Emmet Conrecode, reported that he saw Hussein raise his beer "as in a salute and took a swig" when the images of the planes hitting the World Trade Center towers were being replayed in the news.[14] Conrecode reported that Hussein's behavior "seemed to be intimidating passengers" by telling passengers he was flying a plane the next day.[15] Hussein denied Conrecode's accusations, and stated that he was smiling because he had just

6. *Trans State Airlines*, 462 F.3d at 987.

7. Carter v. Chrysler Corp., 173 F.3d 693 (8th Cir. 1999); Keathley v. Ameritech Corp., 187 F.3d 915, 919 (8th Cir. 1999) (quoting Hindman v. Transkrit Corp., 145 F.3d 986, 990 (8th Cir. 1998)).

8. *See* 29 C.F.R. § 1606.1.

9. *Trans State Airlines*, 462 F.3d at 989.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 990.

15. *Id.*

learned of his wife's pregnancy.[16] Conrecode took it upon himself to follow Hussein to his hotel and ask the hotel staff about Hussein's identity.[17] He reported Hussein's conduct to the Federal Bureau of Investigation (FBI) and TSA.[18]

Shortly thereafter, TSA Vice President Reed fired Hussein without further investigation.[19] Reed said he fired Hussein within an hour after receiving the anonymous call after he confirmed that Hussein was in St. Louis.[20] Reed later tried to explain that he fired Hussein after he received a call from the FBI asking if Hussein was a TSA employee, because he felt the anonymous call in addition to the FBI inquiry was sufficient information to fire Hussein.[21] However, the EEOC raised several facts disputing whether Reed fired Hussein one hour after receiving the initial anonymous call from Conrecode, or after receiving the FBI phone call, which occurred several days after the initial anonymous call.[22]

The EEOC filed a complaint on behalf of Hussein against TSA with the U.S. District Court for the Eastern District of Missouri.[23] TSA moved for summary judgment.[24] The district court granted summary judgment, holding the EEOC did not provide sufficient evidence to demonstrate the reasons TSA gave for firing Hussein were a pretext for discrimination.[25]

The Eighth Circuit's Reasoning

On appeal, the Eighth Circuit unanimously affirmed the district court's decision to grant summary judgment for Trans States Airlines.[26] In an employment discrimination case, the plaintiff can survive a motion for summary judgment by showing direct evidence of discrimination, or meeting the three-part *McDonnell Douglas* standard.[27] Under *McDonnell Douglas*, the plaintiff must first establish a prima facie case of discrimination.[28] Once the plaintiff establishes a prima facie case, the defendant may provide evidence of a legitimate non-discriminatory reason

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 991-93.

20. *Id.*

21. *Id.*

22. EEOC v. Trans States Airlines, Inc., 2005 U.S. 8th Cir. Briefs 2009B (U.S. 8th Cir. Briefs 2005).

23. *Trans State Airlines*, 462 F.3d at 987.

24. *Id.*

25. EEOC v. Trans States Airlines, Inc., 356 F. Supp. 2d 984, 1000 (D. Mo. 2005).

26. *Trans States Airlines*, 462 F.3d at 987.

27. *Trans States Airlines*, 462 F.3d at 991 (*citing* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973)).

28. *McDonnell Douglas Corp.*, 411 U.S. at 802-04.

for the adverse employment action.[29] If the defendant can establish such a reason, the plaintiff must present evidence to show an inference of discrimination either by showing the explanation was a pretext for discrimination, or the reason was one of the listed prohibited acts of discrimination.[30]

The Eighth Circuit held that Reed's decision to fire Mohammad Shanif Hussein, a probationary pilot, just days after the September 11 attacks by Muslim extremists, based on an anonymous phone call without further investigation did not sufficiently establish that the employer was acting with a discriminatory motive.[31] The court reasoned that the idea that a jury would find Reed engaged in inaccurate stereotyping, assuming that Hussein was Arab or Muslim, was not compelling because Hussein was actually Fijian.[32]

Furthermore, the court reasoned that Reed could not have discriminated against Hussein based on physical features because Reed had never seen Hussein.[33] The court also declared the jury would not likely have found Reed discriminated against Hussein due to his religion because names are given at birth, while religious beliefs develop "over a lifetime."[34] The court reasoned that it is "generally understood" that names are not necessarily reflective of religion.[35]

The court went on to state that even if a reasonable jury could find that the employer had associated Hussein's name with a protected group, the evidence produced by the EEOC was insufficient to prove that Reed's reasoning for firing Hussein was a pretext for discrimination.[36] The court reasoned that the employer's change from progressive disciplinary policies to firing a pilot on a first offense was not sufficient to indicate a pretext for discrimination.[37] In addition, the court found that the EEOC did not show that other similarly situated probationary pilots were treated differently.[38] The court relied on Reed's statement that he fired other probationary pilots on the spot after receiving an anonymous call that they were drinking in South Bend twelve hours before flying a plane.[39] When the EEOC presented pilot Lionel Purnwasy's testimony stating he heard a rumor that some probationary and non-probationary pilots were fired after a week's investigation, rather than immediately, the Eighth Circuit concluded that the

29. *Id.*
30. *Id.*
31. *Trans States Airlines*, 462 F.3d at 992-96.
32. *Id* at 992-93.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*

evidence presented did not conflict with Reed's testimony because Reed testified that he conducted a brief investigation before firing the non-probationary pilots.[40]

The court rejected the EEOC's argument that the South Bend probationary pilots were not similarly situated because they committed a more serious violation by drinking twelve hours before flying a plane.[41] The court concluded the plaintiff had not presented sufficient evidence to meet the burden of proof.[42] The court also held the EEOC's evidence demonstrating other members of management would have treated Hussein differently was not sufficient to show Reed acted with a discriminatory motive.[43] The court found Reed's shifting story about when and why he fired Hussein was not sufficient to show a pretext for discrimination.[44] The court further rejected the idea that the case should be given to a jury, stating that there were no genuine issues of material fact.[45] The court stated the evidence presented by the EEOC on behalf of Hussein did not rebut Reed's explanation for firing Hussein.[46] Because of these reasons, the court granted TSA summary judgment, thus denying the opportunity for the case to go to a jury.[47]

Case Analysis

To recover under Title VII, one must show evidence of discrimination based on race, color, religion, sex, or national origin.[48] While proof of discrimination would have been easy to prove when Jim Crow laws governed and intentional discrimination was part of the largely accepted social fabric, those who discriminate today are rarely as overt. Additionally, sometimes discrimination may not be intentional,[49] but is nevertheless harmful. Showing direct evidence of discrimination has proven to be even more difficult in cases involving inaccurate stereotyping, particularly name associations.

The Eighth Circuit's decision in *Trans States Airlines* creates another barrier for potential meritorious Title VII claims based on proxy factors such as associating a name with a race, national origin or religion. There are two primary reasons why other circuits should reject the Eighth

40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. 42 U.S.C. § 2000e-2.
49. *See, e.g.*, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

Circuit's approach. First, granting summary judgment cut against established precedent, as the court had cautioned against granting summary judgment in employment discrimination cases because they are "inherently fact based."[50] Second, by rejecting the idea that discrimination by name association alone is possible, the court has effectively wiped out future meritorious Title VII name association discrimination claims protected under EEOC guidelines.[51]

Summary Judgment Was Not Appropriate

The Eighth Circuit affirmed the district court's decision to grant summary judgment to Trans States Airlines.[52] The court reasoned no genuine issue of material fact existed to demonstrate Reed's reasoning for firing Hussein was a pretext for discrimination.[53]

Granting summary judgment cuts against established precedent. The court's function was to determine whether "a fair-minded jury could return a verdict for the plaintiff on the evidence presented."[54] Summary judgment "should be granted only in those rare instances where there is no dispute of fact and where there exists only one conclusion."[55] The Eighth Circuit "has repeatedly cautioned that summary judgment should seldom be granted in the context of employment actions, as such actions are inherently fact based."[56]

Here, the Eighth Circuit overstepped its boundaries by granting summary judgment even though there were genuine issues of material fact. The court made great efforts to examine the differences in facts presented by the EEOC and Trans States Airlines, and made conclusions about the facts. The court decided several disputed facts that should have gone to a jury, such as determining (1) the veracity of Reed's changing explanation for firing Hussein, (2) the reasonableness of Reed's departure from progressive discipline policies, and (3) whether Reed possibly associated the name Hussein with an Arab or Muslim identity.[57]

Rejecting Name-Association Discrimination Will Deter Meritorious Title VII Claims

50. *See Carter*, 173 F.3d at 693; *Keathley*, 187 F.3d at 919 (internal citations omitted).
51. *See* 29 C.F.R. § 1606.1.
52. *Trans State Airlines*, 462 F.3d at 986.
53. *Id.* at 992-96.
54. *Anderson*, 106 S. Ct. at 2512.
55. Hardin v. Hussman Corp., 45 F.3d 262, 264 (8th Cir. 1995).
56. *Carter*, 173 F.3d at 693; *Keathley*, 187 F.3d at 919 (internal citations omitted).
57. *See Carter*, 173 F.3d at 693.

In *Trans State Airlines*, the court concluded Mohammed Hussein could not have been discriminated against on the basis of national origin or ethnicity because Hussein was Fijian and not Arab.[58] In addition, the court reasoned that names such as Hussein are not automatically associated with religion because people understand that names are given at birth, making it unlikely for people to make religious presumptions or engage in religious discrimination based on names.[59] This is somewhat analogous to suggesting that because race is determined at birth and is not chosen, it is unlikely people will make presumptions based on race. Common sense tells us that is not the case.

Recent cases suggest that associating a name with a particular race, religion, or national origin group is not atypical and may be done in a discriminatory manner. The Ninth Circuit has addressed name-association discrimination outside of the Title VII context in *Orhorhaghe v. INS*[60] and *El-Hakem v. BJY, Inc.*[61] In *Orhorhaghe*, the Ninth Circuit addressed name association in a Fourth Amendment case.[62] The court held that the INS's use of a woman's tip regarding immigrants' legal status was unlawful because she had based her tip on the individuals' "Nigerian-sounding" names.[63] The court held "[t]he sound of one's name often serves as a proxy in many people's minds for one's race or ethnicity."[64] While the court recognized that at times, the government has used similar proxies to help disadvantaged groups, more often than not, such proxies that point to race or national origin have been used for "less benevolent purposes."[65] The court concluded "discrimination against people who possess surnames identified with particular racial or national groups is discrimination on the basis of race or national origin."[66]

In *El-Hakem*, an Arab employee named Mamdouh El-Hakem sued his employer under Section 1981 for calling him by a non-Arabic name against his repeated objections.[67] El-Hakem, a native of Egypt and a practicing Muslim, worked for BJY, Inc.[68] El-Hakem and his employer made contact through e-mails, phone calls, and conference calls, but never met in

58. *Trans States Airlines, Inc.*, 462 F.3d at 992-96.

59. *Id.*

60. 38 F.3d 488 (9th Cir. 1994).

61. 415 F.3d 1068 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1470 (2006).

62. 38 F.3d at 498.

63. *Id*

64. *Id.*

65. *Id.*

66. *Id.*

67. 415 F.3d at 1071. *See* 42 U.S.C. § 1981 (prohibiting race discrimination in the making or enforcement of contracts).

68. *El-Hakem*, 415 F.3d at 1068.

person.[69] Young allegedly started calling El-Hakem "Manny" to "'make it easier' for BJY's clients to interact with its employees who did not have familiar, traditionally Western names."[70] The court found "discriminatory intent" evidenced by the fact that Young "intended to discriminate against El-Hakem's Arabic name in favor of a non-Arabic name, first by altering Mamdouh to 'Manny' and then by changing Hakem to 'Hank.'"[71] The court held that race discrimination does not require discrimination against those with "a distinctive physiognomy," but rather, is "intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics."[72]

In *Trans State Airlines*, the court rejected the idea that names could be associated with religion, reasoning that people understand names are given at birth and are not chosen by choice, so it is unlikely people will make presumptions based on names.[73] The court supported its reasoning using Reed's testimony that "there's [sic] Jewish names that are Christians and there's Muslim names that are Arabic names that aren't Muslim."[74] While this may be true, the court fails to recognize that the issue is not whether there are names that are not reflective of one's national origin or religion, but whether one's name alone could be associated to one's national origin or religion. The fact that Reed and the Eighth Circuit mention that there are "Arabic" and "Muslim" names demonstrates they recognize there are names associated with one's national origin and religion. In this case, both the names Mohammad and Hussein continue to carry specific religious and ethnic connotations in today's society. For example, a political debate

69. *El-Hakem*, 415 F.3d at 1068; Andrew M. Milz, *But Names Will Never Hurt Me?: El-Hakem v. BJY, Inc. and Title VII Liability For Race Discrimination Based On An Employee's Name*, 16 TEMP. POL. & CIV. RTS. L. REV. 283, 284 (2006).

70. Milz, *supra* note 69, at 284.

71. *Id.* at 290.

72. *El-Hakem*, 415 F.3d at 1073. *See, e.g.*, Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283 (2005). Onwauchi-Willig and Barnes discusses the significant decrease in an individual's job interview opportunities for individuals with African American-sounding names. In the case study, identical, fictitious resumes were sent to the same employers in Boston and Chicago, and "resumes with white-sounding names received fifty percent more callbacks for interviews." *See also* Karen McBeth Chopra, *A Forgotten Minority: An Asian Perspective: Historical and Current Discrimination Against Asians From the Indian Subcontinent*, 1995 MICH. ST. L. REV. 1269, 1319-20 (1995) (*citing* Lynn Hudson, *FMG Bias: A Case at Ohio State*, AAPI JOURNAL (Spring 1993), at 11) (describing name discrimination against Indian-sounding names. In an informal case study, Dr. Prem Kar was told by the director of program for medical residency in Chicago that no openings were available when he sent an application under his name. However, when he sent an application with a white-sounding name, Peter Karwoski, he received a positive letter from the program within weeks. This experiment was carried out three more times by Dr. Prem Kar's Indian friends. The director had apparently associated the Indian-sounding names with foreign students, and had discriminated against the individuals "based on name recognition alone.")

73. *Trans States Airlines, Inc.*, 462 F.3d at 992-93.

74. *Id.*

ensued when Ed Rogers used Barack Obama's middle name, Hussein, in a public statement.[75] Political strategists disputed whether Obama's middle name would help or hurt his chances for winning the democratic nomination.[76] If name association does not exist as the Eighth Circuit reasoned, Obama's middle name would be irrelevant to the campaign. The debate about Barack Obama's middle name illustrates the power of names in American society today, and the association between one's name and race, national origin, and religion.

EEOC regulations and Ninth Circuit precedent suggest that discrimination based on associating a name with race, religion, or national origin may form the basis of a meritorious claim of employment discrimination.[77] While the *Trans State Airlines* court reasoned "[t]he contention that a jury necessarily would infer that Reed engaged in inaccurate stereotyping is not attractive,"[78] there is a strong association between names and race, religion, and national origin. Mohammed Hussein is a name that is widely recognized and associated with being Arab and Muslim, making it reasonable to infer that an individual may discriminate against someone with such a name on the basis of race, religion, or national origin. The Eighth Circuit's outright rejection of name association discrimination will set a negative precedent for other name association claims and serve as another barrier to meritorious Title VII claims.

Conclusion

Since the September 11 attacks, President Bush has openly talked about the war on terrorism. Leti Volpp believes that President Bush's public statements effectively instruct Americans that "looking 'Middle Eastern, Arab, or Muslim' equals 'potential terrorist.'"[79] Individuals who appear Middle Eastern, Arab, or Muslim and are "subject[ed] to potential profiling, have had to, as a matter of personal safety, drape their dwellings, workplaces, and bodies with flags in an often futile attempt at demonstrating their loyalty."[80] The court's failure to acknowledge the reality of name association with race, religion, and national origin is damaging to meritorious claims of Arabs and Muslims, especially in the wake of the September 11 attacks.

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75. Peter Funt, *The Mononym Platform*, N.Y. TIMES, Feb. 21, 2007, at A1; Maureen Dowd, *What's In a Name, Barry?*, N.Y. TIMES, Dec. 2, 2006, at A6; David Wallis, *Malice in the Middle: Barack Hussein Obama and the History of Bad Middle Names in Politics*, SLATE, December 27, 2006; *available at* http://www.slate.com/id/2155434/?nav=ais.

76. *Id.*

77. *See* 29 C.F.R. § 1606.1; *El-Hakem*, 415 F.3d at 1068; *Orhorhaghe*, 38 F.3d at 488. *See also* Karen McBeth Chopra, *supra* note 61, at 1319-20.

78. *Trans States Airlines*, 462 F.3d at 992.

79. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1582 (2002).

80. *Id.* at 1584.

Think back to the initial question asked: "Who do you think of when you hear the names Mohammad or Hussein?" Now ask yourself, if you were a juror in this case, would it be possible for you to conclude that Reed's firing of Hussein resulted from inaccurate name association stereotyping?

Samorn Selim J.D. 2009 (UC Berkeley)