



Case Analysis by  
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# NewsFlash!

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## *Fifth Circuit Breathes New Life into EEOC Claim Based on Religion and National Origin*

In a case of first impression with the Fifth Circuit, but echoing concerns around the country, especially since the terrorist attacks of September 11, 2001, the decision in *E.E.O.C. v. WC & M Enterprises, Inc.*, provides employers with guidance when dealing with alleged national origin discrimination and religious harassment.<sup>1</sup> This case underscores the responsibility of employers to recognize and confront repeated and escalating misconduct and harassment, and to curtail retaliation related to complaints of discrimination and harassment.

The Fifth Circuit, generally thought of as a conservative court, reversed a dismissal of a national origin and religious harassment claim brought by the Equal Employment Opportunity Commission. The lawsuit was filed on behalf of Mohammed Rafiq, a Muslim worker from India. The EEOC filed an action against WC&M Enterprises, Inc., d/b/a Streater-Smith Honda, Inc. for alleged discrimination against Rafiq, seemingly connected to "9/11" and its aftermath.

### **Facts**

In fact, the first alleged incident reportedly occurred on Sept. 11, 2001, when Rafiq arrived at the car dealership for his afternoon shift. Co-workers and managers, including Rafiq's direct supervisor, were watching news coverage of the attacks and called out, "Hey, there's Mohammed," and asked "Where have you been?" causing everyone to laugh. Other harassment occurred a year later, allegedly when a co-worker and managers began repeatedly calling Rafiq "Taliban." Further instances of harassment included both comments such as "why don't you just go back to where you came from since you believe what you believe?" and ridicule of Rafiq's dietary restrictions and prayer rituals. Despite repeatedly telling his coworkers that he was from India, Rafiq was often referred to as an "Arab," and once a manager also played a joke related to the "Taliban" over the speaker on the sales floor.

The situation intensified on October 16, 2002, when Rafiq got into a dispute with his boss, who wanted Rafiq to attend a United Way meeting. When Rafiq questioned him, the manager stated, "This is America. That's the way things work over here. This is not the Islamic country where you come from!" Shortly thereafter, Rafiq received a written warning that he "was acting like a Muslim extremist," and the warning also objected to his "militant stance."

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The issues seemingly came to a head, on October 26, 2002, when Rafiq complained about a manager purposefully (and repetitively) startling him by banging on the wall and shouting, "Got you!" After a heated discussion with the offending manager, Rafiq told the general manager about the incident. Two days later, Rafiq was fired, and a charge with the EEOC followed.

### **District Court Summary Disposal**

The EEOC prosecuted the lawsuit on Rafiq's behalf, but the case was dismissed on the dealership's motion for summary judgment. The lower court concluded that the case should not go forward for several reasons, including that the EEOC's charge was untimely. The court also determined that the events were insufficient to establish the existence of severe and pervasive harassment and insufficient to show that Rafiq himself was the target of national origin harassment. Lastly, the trial court also decided that Rafiq's mental anguish was not severe enough to support a legal claim.

Specifically, the district court made two important findings supporting its dismissal: (1) Rafiq had not lost any sales as a result of the harassment; and (2) a national origin claim did not exist because none of the harassment specifically referred to the fact that Rafiq was from India.<sup>2</sup>

### **Fifth Circuit Reversed, Allowing the Case to Go Forward**

Disagreeing, the Fifth Circuit held that the EEOC charge was timely<sup>3</sup> and that there was sufficient evidence of discrimination and harassment on the basis of Rafiq's national origin. Further, the Fifth Circuit held that Rafiq's testimony alone regarding mental anguish was enough to support the hostile work environment claim.

The Fifth Circuit dismissed as *not* conclusive the fact that Rafiq had lost no sales due to the alleged harassment. Rather, under the totality of the circumstances test, the court agreed that the EEOC had demonstrated a pattern of frequent verbal ridicule or insults sustained over time and that conduct was, it held, pervasive enough to alter the conditions of Rafiq's employment.<sup>4</sup> Even though the conduct was not directed to him as an Indian, the Fifth Circuit decided that Rafiq had sufficient evidence of diverse treatment because of physical, cultural or linguistic characteristics of a national origin group.<sup>5</sup> Thus, the hostile work environment claim based on religion and national origin was sustained for jury consideration. Finally, the appellate court determined that Rafiq's testimony alone was sufficient to support an award for damages for emotional distress. Rafiq testified that he had family problems, sleeping problems, sought counseling from mosques, lost 30 pounds,

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pounds and suffered gastrointestinal problems. The case was sent back for trial adjudication by a jury.

### Possible Implications

The Fifth Circuit's instruction in *EEOC v. WC&M Enters. Inc.* is a timely lesson. According to the EEOC, between September 11, 2001 and December 11, 2005, there were 988 charges filed alleging post-9/11 backlash employment discrimination.<sup>6</sup> During that same period, a staggering 2,459 charges of discrimination based on "religion-Muslim" were filed, more than double the amount five years before.<sup>7</sup> Although some studies suggest there has not been an increase in the success rate of these claims in the courts,<sup>8</sup> the potential for an increase in litigation remains. As workers from Asia and the Middle East increase in the United States, the number of national origin and religious discrimination claims are expected to rise also. Thus, preventing litigation in this sensitive area will be critical. The *WC&M Enters.* decision provides insight on the Fifth Circuit's treatment of these claims and guidance as to the types of conduct employers need to address carefully, tactfully and in a timely fashion.

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### END NOTES:

<sup>1</sup> *EEOC v. WC&M Enters. Inc. d/b/a Streater-Smith Honda*, No. 05-21090, 2007 WL 2285320 (5th Cir. Aug. 10, 2007).

<sup>2</sup> A hostile work environment claim under Title VII must show: (1) the victim belongs to a protected group; (2) the victim was subjected to unwelcome harassment; (3) the harassment was based on a protected characteristic; (4) the harassment affected a term, condition, or privilege of employment; and (5) the victim's employer knew or should have known of the harassment and failed to take prompt remedial action. See, e.g., *Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 434 (5th Cir.2005). In order for the harassment to be sufficiently severe, the conduct complained of must be both objectively and subjectively offensive. See *Harris v. Forklift Sys.*, 510 US 17, 21-22, 114 S.Ct. 367. In other words, the situation must be such that a reasonable person would find it hostile or abusive. The courts use a totality of the circumstances test to determine if the conduct is hostile or abusive based on: frequency, severity, whether it is physically threatening or merely an offensive utterance; and whether it interferes with an employee's work performance. *Id.* at 23, 114 S.Ct. 367. One factor, taken alone, is not dispositive. In fact, if a single incident of harassment is severe enough, or less severe incidents are continuous enough, a Title VII claim may be established. See *Harvill*, 433 F.3d at 435-36.



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<sup>3</sup> In reversing the district court, the Fifth Circuit found that at least one incident of harassment occurred within the requisite 300 day period for filing a charge with the EEOC. The EEOC provided sufficient evidence of a continuous pattern of harassment throughout Rafiq's employment, and also of the specific event on October 26, 2002, between Rafiq and a manager, which ultimately led to Rafiq's dismissal. Furthermore, Rafiq testified in his deposition and by affidavit that he was called "Taliban" and "Arab" until the very last day of his employment.

<sup>4</sup> *WC&M Enters.*, No. 05-21090, 2007 WL 2285320 at 4 (5th Cir. Aug. 10, 2007).

<sup>5</sup> 29 C.F.R. § 1606.1.

<sup>6</sup> Shirin Sinnar, Presentation for the National Conference on Equal Employment Opportunity Law Panel: "The 9/11 Fallout: Ethnic and Religious Discrimination and Cultural Differences in the Workplace," March 23, 2005.

<sup>7</sup> *Id.*

<sup>8</sup> Jeffrey Breinholt, *Muslim Employment Discrimination: A Legal Examination* <[http://www.strategycenter.net/research/pubID.169/pub\\_detail.asp](http://www.strategycenter.net/research/pubID.169/pub_detail.asp)>.

*This article is not intended as legal advice to a specific problem or issue. If you have a question about employment law, please contact the Powers & Frost attorney with whom you work or Andrea Johnson, Partner, Head of Employment and Commercial Litigation Section.*

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