

Legal Issues Affecting Arab-Americans

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I am actually a newcomer to Arab-American activism. I'm one of those assimilated third generation Arab-Americans. I grew up in Brooklyn, where we thought that there were two religions, Catholic and public. The Catholic kids went to Catholic school and the public kids went to public school. Identity came to me after September 11th when two days later the schools that had closed temporarily reopened, and during the first class that day my daughter was threatened at her high school. It was an isolated incident but it upset her quite a bit. I don't think that she felt in any danger but she didn't understand why she was singled out. This is her first experience of this kind. And growing up I never had that experience. So that identity came to me recently.

Arab-Americans face the same legal problems as all minorities seeking to assimilate into American life while at the same time preserving their identities. There are questions of discrimination in employment, housing, public accommodation and education.

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Employment discrimination on the basis of race, color, religion, sex or national origin has been unlawful in the United States since 1964, under Title VII of the Civil Rights Act.¹ Curiously, however, national origin is not defined anywhere in Title VII, so it raises questions such as whether you have to come from a nation in order to have a claim of national origin discrimination. Palestine, for example, is not a recognized state. Can Palestinians bring claims for employment discrimination? The answer is yes, because the Equal Employment Opportunity Commission, to which the courts give deference in its interpretation of the Act, has defined national origin discrimination as “including but not limited to the denial of equal employment opportunity because of an individual or his ancestor’s place of origin or because an individual has the physical, cultural, or linguistic characteristics of a national origin group.”² Case law flushed this out to show that, for example, national origin can include those with a common heritage or shared ethnic characteristics. Hispanics, for example, can claim discrimination as a group on the basis of national origin, even though they do not necessarily originate from any particular Latin nation. This of course takes us back to the interesting question, what is an Arab-American?

National origin discrimination can be both intentional discrimination and what's known in law as disparate impact. A good example of disparate impact cases is the classic one in which New York City Police Department height requirements eliminated Puerto Ricans. Although the height requirements were not intended to screen out Puerto Ricans, that was their impact, and as they could not be proven necessary to the job, they were impermissible.

American Arabs are protected from both kinds of discrimination by various statutes. A Reconstruction era civil rights act, for example, addresses race discrimination. It was passed to protect newly emancipated slaves, and included the phrase, "All persons...shall have the same right...to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."³ In 1987, the Supreme Court held in *St. Francis College v. al-Khazraji*⁴ that Arabs are a race for purposes of this statute. The court went back to books and publications around 1886, when the law was passed, and found that Arabs were frequently referred to as a race at the time.⁵ So Arab-Americans can now bring race discrimination cases under the statute. The Immigration Reform and Control Act of 1986⁶ placed on employers the duty to employ only people who are properly documented to work in the United States. Because of fears that the statute might result in national origin discrimination and citizenship discrimination – employers assuming, for example, that Hispanics are not legal immigrants - the statute prohibits both national origin and citizenship discrimination. Arab-Americans and Arabs legally employable in the U.S. have recourse under this law.

Title VII also prohibits religious discrimination. In 1972 Congress added a reasonable accommodation requirement to it. Employees must accommodate “all aspects of religious observance and practice as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee or prospective employee’s religious observance or practice without undo hardship on the conduct on the employer’s business.”⁷ Harassment on the basis of religion or national origin is also prohibited.

Interestingly, there are very few cases involving Arab-Americans and Muslims. That means either that there is no discrimination occurring or that its victims are not filing. I think that goes to the sense of entitlement, participation. Do you feel sufficiently entitled to the protection of these laws to file claims under them, or do you lay low? I can’t draw definitive conclusions, but the paucity of cases is surprising.

Before September 11, the Department of Transportation was going to do a study to find out whether or not the Computer Assisted Passenger Screening System used at airports was unfairly profiling and singling out Arab-Americans. That study was never published but I do note that after September 21st, the Department of Transportation sent out an e-mail to all the major airlines and aviation associations reminding them to ensure that their employees understand that it is not only wrong but illegal to discriminate against people on the basis of their race, ethnicity, or national origin.

The immigration/secret evidence cases have already been mentioned. The shocking thing is that the pattern of use of secret evidence would seem to

suggest that there is no such thing as non-Arab, non-Muslim terrorists. The Foreign Intelligence Surveillance Act of 1978 (FISA)⁸ allows electronic surveillance on the basis of an *ex parte* application to a secret court. It meets in secret and permits wiretapping without notice to the individuals who are wiretapped. The new U.S.A. Patriot Act⁹ permits the FISA court to act not only in national security cases but also in any case where intelligence is “a significant purpose of the investigation.” That, when combined with all the intelligence sharing provisions of the act, is worrisome to civil liberties groups. The act gives the Attorney General broad authority to detain immigrants, including legal permanent residents. The Attorney General must charge them within seven days or release them, but it is easy enough to charge them with a technical immigration violation or a minor criminal violation and continue to hold them. The act also contains a provision that greatly expands computer searches by permission of the owner or operator of the computer so that, for instance, you might have your own computer but if you’re connected to a network that’s organized by somebody else, there’s broad authority to get that information without your permission or knowledge. The Palestinian Right of Return Coalition e-mail network mentioned earlier might well be the target by some of those searches.

The appendix lists many of the provisions of the Patriot Act. When it was going through the legislative process, Senator Russell Feingold commented on the Senate floor, “Now here is where my caution in the aftermath of the terrorist attacks and my concerns over the reach of the anti-terrorism bill come

together. To the extent that the expansive new immigration powers that the bill grants to the Attorney General are subject to abuse, who do we think that is most likely to bear the brunt of the abuse? It won't be immigrants from Ireland. It won't be immigrants from El Salvador or Nicaragua. It won't even be immigrants from Haiti or Africa. It will be immigrants from Arab, Muslim and South Asian countries. In the wake of these terrible events our government has been given vast new powers and they may fall most heavily on a minority of our population who already feel particularly acutely the pain of this disaster."¹⁰

In 1942, Lord Atkin, a law lord in the British House of Lords, said, "In this country amid the clash of arms, the laws are not silent. They may be changed but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachment on his liberty by the executive alert to see that any coercive action is justified in the law."¹¹

A final word might be said about Arab-Americans and identity. As I deal with U.S. laws based on respect for pluralism, for civil liberties, and the protection and promotion of identity within the United States, the question arises, what does it mean to be an Arab-American with respect to the rest of the Arab world? And my feeling about it is that the test to me will be whether there will be some reciprocity in this. Can Arab-Americans share the American values of civil liberties and non-discrimination, as a part of our culture, with

the Arab world? As a union lawyer I am quite familiar with the concept of solidarity. When a community is embattled, there's a circling of the wagons, and its members are loath to criticize each other and to raise difficult issues. But the test of whether Arab-Americans are really going to feel an identity with both other Americans and Arabs abroad will be whether they feel free to promote the American values of civil liberties and diversity in a reciprocal way with their homelands and with their brothers and sisters of the Arab world.

¹ Pub. L. 88-352 (72 U.S.C. 2000 et seq.) These citations refer to the part of the U.S. Code in which the laws appear or, where the citations are linked to cases, to the volume and page number of the relevant court reports.

² 29 CFR 1606.1.

³ 42 U.S.C. 1981

⁴ *St. Francis College v. al-Khazraji*, 481 U.S. 604 (1987)

⁵ "The 1863 version of the *New American Cyclopaedia* divided the Arabs into a number of subsidiary races, vol. 1, p. 739; represented the Hebrews as of the Semitic race, 9 *id.* at 27, and identified numerous other groups as constituting races, including Swedes, Norwegians, Germans, Greeks, Finns, Italians, (referring to mixture of different races), Spanish, Mongolians, Russians, and the like. The Ninth edition of the *Encyclopedia Britannica* also referred to Arabs, vol. 2, p. 245 (1878), Jews, and other ethnic groups such as Germans, Hungarians, and Greeks, as separate races." 481 U.S. 604, 611-612 (internal citations omitted).

⁶ Pub. L. 99-603 (8 U.S.C. 1364)

⁷ 42 U.S.C. § 2000e(j)

⁸ Pub. L. 95-511 (50 U.S.C. 1801)

⁹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, PL 107-38.

PL 107-38

¹⁰ www.senate.gov/~feingold/releases/01/10/102501at.html

¹¹ *Liversidge v. Anderson*, [1942] AC 206, 244