



Preventing discrimination in a post 9-11 world

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It was just two years ago that the nation watched in horror as terrorists armed with knives and boxcutters hijacked four commercial airliners and crashed them into the World Trade Center towers, the Pentagon, and the Pennsylvania countryside. That tragic day dominated the headlines for months. A story that did not grab the headlines, but which occurred immediately after 9-11 and is still happening in towns and cities across the United States, is the backlash against Muslims and individuals from Islamic countries.

Not surprisingly, this backlash has made its way into the workplace. Subsequent to September 11, 2001, there has been a dramatic increase in the number of discrimination suits against hoteliers and other employers by individuals who alleged they were discriminated against on the basis of their religion or national origin in violation of federal and New York law. This article provides hotel employers with a "how to" guide for insulating their hotels from successful charges of discrimination regarding employment in the post 9-11 landscape.

Employment discrimination

In the employment context, unlawful discrimination occurs when an individual is subject to unfavorable terms and conditions of employment by virtue of his or her membership in a protected category. Thus, terminating a Muslim from Saudi Arabia is not necessarily unlawful. What is unlawful is terminating that individual *because* he is Muslim or from Saudi Arabia.

Before discussing national origin and religious discrimination specifically, it is important to generally advise hoteliers on ways to reduce their exposure to possible discrimination liability. The two keys to avoid such liability are proper documentation and consistency.

Documentation

It is imperative that employees who have performance or behavioral deficiencies be given written warnings so that a paper trail is created. Such a documentation trail (or evidentiary trail) is the defense that a manager or hotel operator can rely on if his or her employment decisions are ever challenged.

But documentation alone is not sufficient. It is imperative that any documentation concerning employees is factually accurate. Supervisors who have a poorly performing employee should not render a positive performance evaluation because they do not want to hurt his feelings. Performance appraisals are meant to allow an employee to honestly know where he stands, and to acknowledge what areas of improvement are needed to become retainable.

Yet, too many hoteliers have been stung by employees who were terminated for poor performance, and who were later able to successfully use inaccurate, positive performance appraisals as evidence to argue that they were unlawfully discriminated against. Be constructive when writing and explaining performance appraisals, but be accurate!

Consistency

The other key to avoiding liability is to treat all employees **in a similar fashion** with regard to workplace conditions and terms of employment. Note, this does not mean that all employees must be treated exactly the same.

For example, if a hotel manager has a Muslim employee whom she is considering terminating because of a cash register shortage, she should determine if similarly situated employees of other religions were allowed to continue working even though they also had cash shortages. If the answer to that question is "yes," the manager should be reluctant to terminate the employee unless other compelling factors justify his discharge, such as other performance problems that similarly situated employees did not have.

Workplace harassment

Keep in mind that discrimination also encompasses harassment. Thus, just as women have a right not to be harassed because of their sex, individuals have a right not to be harassed on the basis of their religion or national origin. These individual rights are afforded through the protections of Title VII of the Civil Rights Acts of 1964 which basically outlaws intentional

workplace discrimination because of an employee's race, religion, national origin, color or sex. While these protections were created by Congress to benefit workers at companies with 20 or more employees, the spirit of the legislation is inviolate and its preservation is applicable to all employers.

Since the courts have held that employers may set the conditions and terms of employment for their workers, as long as these conditions and terms do not violate individuals' civil rights, labor laws, or other defined laws, federal and state governments hold employers accountable for all workplace conditions that an employee may experience. Hence, an employer may be held liable for harassment that an employee experiences in the workplace, even if it was not sanctioned or condoned by management or ownership.

Anti harassment policies

It is recommended that all organizations, including hotels, consider drafting a detailed anti harassment policy for their employees to sign. Briefly, any antiharassment policy should state that harassment of employees by anybody — including customers — will not be tolerated, and should include a mechanism for employees to report incidents of harassment with an explicit assurance that reporting employees will not be retaliated against. At a minimum, management should provide harassment training for supervisors, so that they can help identify and prevent the harassment of their employees. Ideally, all employees should be educated regarding the indications, devastating effects and consequences of on-the-job harassment as well as management's policy of zero tolerance for any form of harassment in the workplace.

National origin discrimination

Looking at national origin and religious discrimination specifically, there are over 1.6 billion Muslims today according to the most recent worldwide censuses. Predominantly Muslim countries can be found in Europe, Africa, and Asia. Thus, it is not just individuals from the Middle East who have claimed they were victims of national origin discrimination after 9-11. Also remember that national origin discrimination has nothing to do with one's religion. For example, a Christian who happens to hail from Lebanon can make a successful claim that he was the victim of national origin discrimination that stemmed from the public's reaction after the terrorist attacks. Subsequent to 9-11, it is more important than ever that hoteliers be vigilant in ensuring that their employees from other countries are not discriminated against.

Making an accommodation

Religious discrimination is a little more involved, because a hotelier's duty not to discriminate encompasses reasonably accommodating employees' sincerely held religious beliefs. For example, it may be a reasonable accommodation for a hotelier to allow a Muslim employee to wear a hijab (head scarf) even though the hotel has a dress policy in place which prohibits employees from wearing hats and other headwear.

One should bear in mind, however, that a reasonable accommodation does not have to be the least restrictive or the one preferred by the employee requesting it, so long as it is effective. Also, an accommodation that imposes more than a minimal cost to a hotelier or would violate a valid seniority system is sometimes not required because it would be deemed an undue hardship. When accommodating an employee's religious beliefs, it is important that managers are fully informed of their organization's rights and obligations, as well as those that are afforded to their employees.

More hoteliers are finding themselves exposed to possible liability for religious and national origin discrimination after September 11th. By following the above guidelines and ideas, managers can help insulate their hotel from successful claims of unlawful discrimination in the workplace.

(Krupin O'Brien LLC's national practice exclusively represents employers and management in the fields of labor relations, employment law, business immigration and related litigation.

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