

IRCA'S ANTIDISCRIMINATION PROVISIONS: PROTECTIONS AGAINST HIRING DISCRIMINATION IN PRIVATE EMPLOYMENT

Employers who hire unauthorized aliens face strict penalties from the Immigration Reform and Control Act of 1986 (IRCA). Recognizing the potential for discrimination against authorized aliens and United States citizens of minority national origin, IRCA also provides an administrative procedure to handle these discrimination claims. This Comment examines how the current anti-discrimination protections of title VII and 42 U.S.C. § 1981 can be used to supplement the IRCA protections. The conclusion is that IRCA, title VII, and section 1981 can interact to provide adequate protection for those likely to be the target of discrimination.

INTRODUCTION

The Immigration and Naturalization Service (INS) has not been able to control the flow of illegal aliens into this country. While some are political refugees, many others are "economic refugees" lured by the availability of jobs in the United States. Previous efforts, concentrated on patrolling the borders, were largely ineffective in stemming the tide of illegal aliens.

Recently, President Reagan signed a new bill into law that attempts to attack this problem from a different perspective. Among its provisions, the Immigration Reform and Control Act of 1986 (IRCA)¹ makes it illegal for employers to knowingly hire unauthorized aliens, and establishes a procedure for employers to verify the eligibility of applicants they hire to work. Employers who violate IRCA's provisions are subject to civil penalties.²

During the long Congressional battle over IRCA, concern was expressed that some groups would suffer discrimination as a result of

1. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1987) (codified in scattered titles and sections) [hereinafter IRCA].

2. See *infra* notes 10-12 and accompanying text.

its sanctions.³ To counter this concern, IRCA includes provisions designed to protect legal aliens and citizens of national minority origin from discrimination.⁴ Employers who attempt to avoid sanctions by refusing to hire those applicants who look or appear foreign run the risk of fines and other penalties.⁵

These antidiscrimination provisions already are seen as unnecessary by some and confusing by others. Various congressmen have referred to the antidiscrimination provision as "ill-advised" and "unnecessary and over inclusive."⁶ Minority groups are concerned that these provisions will not provide enough protection.⁷ Employers are worried that their legitimate efforts to avoid sanctions will result in lawsuits charging them with discrimination.⁸ No one is exactly sure how the provisions of IRCA will be enforced.

This Comment analyzes IRCA and its likely effects in providing protection against hiring discrimination in the private sector. Initially, the Comment looks at IRCA's employer sanctions, surveys the basic principles of employment hiring discrimination, and reviews the past protections against race and national origin discrimination — title VII and section 1981 — to determine the necessity of IRCA's antidiscrimination provisions. The Comment then details the legislative history of IRCA, as well as recent regulations and statements promulgated by the Special Council in charge of enforcement, the INS, and other government and non-governmental organizations. Finally, the Comment examines the past and present protections against citizenship and national origin discrimination, and concludes that IRCA, title VII, and section 1981 can interact to provide adequate protection for those likely to be the target of discrimination.

EMPLOYER SANCTIONS UNDER IRCA FOR HIRING ILLEGAL ALIENS

The cornerstone of IRCA, and the key to its effectiveness in discouraging the flow of illegal immigration is its employer sanctions. There are three aspects of the sanctions that have ramifications on the hiring process: (1) knowingly hiring an unauthorized alien; (2) failing to fill out the required paperwork for any new person hired;

3. See H.R. REP. NO. 682, 99th Cong., 2nd Sess., pt. 1, at 90, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5694.

4. IRCA § 102(a), 100 Stat. at 3374-79 (codified at 8 U.S.C. § 1324b (1986)) (also referred to as the Frank Amendment).

5. See *infra* notes 95-97 and accompanying text.

6. H.R. REP. NO. 682, *supra* note 3, at 110, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 5714.

7. *Immigration Law: When the Best Minds in Washington*. . ., U.S. NEWS AND WORLD REP., Mar. 9, 1987, at 39.

8. Recio & Neff, *The Immigration Bill: Business Joins the Border Patrol*, BUS. WEEK, Oct. 27, 1986, at 41.

and (3) continuing to employ an alien hired after November 6, 1986, who is or has become unauthorized to continue working.

The first part of the statute reads, "It is unlawful for a person or other entity to hire . . . for employment in the United States . . . an alien knowing the alien is an unauthorized alien. . . ."⁹ Employers who knowingly hire unauthorized aliens are subject to both civil and criminal penalties. An employer can be fined between \$250 to \$2,000 per offense; a second offense carries a fine of between \$2,000 to \$5,000 for each unauthorized alien; and a third offense carries a fine of between \$3,000 to \$10,000 for each unauthorized alien.¹⁰ An employer who hires unauthorized aliens as a general practice faces possible criminal penalties of up to \$3,000 per unauthorized alien hired plus six months of jail time.¹¹ The statute also authorizes the granting of injunctions.¹²

The second aspect of the sanctions is the establishment of procedures that employers must follow for each new worker hired. An employer must ask each newly-hired employee for documents proving the employee's identity and authorization to work in the United States.¹³ The employer and employee are then required to fill out and sign an I-9 citizenship verification form within three days after the employee begins working.¹⁴ These verification forms then must be kept for all current employees and must be made available for the INS to inspect upon demand. Failure to keep these records properly can result in fines to the employer of \$100 to \$1,000 for each employee without the verification paperwork.¹⁵

IRCA requires the employer to inspect the documents offered by the employee as proof that the employee is authorized to work in the United States.¹⁶ There has been concern that unauthorized aliens

9. IRCA § 101(a)(1), 100 Stat. at 3360 (codified at 8 U.S.C. § 1324a). Presumably all employers not specifically exempted in the statute must fill out an I-9 (citizenship verification) form for any employee, including those "employers" who hire individuals for domestic work in their private homes on a regular basis. However, those hired for domestic work on a sporadic basis are not required to fill out an I-9. See IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, HANDBOOK FOR EMPLOYERS, INSTRUCTIONS FOR COMPLETING FORM I-9, at 2 (May 1987) [hereinafter I-9 HANDBOOK].

10. IRCA § 101(a)(1), 100 Stat. at 3366-67 (codified at 8 U.S.C. § 1324a).

11. *Id.*, 100 Stat. at 3367-68.

12. *Id.*, 100 Stat. at 3368.

13. *Id.*, 100 Stat. at 3361-62.

14. I-9 HANDBOOK, *supra* note 9, at 2, 7. A new employee who cannot come up with the necessary documents has this deadline extended to twenty-one days if he produces a receipt showing he has applied for the document. *Id.* at 8.

15. IRCA § 101(a)(1), 100 Stat. at 3367 (codified at 8 U.S.C. § 1324a).

16. *Id.*, 100 Stat. at 3361.

will obtain "false identification." In fact, counterfeit document underground already has sprung up in some major United States cities.¹⁷ Many employers, who have had no training or experience in judging the authenticity of the identification, are concerned that they could be fined if they hire persons whose identification seems genuine, but turns out to be counterfeit. The new law states that employers need only verify that the documents appear to be genuine.¹⁸ While this language is vaguely reassuring to employers, it does not establish an adequate standard of duty.¹⁹ For example, if an employer accepts a "green card" as authentic that is green in color instead of (genuine) blue, is he held to a "reasonably informed employer" standard or to a different standard? And will an employer in Maine who has had little contact with the various documents an authorized alien might possess be held to a less strict standard than an employer in California who has had a great deal of experience with such documents?

The last practice that could subject the employer to fines is one of continuing to employ an alien whose authorization has expired.²⁰ Such an employer will be subject to the same schedule of fines and presumably criminal penalties that it would if it knowingly had hired an authorized alien.²¹ This places an additional burden on the employer. Not only must it screen each new hire for employment authorization, it must also keep track of any authorization expiration dates for any authorized aliens it hires. Further, some aliens whose authorizations expire are still legally authorized to work if the reason for expiration of authorization is due to delay on the part of the INS.²²

Each part of IRCA that discourages employers from hiring illegal aliens also encourages employers to discriminate against persons who might turn out to be illegal aliens. An employer who hires an applicant of Hispanic origin runs some risk that the documents produced by the applicant might be counterfeit. An employer who hires an authorized alien has the additional burden of keeping track of the employee's authorized status throughout the period of employment. There will be increased pressure on employers to discriminate on the

17. See Stevenson, *Hiring Aliens: The New Risks*, N.Y. Times, Jan. 12, 1987, at D11, col. 2; DelVecchio & Garcia, *Scam Artists Who Prey on Illegal Aliens*, San Francisco Chron., Jan. 28, 1987, at 6, col. 2.

18. IRCA § 101(a)(1), 100 Stat. at 3361 (codified at 8 U.S.C. § 1324a).

19. The INS is training some employers to spot counterfeit documents, which would indicate that employers will be held to a certain level of knowledge and expertise in this area. See Hill, *Phony Papers a Hot Item for Illegals*, USA Today, Apr. 10, 1987, at 3A, col. 2. Also, photocopies of the acceptable documents are given in I-9 HANDBOOK, *supra* note 9, at 12-17.

20. IRCA § 101(a)(1), 100 Stat. at 3359-60 (codified at 8 U.S.C. § 11324a).

21. *Id.*, 100 Stat. at 3366-67.

22. 64 INTERPRETER RELEASES 52 (1987).

basis of an applicant's national origin and/or citizenship.

BASIC PRINCIPLES OF PROVING EMPLOYMENT HIRING DISCRIMINATION

The United States Supreme Court established the elements required to prove hiring discrimination in *McDonnell Douglas Corp. v. Green*.²³ A plaintiff charging discrimination in the hiring process must prove that (1) he belongs to a racial minority; (2) he applied to and was qualified for the job that the employer sought to fill; (3) despite being qualified, his application was rejected; and (4) after rejecting him, the position remained open and the employer continued to seek applications from persons of his qualifications.²⁴ If the applicant does so prove, the burden of proof shifts to the employer to prove that the decision not to hire the applicant was not based on improper criteria.²⁵ If the employer offers a valid reason to explain why the applicant was not hired, the burden then shifts back to the applicant to prove the employer's explanation was a "pretext."²⁶

Courts have discussed two different groupings of discrimination: disparate treatment and disparate impact.²⁷ Disparate treatment is the more easily recognizable and provable of the two. Simply, members of one race, national origin, or other group are treated differently from everyone else. An example of disparate treatment is found in *McDonald v. Santa Fe Transportation Co.*²⁸ In *McDonald*, two white employees and one black employee were caught stealing. The white employees were fired; however, the black employee was not. The Court held, in effect, that employers cannot use different standards to evaluate members of different racial, national origin, or citizenship groups.²⁹

In disparate impact cases, an employer uses one standard, but that standard has a detrimental effect on one or some racial, national or citizenship groups but not on others. Such devices as intelligence tests,³⁰ fluency tests,³¹ and even height and weight requirements³²

23. 411 U.S. 792 (1973).

24. *Id.* at 802.

25. *Id.*

26. *Id.* at 805.

27. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

28. 427 U.S. 273 (1976).

29. *Id.* at 290.

30. *Griggs*, 401 U.S. at 431.

31. 2 EEOC COMPL. MAN. (BNA) § 623.9, at 623.0019 (Aug. 1984).

32. 2 EEOC, EEOC POLICY STATEMENT, RELATIONSHIP OF TITLE VII OF THE CIVIL RIGHTS ACT TO THE IMMIGRATION REFORM AND CONTROL ACT OF 1986 (adopted

could be held to be unlawful discrimination, even if applied uniformly to all applicants. However, just because some of these devices result in disparate impact does not mean that they are illegal. There could be valid business reasons for requiring that applicants measure up to some objective criteria. If the employer can show that the screening device has a demonstrable relationship to successful performance, and is a "Bona Fide Occupational Qualification" (BFOQ), it is not guilty of unlawful discrimination.³³ If it cannot, it is liable, even if it did not intend to discriminate against the racial, national origin or citizenship group.³⁴

Statistics have become increasingly important to prove discrimination. Most discrimination is not open and flagrant, and there often is no evidence besides the plaintiff's testimony of his personal experience and the employer's denial that he or she discriminated. The Supreme Court in *International Brotherhood of Teamsters v. United States*³⁵ noted, "in many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved."³⁶

PROTECTIONS EXISTING PRIOR TO IRCA

Before passage of IRCA, certain statutory protections existed that purported to protect certain groups and classes against this type of employment discrimination. The two main sources of protection, still in force today, are 42 U.S.C. § 1981³⁷ and title VII of the Civil Rights Act of 1964.³⁸ Both sources will be examined to determine first, what remedies are available under each, and, second, to what extent non-citizens and minorities of national origin are protected by these statutory provisions.

Section 1981

42 U.S.C. § 1981 (section 1981) states: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to . . . the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ."³⁹

Feb. 26, 1987), reprinted in 64 INTERPRETER RELEASES 400, 402 (1987).

33. See generally 2 EEOC COMPL. MAN. (BNA) § 625.1, at 625:0003 (Apr. 1982).

34. See, e.g., *Griggs*, 401 U.S. at 432.

35. 431 U.S. 324 (1977).

36. *Id.* at 339 n.20 (quoting *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir.), cert. denied, 404 U.S. 984 (1971)).

37. 42 U.S.C. § 1981 (1982); see *infra* text accompanying note 39.

38. Civil Rights Act of 1964, title VII, §§ 701-706 (codified at 42 U.S.C. §§ 2000e to 2000e-17).

39. 42 U.S.C. § 1981.

Since the early 1970s, alleging a violation of this section has become quite popular with plaintiffs, in part because it has fewer restrictions than title VII and allows a greater range of remedies. Under section 1981, courts can award both equitable and legal remedies including compensatory and punitive damages.⁴⁰ However, it is not always more advantageous to pursue a section 1981 remedy. One of the disadvantages of section 1981 compared to title VII is that the former requires the plaintiff to prove that the defendant's discrimination was intentional.⁴¹

Citizenship Discrimination

Whether section 1981 protects against discrimination based on citizenship is not entirely settled. Following *Guerra v. Manchester Terminal Corp.*,⁴² it seemed clear that the court would consider pure citizenship discrimination to be violative of this statute. In *Guerra*, a legal alien from Mexico was transferred to a lesser job because of an agreement between the employer and the union to reserve certain types of jobs for United States citizens, or aliens, with family in the United States, intending to become citizens. The worker who took the plaintiff's former position was a Mexican national whose family lived in the United States. The court held that this discrimination, although ultimately determined to be between classes of noncitizens, was based on an initial distinction between citizens and noncitizens. This citizenship discrimination was held to violate section 1981.⁴³

Subsequent cases generally followed the *Guerra* holding. In *Ramirez v. Sloss*,⁴⁴ a city's hiring procedures, which provided preference to citizens, were held to violate section 1981.⁴⁵ In *Thomas v. Rohner-Gehrig & Co.*,⁴⁶ a recent action brought by United States citizens against a Swiss-owned company, the plaintiffs sued on both title VII and section 1981 grounds, alleging a hiring bias for Swiss and German citizens. The court upheld the title VII change and dismissed the section 1981 charge with leave to amend, so that the plaintiff could allege the defendants were all noncitizens and claim

40. See, e.g., *Tafoya v. Adams*, 612 F. Supp. 1097, 1099 (D. Colo. 1985), *aff'd*, 816 F.2d 555 (10th Cir.), *cert. denied*, 108 S. Ct. 152 (1987).

41. See, e.g., *Erebia v. Chrysler Plastix Prods. Corp.*, 772 F.2d 1250, 1257 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1197 (1986).

42. 498 F.2d 641 (5th Cir. 1974).

43. *Id.* at 655.

44. 615 F.2d 163 (5th Cir. 1980).

45. *Id.* at 169-70.

46. 582 F. Supp. 669 (N.D. Ill. 1984).

that the plaintiffs were all citizens of the United States.⁴⁷

Recent cases considering citizenship discrimination have cast considerable doubt on the continued viability of section 1981 as a tool against pure citizenship discrimination. This trend started with *De Malherbe v. International Union of Elevator Constructors*.⁴⁸ The court analyzed the legislative history of section 1981 and determined that it did not cover aliens. The court denied relief to a resident legal alien who had been removed from a union hiring list because he lacked United States citizenship.⁴⁹

In *Bhandari v. First National Bank of Commerce*,⁵⁰ the most recent case addressing citizenship discrimination, the Fifth Circuit allowed a cause of action for such citizenship discrimination, explicitly stating that if it had not been bound by the *Guerra* precedent, it would have held otherwise.⁵¹ In *Bhandari*, the court analyzed the legislative history and reached the same conclusion as the *De Malherbe* court: discrimination based on citizenship was not meant to be covered by section 1981. The court grudgingly allowed the suit to continue, but made it clear that it thought the *Guerra* case was wrongly decided.⁵²

What future courts will do in this area is uncertain. One possibility seems most likely — courts may find that pure citizenship discrimination is *not* covered by section 1981, absent of showing of discrimination against noncitizens based on race. The likelihood of this outcome is evidenced by the holding in *Ben-Yakir v. Gaylinn Associates*.⁵³ In *Ben-Yakir*, an alien sued a former employer for a pay discrepancy allegedly caused by his noncitizen status. The court denied the claim and noted “this court has decided on several occasions that claims under section 1981 that attack private acts *must allege racial discrimination*.”⁵⁴

Thus, an employer who refuses to hire all aliens regardless of legal status, but who does not discriminate against any “race,” might be free from a section 1981 claim. However, an employer who intentionally discriminates against noncitizens on the basis of race by, for example, only checking the identification of those who appear Hispanic, and then refusing to hire any noncitizens, probably would be liable under section 1981.

47. *Id.* at 672.

48. 438 F. Supp. 1121 (N.D. Cal. 1977).

49. *Id.* at 1142.

50. 808 F.2d 1082 (5th Cir. 1987). *Bhandari* did not deal with employment discrimination, but did deal with related issues, involving a person of Arab citizenship who alleged he was denied a Visa credit card because he was a noncitizen.

51. *Id.* at 1099-1100.

52. *Id.* at 1105.

53. 535 F. Supp. 543 (S.D.N.Y. 1982).

54. *Id.* at 544 (emphasis added).

A further possibility is that section 1981 may be expanded by courts to include citizenship discrimination if the antidiscrimination provision of section 102(a) of IRCA does not provide enough protection.⁵⁵ The history of the use of section 1981 in employment discrimination cases shows that courts began to recognize it as a viable claim in discrimination cases not covered by title VII.⁵⁶ Rather than dismiss discrimination claims not covered, courts could render some relief to worthy plaintiffs by recognizing a section 1981 claim. The Frank Amendment,⁵⁷ like title VII, contains some strict and elaborate procedural prerequisites and qualifications.⁵⁸ If these result in dismissal of otherwise valid claims by noncitizens, courts may be willing to allow claims resurrected under section 1981. Courts could justify this as following the severely criticized, but not overruled, *Guerra* precedent.

National Origin Discrimination

Section 1981 does not cover discrimination based solely on national origin. Many courts have noted that national origin discrimination is addressed specifically by title VII, and that section 1981 does not specifically mention national origin.⁵⁹

The language of section 1981 is vague when it comes to defining protected individuals. "All persons . . . shall have the same right . . . as is enjoyed by white citizens."⁶⁰ At the time of enactment, the statute was designed primarily to protect blacks. In recent times, it has been expanded to protect all "races." The Supreme Court, in *McDonald*, set the tone for interpreting section 1981 to allow protection against *any* discrimination based on race, holding that section 1981 protected whites from such discrimination.⁶¹

The definition of the term "race" has evolved slowly through case law in this area. Even early cases recognized that "race" should not be defined literally, but should also protect groups that were perceived to be a race and who had traditionally suffered from

55. IRCA § 274B, 100 Stat. at 3374 (codified at 8 U.S.C. § 1324b).

56. See, e.g., *Guerra v. Manchester Terminal Corp.*, 498 F.2d at 655. See *supra* notes 40-45 and accompanying text. In *Guerra*, the court pointed out that title VII did not cover citizenship discrimination, but that section 1981 applied.

57. See *supra* note 4.

58. See *infra* notes 99-101 and accompanying text.

59. See, e.g., *Chaiffetz v. Robertson Research Holding, Ltd.*, 798 F.2d 731, 735 (5th Cir. 1986); *Carillo v. Illinois Bell Tel. Co.*, 538 F. Supp. 793, 795 (N.D. Ill. 1982).

60. 42 U.S.C. § 1981.

61. 427 U.S. at 296.

discrimination.⁶²

Hispanics, the group most likely to need protection from discrimination resulting from IRCA sanctions, long have been recognized as a group traditionally discriminated against and a group perceived by the community as a "race."⁶³ Dismissal of suits brought by Hispanics has occurred only when the plaintiff has alleged national origin discrimination and failed to allege racial discrimination, or when there was clearly no discrimination on the basis of race.⁶⁴ If the complaint alleges racial discrimination, courts generally allow the claim to proceed under section 1981.⁶⁵

The number of "races" protected by section 1981 has been growing steadily. Pakistanis⁶⁶ and East Indians⁶⁷ have qualified to proceed on a section 1981 claim. In the past, persons of Slavic,⁶⁸ Ukrainian,⁶⁹ and American⁷⁰ national origin have been held not to qualify regardless of whether "racial" discrimination is alleged. However, in two recent cases,⁷¹ the Supreme Court cast doubt on whether any such group would be denied protection under section 1981 in the future.⁷² The effectiveness of section 1981 as a weapon against na-

62. See, e.g., *Budinsky v. Corning Glass Works*, 425 F. Supp. 786 (W.D. Pa. 1977). See also *Ramos v. Flagship Int'l*, 38 Fair Empl. Prac. Cas. (BNA) 400, 403 (E.D.N.Y. 1985), in which the court analogized the definition of "race" to that of "obscenity," using the so-called "community contemporary standards concept." By this definition, a race is any national origin that is considered by the community to be a "race" or traditionally has been discriminated against in that community.

63. *Budinsky*, 425 F. Supp. at 788.

64. See *Vera v. Bethlehem Steel Corp.*, 448 F. Supp. 610 (M.D. Pa. 1978); *Apodaco v. General Electric Co.*, 445 F. Supp. 831 (D.N.M. 1978).

65. For an analysis of cases dealing with Hispanics as a race, see *Ortiz v. Bank of Am.*, 547 F. Supp. 550 (E.D. Cal. 1982). *Ortiz* breaks down the cases dealing with this issue into three different groupings: (1) courts that have denied recovery to Hispanics as a race; (2) courts that have granted plaintiffs leave to amend their suits to allege the discrimination was "racial" in character; and (3) courts that have allowed the claim to proceed when Hispanic plaintiffs have alleged the discrimination was racial in character. In *Ortiz*, the court noted the trend and logic of recognizing claims by Hispanics under section 1981 and allowed the plaintiff's claim to continue even though he had failed to allege explicitly that the discrimination was racial in character. *Id.* at 568.

66. *Khawaja v. Wyatt*, 494 F. Supp. 302 (W.D.N.Y. 1980).

67. *Banker v. Time Chem. Inc.*, 579 F. Supp. 1183 (N.D. Ill. 1983).

68. *Budinsky*, 425 F. Supp. 786.

69. *Hiduchenko v. Minneapolis Medical & Diagnostic Ctr.*, 467 F. Supp. 103 (D. Minn. 1979).

70. *Chaffetz*, 798 F.2d 731.

71. *Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022 (1987) (holding that Arabs were protected under section 1981); *Shaare Tefila Congregation v. Cobb*, 107 S. Ct. 2019 (1987) (holding Jews were also protected).

72. The Court's test of whether a group qualifies as a race is whether Congress intended to protect that group, not whether that group is considered to be a separate race by today's standards. *Shaare Tefila Corporation*, 107 S. Ct. at 2022. The Court reviewed the legislative history of section 1981, which it traced back to the Civil Rights Act of 1866 and the Voting Rights Act of 1870. Many different ethnic groups were discussed in the Congressional debates as races, including Scandinavians, Anglo-Saxons, Latins, Jews, Gypsies and Germans. *St. Francis College*, 107 S. Ct. at 2027. By this

tional origin discrimination may still depend on the complainant's race. Hispanics would seem to be covered as long as their complaints allege racial discrimination. Persons belonging to less distinguishable national origin/race groups, such as Italians, are probably also covered, but it is less clear. Overall, section 1981 would be very helpful in augmenting the protection of IRCA. The groups most distinguishable and likely to be discriminated against are the groups most likely to qualify as "races" under section 1981.

Title VII

Title VII of the Civil Rights Act of 1964 states: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin. . . ."⁷³ The remedies available under title VII are limited. Successful plaintiffs can obtain only injunctive relief, reinstatement, and up to two years of back pay.⁷⁴ Unlike section 1981, general and punitive damages are not available.⁷⁵ The prevailing party in a title VII suit is, however, entitled to reasonable attorney fees.⁷⁶ Title VII plaintiffs encounter an additional kind of limitation — title VII suits cannot be jury trials.⁷⁷

Title VII also imposes strict procedural limits on plaintiffs. Claims must be filed with the state or local employment commissioner or the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged discrimination.⁷⁸ The EEOC investigates and attempts to negotiate a compromise; if that is not possible, it either institutes an action in federal court or issues a "rights to sue" letter.⁷⁹ If the letter is issued, the plaintiff must file a suit in federal court within ninety days.⁸⁰

Citizenship Discrimination

Title VII does not explicitly protect against discrimination based on citizenship, and courts generally have refused to extend its protection to discrimination on the basis of citizenship alone. In *Espinoza*

reasoning, all these groups would now qualify for protection under section 1981.

73. 42 U.S.C. § 2000e-2(a)(1).

74. *Id.* § 2000e-5(g).

75. *See, e.g., Tafoya*, 612 F. Supp. at 1098.

76. 42 U.S.C. § 2000e-5(k).

77. *See, e.g., Tafoya*, 612 F. Supp. at 1099.

78. 42 U.S.C. § 2000e-5(e).

79. *Id.* § 2000e-5(f)(1).

80. *Id.*

v. Farah Manufacturing Co., Inc.,⁸¹ the Court denied relief to a lawful alien who had sued a company with a long-standing policy of not hiring aliens. In its opinion, the Court stated “[a]liens are protected from illegal discrimination under the Act but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage.”⁸²

Aliens *can* bring suit successfully under title VII on grounds of discrimination on the basis of national origin. This distinction is illustrated by the recent case of *Vicedomini v. Alitalia Airlines*,⁸³ in which an American of Italian descent brought a title VII suit, alleging that the employer discriminated against him in favor of Italian natives. The court dismissed the suit because there was no difference in national origin and, thus, there could not be national origin discrimination.⁸⁴

Thus, title VII could apply in cases of discrimination against legal aliens resulting from IRCA. If an employer discriminated against aliens of one national origin group but not against others, the aliens of that national origin could recover on a title VII claim.⁸⁵ On the other hand, if the discrimination only affected aliens and not citizens of the same national origin, title VII would not offer relief.

National Origin Discrimination

Title VII specifically prohibits employment discrimination on the basis of national origin. The term “national origin” has not been taken literally to mean a person’s nation of origin. It commonly means the nation or identifiable geographic location from which one’s ancestors came.⁸⁶ Most often, national origin discrimination occurs when the complaining individual has noticeable characteristics that clearly identify him or her as a member of a minority national origin. These characteristics include such things as skin color,⁸⁷ facial features, accent,⁸⁸ and surname.⁸⁹

Groups such as Hispanics and Orientals are easily recognizable as distinct national origin groups, entitled to sue under title VII. Other groups, such as people of slavic background, can bring national origin discrimination suits; however, they are far less likely to suc-

81. 414 U.S. 86 (1973).

82. *Id.* at 95.

83. 37 Fair Empl. Prac. Cas. (BNA) 1381 (S.D.N.Y. 1983).

84. *Id.* at 1383.

85. *See Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. at 92-93 n.5.

86. *See id.* at 88.

87. *Garcia v. Gardner’s Nurseries, Inc.*, 585 F. Supp. 369 (D. Conn. 1984).

88. *Mandhare v. LaFargue Elementary School*, 37 Fair Empl. Prac. Cas. (BNA) 1161 (E.D. La. 1985); *Carino v. University of Okla.*, 36 Fair Empl. Prac. Cas. (BNA) 826 (10th Cir. 1984).

89. *See Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979).

ceed.⁹⁰ One possible reason for this is that courts appear to be less sympathetic and require more proof of national origin when the claim involves groups who are not as clearly identifiable as "different."⁹¹ Another possible reason is that statistics are frequently kept for clearly identifiable national origin groups like Hispanics, but are infrequently kept for other smaller and less identifiable groups like Slavs.⁹²

Title VII then can be a very effective weapon against the type of discrimination most likely to result from IRCA sanctions. Employers who treat applications of one national origin group differently from others will violate title VII. Employers who choose not to hire members of certain national origins, like Hispanics, to avoid hiring illegal aliens, will be liable under title VII. Employers requiring identification verification from applicants of some national origins but not others also will violate title VII.

Less obvious forms of discrimination on the basis on national origin also are covered by title VII. Hiring procedures based on a testing⁹³ or fluency⁹⁴ requirements that have a disparate impact on individuals of certain national origins violate title VII, if such screening requirements are not bona fide occupational qualifications (BFOQs).⁹⁵ For example, an employer that requires applicants to pass an English language competency examination in an effort to eliminate illegal aliens from the hiring pool will be liable if competency in English is not necessary to perform the job.

THE ANTIDISCRIMINATION PROVISIONS OF IRCA

Section 102(a) of IRCA, the Frank Amendment, prohibits discrimination based on national origin or citizenship status:

It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien) with respect to the hiring . . . of the individual for employment . . . (A) because of such individual's national origin, or (B) in the case of a citizen or intending citizen . . . because of such individual's citizenship status.⁹⁶

90. See, e.g., *Sklenar v. Central Bd. of Educ., Detroit*, 23 Fair Empl. Prac. Cas. (BNA) 1396 (E.D. Mich. 1980). See generally Keotahian, *National Origin Discrimination in Employment: Do Plaintiffs Ever Win?*, 11 EMPL. REL. L.J. 467 (1985).

91. See, e.g., *Hiduchenko*, 467 F. Supp. at 106.

92. See, e.g., *Sklenar*, 23 Fair Empl. Prac. Cas. (BNA) at 1408.

93. See, e.g., *Griggs*, 401 U.S. at 436.

94. 2 EEOC COMPL. MAN. (BNA) § 623.9, at 623:0019 (Aug. 1984).

95. 42 U.S.C. § 2000e-2(e).

96. IRCA § 102(a), 100 Stat. at 3374 (codified at 8 U.S.C. § 1324b).

Like title VII, the Frank Amendment has some strict and narrow statutory qualifications. It covers only discrimination by employers with four or more employees,⁹⁷ and it protects only citizens and noncitizens who have filed declarations of intent to become citizens and who are "on schedule" to becoming naturalized citizens.⁹⁸ The complicated procedural qualifications are a potential trap for the unwary. A plaintiff must file a claim with the Office of Special Counsel within 180 days.⁹⁹ The Special Counsel has 120 days after the claim is filed to file a complaint with an Administrative Law Judge (ALJ).¹⁰⁰ If the Office of Special Counsel fails to file or chooses not to file within the 120 days, the plaintiff may bring a private action in front of the ALJ.¹⁰¹

The penalties possible under the Frank Amendment largely parallel those of title VII. The ALJ may issue an injunction to force an employer to stop the illegal practices;¹⁰² fine the employer up to \$1,000 per applicant discriminated against;¹⁰³ and may further order the employer to keep records on all applicants for positions to help ensure that no further discrimination takes place.¹⁰⁴

Plaintiffs are eligible for some remedies, but also may be subject to potential liabilities associated with pursuing a claim. If successful, a plaintiff can force the employer to hire or rehire him as well as collect back pay for up to two years.¹⁰⁵ If the losing party's argument is without reasonable foundation in law or fact, the ALJ may, in his discretion, award reasonable attorneys' fees to the prevailing party.¹⁰⁶ And if the losing party appeals to the Court of Appeals and loses, the appellate court also can award reasonable attorneys' fees.¹⁰⁷ To be successful, a plaintiff must prove by a preponderance of the evidence that the employer intentionally discriminated against a protected party.¹⁰⁸ If two applicants are equally qualified, an employer can prefer to hire a citizen over an authorized noncitizen and will not be liable.¹⁰⁹ This provision, which is highly subjective, allows employers to escape liability under the Frank Amendment.

The criteria for bringing an action under the Frank Amendment

97. *Id.*

98. *Id.*, 100 Stat. at 3374-75.

99. *Id.*, 100 Stat. at 3376.

100. *Id.*

101. *Id.*

102. *Id.*, 100 Stat. at 3377-78.

103. *Id.*, 100 Stat. at 3378.

104. *Id.*

105. *Id.* However, any amounts earned by plaintiffs must be used to reduce the back pay award. *Id.*

106. IRCA § 102(a), 100 Stat. at 3378 (codified at 8 U.S.C. § 1324b).

107. *Id.*, 100 Stat. at 3379.

108. 64 INTERPRETER RELEASES 378 (1987).

109. IRCA § 102(a), 100 Stat. at 3375 (codified at 8 U.S.C. § 1324b).

will make it difficult for plaintiffs to establish claims in this area. Nevertheless, there are certain employment practices that clearly violate the Frank Amendment. One example is when an employer refuses to accept any of the documents listed as possible proof of identification and/or work authorization, but instead insists on only one, such as a passport, before hiring.¹¹⁰

Because this law is so new, it is difficult to determine whether the courts will strictly follow the procedure and guidelines thus far established. One case recently decided in this area, *League of United Latin American Citizens v. Pasadena Independent School District*,¹¹¹ does not closely adhere to the guidelines. In *League of United Latin American Citizens*, an employer fired four undocumented aliens upon learning they had used false Social Security numbers to obtain employment. In a class action, the plaintiffs argued that because ninety percent of the workers were Hispanics and that undocumented Hispanic aliens generally use false Social Security numbers, the policy of firing workers who had given false Social Security numbers would have a disparate impact on Hispanics.¹¹²

The court granted a temporary injunction on behalf of the plaintiffs. The court noted that the employer had failed to warn applicants that they could be dismissed for submitting false information on their applications, and further had failed to investigate the information on the application in a timely manner.¹¹³ The court was concerned that employees who came forward and revealed their unlawful status to qualify for amnesty and lawful status under IRCA might risk losing their jobs if employers were permitted to dismiss them for providing false information.¹¹⁴ Finally, the court determined that the plaintiffs likely would prevail on a Frank Amendment cause of action.¹¹⁵ This holding is inconsistent with the prerequisites of the Frank Amendment. There was no indication that the firing policy was intended to discriminate against Hispanic citizens or authorized aliens. Indeed, the persons who were fired were not entitled to the protection of the Frank Amendment.¹¹⁶ Because this case did

110. 133 CONG. REC. S7000 (daily ed. May 21, 1987), reprinted in 64 INTERPRETER RELEASES 629 (1987).

111. 662 F. Supp. 443 (S.D. Tex. 1987).

112. *Id.* at 445-46.

113. *Id.* at 445.

114. *Id.* at 449.

115. *Id.* at 451.

116. No member of the class had filed a declaration of intention to become a United States citizen as required by the Frank Amendment. IRCA § 102(a), 100 Stat. at 3374 (codified at 8 U.S.C. § 1324b). Further, the proper procedure is to file a claim

not deal with the Frank Amendment in depth, and because it focused on temporary relief in a transitional situation, it may have little precedential value once the amnesty deadlines have passed. Still, at the very least, the case demonstrates that courts will be tempted to stretch the Frank Amendment to protect against discrimination.

THE INTERACTION BETWEEN THE VARIOUS ANTIDISCRIMINATION PROTECTIONS

Prior to IRCA, title VII and section 1981 were the only protections against citizenship and national origin discrimination. Title VII generally protected against national origin discrimination, while section 1981 protected national origin groups that qualified as "races," and sometimes provided for relief to victims of pure citizenship discrimination. However, gaps in coverage existed. Employers with less than fifteen employees could discriminate against national origin groups that did not qualify as "races,"¹¹⁷ and employers who discriminated solely on the basis of citizenship faced a steadily decreasing risk that they would be found liable under section 1981.

With the strong economic pressure exerted on employers to discriminate on the basis of national origin and/or citizenship, protections in addition to title VII and section 1981 were urgently needed. The questions now are: (1) Whether the Frank Amendment provides appropriate protection; and (2) How the Frank Amendment and the existing protections of title VII and section 1981 will work together.

The Frank Amendment provides some protection against pure citizenship discrimination against aliens who have filed a declaration of intent to become citizens and are on schedule to become naturalized citizens. Applicants who have been discriminated against by employers with between four and fourteen employees also are protected if they are citizens or qualify under the noncitizen requirements.¹¹⁸

Discrimination against authorized aliens who have not filed declarations or proceeded with naturalization presents a more difficult question. Judges will be faced with a difficult choice — either dismiss an otherwise valid claim or stretch the rules to allow the claim to continue. There are two possible ways to remedy this situation. First, a procedure for yearly evaluation and modification of the protections does exist.¹¹⁹ However, this is a time-consuming process that

with the EEOC or Special Counsel, not to bring an action in federal court. *Id.*, 100 Stat. at 3374-75. Here, however, the court granted the injunction even though the Frank Amendment does not specifically provide for injunctive relief. *League of United Latin American Citizens v. Pasadena Indep. School Dist.*, 662 F. Supp. at 451.

117. See *supra* note 90 and accompanying text.

118. See *supra* notes 97-98 and accompanying text.

119. The Comptroller of the General Accounting Office will prepare annual reports for the first three years, evaluating the effectiveness of IRCA, including its antidiscrimination provisions. IRCA § 101(a)(1), 100 Stat. at 3370 (codified at 8 U.S.C.

will do nothing to provide guidance for those first cases considering this issue. The second remedy is to use the broad language of section 1981 and the precedent of *Guerra* to extend some protection to authorized aliens. Whether judges will do so probably will depend on the number and circumstances of such claims.

An individual with a valid claim against an employer with fifteen or more employees would have a claim under both the Frank Amendment and title VII. However, the individual cannot maintain both; he or she must choose one and proceed only on that claim.¹²⁰ Whichever claim is chosen will be processed by the EEOC.¹²¹ When the claim involves employers with four to fourteen employees, the Special Counsel will process Frank Amendment claims by authorized and qualifying noncitizens and citizens.

Before the Frank Amendment, members of a national origin group that qualified as a "race," like Hispanics, could bring claims under both title VII and section 1981. The two questions that arise are (1) whether section 1981 will continue to be a possible remedy; and (2) if so, how can it coexist with the procedure required by the Special Counsel?

The Frank Amendment explicitly provides that the EEOC and title VII will continue to operate,¹²² but says nothing about section 1981. Whether that omission was intentional or not is unclear. Section 1981 was resurrected as a remedy against employment discrimination to help fill the gaps left by title VII. Theoretically, the Frank Amendment does this. If that is so, perhaps section 1981 no longer is needed and should not be available as an additional remedy.

However, there are good arguments for continuing to recognize section 1981 claims in some areas of employment hiring discrimination. One role it can play is to plug gaps left by the Frank Amendment. For example, discrimination against authorized aliens who did not file a declaration of intent to become a citizen is not protected against by the Frank Amendment.¹²³ If large numbers of authorized aliens are discriminated against, but barred from recovery because

1324a). A task force consisting of the Attorney General, Chairman of the Commission on Civil Rights and the Chairman of the EEOC will review and make recommendations to Congress. *Id.* The appropriate Congressional committees must then hold hearings within 60 days of receiving the recommendations. *Id.* Note, however, that Congress is under no obligation to follow these recommendations.

120. IRCA § 102(a), 100 Stat. at 3375 (codified at 8 U.S.C. § 1324b).

121. *Id.*

122. *See id.*; *see also id.* § 102(b), 100 Stat. at 3379 (codified at 8 U.S.C. § 1324b).

123. *See supra* note 116.

of the little known prerequisite of having previously filed the declaration, courts might choose to save these claims by allowing a section 1981 claim.¹²⁴

If section 1981 does survive as a valid claim in at least some situations, how can it coexist with the procedural requirements of the Frank Amendment? Section 1981 and title VII claims have coexisted, but the procedural problems have been minimal because both actions must be brought in federal court. The Frank Amendment requires action to be brought before an ALJ.¹²⁵ Clearly, a section 1981 claim still would have to be brought in federal court.

Beyond that, the larger question must be addressed of why Congress would put strict guidelines and procedures on the Frank Amendment if Congress intended section 1981 to continue to provide some relief for some of the claims also covered by the Frank Amendment. Possibly Congress either did not anticipate or did not intend for section 1981 to continue as a separate and additional relief for the discriminations covered by the Frank Amendment. However, the legislative history of the bill shows that Congress was aware of the possible overlap of the Frank Amendment with section 1981.¹²⁶ Also, the fact that section 1981 claims have been well-known and well-established indicates that if Congress had intended to restrict this overlap, they would have or should have explicitly said so in the bill or legislative history.

CONCLUSION

In the face of a potential onslaught of citizenship and national origin discrimination claims, the Frank Amendment of IRCA was enacted to fill the gaps uncovered by the antidiscrimination provisions of title VII and section 1981. Although the various antidiscrimination measures overlap in places and do not address certain other areas, they can provide the necessary discrimination protection.

Therefore, claims of national origin and citizenship discrimination should be handled by either the Frank Amendment or title VII. To the extent that these measures in themselves prove ineffective in addressing legitimate discrimination complaints in these areas, section 1981 should be used to fill those gaps.

Authorized aliens and United States citizens of minority national origin have a clear interest in a complete and available remedy to counter possible discrimination from IRCA. Even proponents of immigration control and IRCA have reason to support a judicial imple-

124. *See supra* note 56 and accompanying text.

125. *See supra* notes 100-101 and accompanying text.

126. H.R. REP. No. 682, 99th Cong., 2d Sess. 6, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5752.

mentation of the Frank Amendment that provides proper protection against discrimination.¹²⁷ Therefore, it is in the best interest of all concerned that future courts use section 1981 in conjunction with the Frank Amendment and title VII to assure that all who encounter hiring discrimination as a result of IRCA have an adequate remedy.

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127. The Comptroller General of the United States will prepare an annual report through 1990 that will examine, in part, whether IRCA has resulted in a pattern of improper discrimination. IRCA § 101(a)(1), 100 Stat. at 3370 (codified at 8 U.S.C. § 1324a). If the Comptroller General finds a widespread pattern of discrimination and Congress enacts a joint resolution approving the substance of his findings, the employer sanctions will be terminated within 30 days of receipt of the last report. *Id.* Therefore, proponents of IRCA and its sanctions have a strong interest in seeing that the victims of IRCA discrimination have a proper and adequate remedy available to them.

