

BORN OSAMA: MUSLIM-AMERICAN EMPLOYMENT DISCRIMINATION

Ishra Solieman*

Muslim-Americans have faced many challenges to their basic civil liberties since the September 11th attacks on the World Trade Centers. One of the areas in which they have felt the most discrimination is in the workplace. The Equal Employment Opportunities Act, otherwise known as Title VII, prohibits employers from discriminating against employees or potential employees. Today, Title VII forms the basis for claims brought against employers who discriminate against their employees. The unique situation of Muslim-Americans has highlighted the inadequacies of Title VII in protecting against the subtle nature of modern forms of discrimination. Without modifications to the rules governing Title VII claims, discrimination against minority groups will continue to prevail in the workplace.

INTRODUCTION

Born and raised in the United States, Osama considers himself an American. But his parents unknowingly chose a most unsuitable name for him. Osama is an Arabic name that means lion-like, symbolizing bravery and courage. Osama graduated with a Bachelor of Science in Computer Science and a minor in Business Administration in 2003. After some difficulty finding employment, he chose to continue his education and received a Master's in Management Information Systems in the fall of 2006 with a 3.97 GPA.¹

Immediately thereafter, Osama began the interview process for recent graduates. He applied online for entry-level jobs, and was shocked when only a few employers contacted him. Osama's advisor recommended that he change his name: he was convinced that once employers were able to talk to Osama, the name would carry less of a stigma. Needing to begin his career, Osama changed his resume to state only his first initial. He resent his resume to the same employers. Within days, he received more responses and initial interest than in the previous

* J.D. Candidate, University of Arizona James E. Rogers College of Law, 2010. I would like to thank my brother, Osama, for sharing his experiences with me. I am also grateful to the editors of the Arizona Law Review for their helpful comments and suggestions. Finally, I am indebted to my parents, Najat and Khalifa, and my fiancé Omar for their unwavering support throughout this process.

1. Interview with Osama Solieman, Implementation Consultant, ETQ Management Consultants, in Tucson, Ariz. (Nov. 20, 2008).

weeks. After interviewing with at least fifteen different companies, Osama secured an offer.

The fact that Osama received responses from the very same employers who ignored his resume the first time around appears to be strong evidence of employment discrimination. If Osama were to bring an employment-discrimination claim, however, he would not be able to prove discrimination by any one employer. As he put it, “Any company could say that I wasn’t the right fit or what have you, and in some cases that may be true.”² But the pattern suggests that he did in fact experience discrimination. Nonetheless, under the present federal employment discrimination law, Osama’s evidence is not strong enough to carry the burden of proof required by a Title VII discrimination claim based on national origin.³

In 1964, Congress passed the Civil Rights Act in response to the Civil Rights Movement.⁴ Among its provisions was the Equal Employment Opportunities Act, otherwise known as Title VII, which prohibits employers from discriminating against employees or potential employees.⁵ Today, Title VII forms the basis for claims brought against employers who discriminate in the workplace.⁶ Title VII provides as follows:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.⁷

In one of the first cases of Title VII jurisprudence, the Supreme Court describes the purpose of the provision: “The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.”⁸

2. *Id.*

3. *See* 42 U.S.C. § 2000e (2006). The various theories under which a Title VII claim can be brought are discussed later in the body of this Note. *See infra* Part I.

4. Civil Rights Act of 1964, 42 U.S.C. § 2000a–2000h-6 (2006). *See* MARGARET C. JASPER, EMPLOYMENT DISCRIMINATION LAW UNDER TITLE VII 1–2 (2d ed. 2008).

5. 42 U.S.C. § 2000e-2.

6. *Id.*

7. *Id.* § 2000e-2(a)(1) to-2(a)(2).

8. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

The Civil Rights Act charges the Equal Employment Opportunity Commission (EEOC) with the enforcement of Title VII provisions.⁹ Based on the statutory language, the EEOC has defined several types of employment discrimination in its regulations, which include discrimination based on sex, religion, and national origin.¹⁰ Title VII does not cover all employers, but it is applicable to all private as well as federal and state government employers that provide work for fifteen or more full-time employees.¹¹

Today, employment discrimination is not as obvious as it was when Congress enacted this legislation.¹² Employers are more sophisticated and are sensitive to the requirements of Title VII.¹³ Businesses with even nominal sophistication are able to easily avoid discrimination liability by denying discriminatory activity, destroying any evidence indicating such behavior, or simply not keeping records to guarantee that no hard evidence ever actually exists.¹⁴ Despite the requirements of Title VII, employers can still discriminate in a manner subtle enough to avoid being caught.¹⁵ Title VII is further limited in its function because it only applies to employers who employ fifteen or more individuals.¹⁶ The consequence of the movement towards subtle discrimination against current and potential employees is that Title VII is not as effectual as it could be.¹⁷

Since the September 11th attacks in New York City, the status of Muslim-Americans in the United States has been compromised.¹⁸ Reported employment discrimination incidents based on religion or national origin against

9. 42 U.S.C. § 2000e-4 .

10. 29 C.F.R. §§ 1604–1607 (2008).

11. 42 U.S.C § 2000e(b).

12. See Christopher Chen, *Rethinking The Direct Evidence Requirement: A Suggested Approach In Analyzing Mixed-Motives Discrimination Claims*, 86 CORNELL L. REV. 899, 901 (2001) (pointing out that research in cognitive psychology shows that discrimination in the workplace is more subtle and complex than traditional models of employment discrimination).

13. *Id.* at 915.

14. *Id.* (“Proof of [intentional] discrimination is always difficult. Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it; and because most employment decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible.”) (citing *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987)).

15. *See id.*

16. 42 U.S.C. § 2000e(b).

17. Chen, *supra* note 12, at 903.

18. See generally COUNCIL ON AMERICAN-ISLAMIC RELATIONS, THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES 2002: STEREOTYPES AND CIVIL LIBERTIES 1 (2002); available at <http://www.cair.com/CivilRights/CivilRightsReports.aspx> (last visited September 27, 2009) [hereinafter CAIR 2002 REPORT]; Julia Duin, *CAIR Reports Bias Rise; Cites Delays For Muslims Pursuing Citizenship*, WASH. TIMES, June 15, 2007, at A09; Chuck McCutcheon, *Civil Liberties Concerns Galvanize U.S. Arab, Muslim Groups*, NEWHOUSE NEWS SERV., June 4, 2003.

those appearing to be Muslims increased sharply after the attacks.¹⁹ As a response, the EEOC created a new database code for such discrimination called “Process Type Z” in order to better track the increase.²⁰ In the year after September 11th, 706 charges were filed for discrimination based on the Muslim faith.²¹ Comparatively, during the prior year, only 323 such charges were filed.²² This represents more than a two-fold increase in complaints.

The increase in employment discrimination incidents against those with Muslim backgrounds did not slow in the years after September 11th. The Council on American–Islamic Relations (CAIR) publishes an annual report on its website regarding the state of Muslim-American civil liberties in the United States, which includes statistics regarding Muslim-Americans and the workplace.²³ In its 2008 report, CAIR reports that discrimination in the workplace increased by 18% over the previous year.²⁴ In 2003, only 196 cases of employment discrimination were reported to the organization.²⁵ In 2006, 384 cases were reported.²⁶ In 2007, the number increased to 452.²⁷

Based on these numbers, it is clear that employment discrimination, in this case against Muslim-Americans, is not going away any time soon. The type of discrimination they face is more subtle than the type of discrimination African-Americans faced during the passage of the Civil Rights Act, but it is every bit as real. The framework used to battle the outright discrimination that occurred in the 1960s is not as effective in combating the subtle nature of employment discrimination today. Employers know better than to directly state their reasons for not hiring or terminating an employee when the reasons are based on illegal motivations.²⁸

Because employers may still engage in discrimination while successfully navigating through the requirements of Title VII, this Note argues that judicial review of Title VII claims should be relaxed to appropriately reflect the subtlety of the discrimination that still prevails in the workplace. Courts presently focus their

19. CAIR 2002 REPORT, *supra* note 18, at 1 (indicating that Muslim-American complaints to CAIR increased three-fold during the time immediately after September 11th).

20. Press Release, Equal Employment Opportunity Comm’n, Muslim/Arab Employment Discrimination Charges Since 9/11 (Dec. 2, 2002), *available at* <http://www.eeoc.gov/origin/z-stats.html>.

21. *Id.*

22. *Id.*

23. *See* Council on American–Islamic Relations (CAIR) Home Page, <http://www.cair.com> (last visited September 27, 2009). CAIR is the lead civil rights group protecting Muslim-American civil liberties in the United States.

24. COUNCIL ON AMERICAN-ISLAMIC RELATIONS, THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES 2008: WITHOUT FEAR OF DISCRIMINATION 5 (2008), *available at* <http://www.cair.com/CivilRights/CivilRightsReports.aspx> [hereinafter CAIR 2008 REPORT].

25. *Id.*

26. *Id.*

27. *Id.*

28. Chen, *supra* note 12, at 915.

analysis on intent, but this Note argues that courts should instead examine the totality of the circumstances. Such an approach would allow courts to consider all factors relevant to discrimination—a more effective method to battling the subtlety of modern forms of discrimination.

Part I of this Note describes the theories currently used to establish a Title VII disparate treatment claim. Part II describes the problems with Title VII's current framework given the current situation of Muslim-Americans as a representative group and analyzes how Title VII claims apply to the individual cases of Muslim-Americans. Finally, Part III presents potential modifications to Title VII claims to better remedy the modern face of employment discrimination.

While all minorities face subtle forms of discrimination in the workplace, this Note focuses on Muslim-Americans because their case has been highlighted and exacerbated by the events of September 11th.²⁹ Although Muslim-Americans have reported and filed more complaints regarding employment discrimination since 9/11, this increase in number has not necessarily translated into successful claims.³⁰ Therefore, the Muslim-American case provides a compelling argument for a new approach to analyzing Title VII claims.

I. THEORIES TO ESTABLISH A TITLE VII DISPARATE TREATMENT CLAIM

A Title VII claim of disparate treatment can be brought under two basic theories: (1) the pretext theory and (2) the mixed-motive theory.³¹ The type of claim brought depends on the facts of the specific case. Both structures are premised on proving the employer's intent.³² I will argue that because of the subtlety of modern employment discrimination, neither of these theories is adequate in its current form to proactively discourage employers from discriminating against their employees.

A. *Pretext Theory*

The pretext theory is the traditional Title VII claim, developed by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*.³³ That case involved a black employee of an aircraft manufacturer claiming that the company refused to rehire him because of his race and involvement in the Civil Rights Movement.³⁴ The Supreme Court granted certiorari to “clarify the standards governing the

29. See generally CAIR 2002 REPORT, *supra* note 18; Duin, *supra* note 18; McCutcheon, *supra* note 18.

30. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004) (finding that plaintiffs filing employment discrimination cases have a significantly lower success rate in both bench and jury trials compared to other civil plaintiffs); see discussion *infra* Part II.C.

31. Chen, *supra* note 12, at 901–02.

32. *Id.* at 913.

33. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

34. *Id.* at 796.

disposition of an action challenging employment discrimination.”³⁵ While recognizing the important role Title VII plays in preventing employment discrimination, the court asserted that “it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.”³⁶ Based on this assertion, the court laid out the elements of a Title VII claim, where the plaintiff shoulders the initial burden.³⁷ To establish a prima facie case of workplace discrimination, a plaintiff must show by a preponderance of the evidence that: (1) the plaintiff belongs to a protected class; (2) the plaintiff was qualified for the employment in question; (3) the plaintiff suffered an adverse employment action despite his or her qualifications; and (4) the circumstances support an inference of discrimination.³⁸

If the plaintiff is able to establish a prima facie case, then the court will recognize a rebuttable presumption that the defendant-employer discriminated against the plaintiff-employee.³⁹ The burden then shifts to the defendant to produce admissible evidence that the adverse employment action was taken for a legitimate, nondiscriminatory reason.⁴⁰ Because the employer is only required to articulate a legitimate reason for the adverse employment action,⁴¹ the presumption of discrimination is easily rebutted by most employers.⁴²

Once the employer makes such a showing, the plaintiff must prove that the defendant’s proffered reasons for the adverse employment action are merely pretextual.⁴³ The plaintiff can show pretext either *directly* by showing that the “discriminatory reason more likely motivated the employer or *indirectly* by showing that the employer’s proffered explanation is unworthy of credence.”⁴⁴ After *Burdine*, however, circuit courts split on how to interpret the plaintiff’s burden.⁴⁵ Under the “pretext-only” rule, the plaintiff could prove pretext by showing that the defendant lied about the reason for the adverse employment action.⁴⁶ On the other hand, the “pretext-plus” rule was that the plaintiff had to show that the employer’s reasons were untrue and produce evidence to show that the true reason was intentional discrimination.⁴⁷ In jurisdictions applying the “pretext-plus” rule, the plaintiff shoulders a heavier burden of proof in order to make a successful Title VII claim.⁴⁸

The framework for making a Title VII claim set out in *McDonnell Douglas* has been modified by *St. Mary’s Honor Center v. Hicks*, arguably making

35. *Id.* at 798.

36. *Id.* at 801.

37. *Id.* at 802.

38. *Id.*

39. *Id.*

40. *Id.*

41. *See id.* at 803.

42. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

43. *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

44. *Id.* (emphasis added).

45. Kristen T. Saam, *Rewarding Employers’ Lies: Making Intentional Discrimination Under Title VII Harder To Prove*, 44 DEPAUL L. REV. 673, 685–86 (1995).

46. *Id.* at 685.

47. *Id.* at 686.

48. *Id.*

the structure more defendant-friendly.⁴⁹ That case involved a black employee of a halfway house alleging that the employer violated Title VII by demoting and discharging him based on his race.⁵⁰ The district court found that even though the employer's offered reasons for the demotion and discharge were not the real reasons, the plaintiff nevertheless failed to carry the ultimate burden of proof that the reasons were racially motivated.⁵¹

The Supreme Court agreed, holding that a trier of fact's rejection of the defendant's proffered reasons for the employment action did not compel judgment for the plaintiff.⁵² Instead, all that was required of the defendant was to come up with "some response" to plaintiff's prima facie case so that the presumption may drop.⁵³ A determination of whether the defendant met its burden of production and successfully rebutted the presumption of discrimination cannot involve a credibility assessment.⁵⁴ Effectively, *St. Mary's* makes it more difficult for a plaintiff to prove discrimination under Title VII and limits the effectiveness of the *McDonnell Douglas* decision in preventing employment discrimination.⁵⁵

B. Mixed-Motive Theory

The Supreme Court recognized the limitations of the pretext theory as a tool in proving employment discrimination in *Price Waterhouse v. Hopkins*.⁵⁶ As an alternative, the mixed-motive theory addresses the gaps in employment-discrimination claims in cases where an employer is at least partly, but perhaps not fully, motivated by discrimination.⁵⁷ In *Price Waterhouse*, a female accountant alleged that her employer did not promote her to partner based on gender.⁵⁸ The issue before the Court was to determine the plaintiff and defendant's relative burdens of proof in an employment-discrimination decision made with a mixture of legitimate and illegitimate motives.⁵⁹

The Court recognized the possibility that an employer's motives might be mixed, and held that in such cases the plaintiff must bear the initial burden of

49. Chen, *supra* note 12, at 905 (arguing that the decision has notably increased the plaintiff's burden of persuasion).

50. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 504–05 (1993).

51. *Id.* at 508.

52. *Id.* at 511.

53. *Id.*

54. *Id.* at 509.

55. Stefanie Vines Efrati, *Between Pretext Plus and Pretext Only: Shouldering the Effects of Pretext on Employment Discrimination after St. Mary's Honor Center v. Hicks and Fisher v. Vassar College*, 75 CHI.-KENT L. REV. 153, 165 (1999); William R. Corbett, *The "Fall" of Summers, the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from McKennon and Hicks*, 30 GA. L. REV. 305, 331–32 (1996) (noting that Hicks "substantially weakened plaintiffs' chances of winning cases at the third stage of the McDonnell Douglas analysis").

56. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989).

57. *Id.*

58. *Id.* at 232.

59. *Id.*

showing that a discriminatory reason played a motivating role in the adverse employment action.⁶⁰ If the plaintiff was successful, then the employer has to prove that it would have taken the same employment action even without the alleged illegitimate reason.⁶¹ If the plaintiff proves a discriminatory reason for the adverse action, then the burden shifts to the employer, who must show that the discriminatory reason played no role in the decision.⁶²

In response to the *Price Waterhouse* decision, Congress codified the mixed-motive theory, with some modifications, as part of the Title VII claim through the Civil Rights Act of 1991.⁶³ The pertinent language reads:

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.⁶⁴

Under the Act, once the plaintiff demonstrates by a preponderance of the evidence that discrimination was a motivating factor in the adverse employment decision; the employer is liable regardless of the existence of other motivating factors.⁶⁵ This is a departure from the original *Price Waterhouse* decision, making the mixed-motive theory more plaintiff-friendly and staying true to the original purpose of Title VII: to prevent discrimination in the workplace.

Nonetheless, the decision does provide employers with a partial affirmative defense to a mixed-motive theory claim.⁶⁶ If an employer is able to demonstrate that it would have made the same decision regardless of the illegitimate reason, then a court can only grant declaratory relief, injunctive relief, and attorneys' fees and costs.⁶⁷ However, a court is unable to grant damages or issue an order requiring the employer to hire, promote, reinstate, or make back payments to the employee.⁶⁸ In a sense, then, an employer still has leeway under the mixed-motive theory to avoid the full consequences of discriminating against an employee, as long as the employer can show that discriminatory reasons were not the deciding factor.

Scholars have argued that the mixed-motive theory has not thoroughly filled the gap it was meant to fill in employment-discrimination claims.⁶⁹ For

60. *Id.* at 246.

61. *Id.* at 244–45.

62. *Id.*

63. *See* 42 U.S.C. § 2000e-2(m) (2006).

64. *Id.*

65. *Id.*

66. *Id.* § 2000e-5(g)(2)(B).

67. *Id.* § 2000e-5(g)(2)(B)(i).

68. *Id.* § 2000e-5(g)(2)(B)(ii).

69. *See* Chen, *supra* note 12, at 907; Steven M. Tindall, *Do as She Does, Not as She Says: The Shortcomings of Justice O'Connor's Direct Evidence Requirement in Price Waterhouse v. Hopkins*, 17 BERKELEY J. EMP. & LAB. L. 332, 337 (1996); Michael A.

years, it was unclear whether the statute required direct, as opposed to circumstantial, evidence of discrimination. The circuit courts of appeals split over the matter, requiring the Supreme Court to resolve the issue.⁷⁰ One commentator contends that requiring direct evidence in mixed-motive cases would thwart the purpose of the mixed-motive theory and frustrate legitimate Title VII claims.⁷¹

The Supreme Court resolved the issue in *Desert Palace, Inc. v. Costa*.⁷² It found that direct evidence of discrimination is not required to successfully make a mixed-motive claim under Title VII.⁷³ While this has eased the evidentiary requirement under a mixed-motive claim of employment discrimination (at least in theory), proving a mixed-motive claim is still highly difficult because it is premised on proving the intent of an employer.⁷⁴ Such an approach does not adequately address modern modes of employment discrimination, which are more subtle than they were during the passage of the original Civil Rights Act.⁷⁵

In the case of Osama,⁷⁶ both the pretext and mixed-motive theories would have been ineffectual had he decided to bring forth a discrimination claim under Title VII. The employers were careful not to make any comments regarding his name, heritage, or national origin. Without such comments or any other type of concrete evidence, such a claim would not satisfy the requirements for a prima facie case under the pretext theory. By the same token, none of the employers had substantial enough contact with Osama to create evidence sufficient to demonstrate an illegitimate reason for not hiring under the mixed-motive theory analysis. Similar to many other frustrated individuals in the job market, Osama would not have been able to bring forth a claim with even a remote possibility of success under either theory.

The two theories available to prove a Title VII claim, therefore, do not adequately address the problem of workplace discrimination today. This is largely the reason why employment-discrimination plaintiffs fare so badly in court as compared to other civil plaintiffs.⁷⁷

Zubrensky, *Despite the Smoke, There Is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After Price Waterhouse v. Hopkins*, 46 STAN. L. REV. 959, 980–84 (1994).

70. Chen, *supra* note 12, at 908.

71. Tindall, *supra* note 69, at 337. Other commentators have argued that the direct evidence requirement is sufficient. See, e.g., Joseph J. Ward, *A Call for Price Waterhouse II: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 ALB. L. REV. 627, 629 (1997).

72. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

73. *Id.* at 98–99.

74. Chen, *supra* note 12, at 914–16; see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164–65 (1995).

75. Chen, *supra* note 12, at 913.

76. See Interview with Osama Solieman, *supra* Introduction.

77. See Clermont & Schwab, *supra* note 30, at 429; Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 555 (2001) (finding that employment discrimination plaintiff success rates are significantly lower than those of other civil lawsuits); discussion *infra* Part II.C.

C. Title VII Claims and Muslim-Americans

Generally, Muslim-American employees can file an employment-discrimination claim based on religious affiliation, national origin, or both. Religious affiliation and national origin are the two most common bases for such claims, although they are certainly not the only types of claims filed by Muslim-Americans. This is because, demographically, Muslims in America come from diverse ethnic and national backgrounds that include Arabs, South-Central Asians, and African-Americans.⁷⁸

D. Claims Based on Religion

Title VII prohibits employment discrimination based on an employee or potential employee's religious background.⁷⁹ In addition, it requires employers to reasonably accommodate a person's religious practice so long as it does not place an "undue hardship" on the employer.⁸⁰ Based on the EEOC federal regulations, an employer cannot discriminate against an employee or a potential employee in the hiring process based on required future accommodations:

(3) The Commission [EEOC] will infer that the need for an accommodation discriminatorily influenced a decision to reject an applicant when: (i) prior to an offer of employment the employer makes an inquiry into an applicant's availability without having a business necessity justification; and (ii) after the employer has determined the applicant's need for an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible.⁸¹

Based on this language, it appears that a hard line is taken against employers who discriminate based on religion in their hiring practices. But while the regulation does stipulate that the burden will be on the employer to show that religious accommodation was not the reason for rejection of an applicant, this is not a very high burden.⁸² Employers usually have no problem finding an alternative reason for not hiring an applicant.⁸³ Employers do not have a difficult

78. According to statistics by Zogby International published in 2000, Arab-Americans make up 26% of Muslims in the United States, African-Americans 24%, and South-Asians 26%. Allied Media Corp., Muslim American Market, <http://www.allied-media.com/AM/> (last visited September 27, 2009).

79. 42 U.S.C. § 2000e-2 (2006).

80. *Id.* § 2000e(j). This Note will not delve into religious accommodation under Title VII. Nonetheless, some discussion of religious accommodation is necessary in order to understand the premise of religious discrimination.

81. 29 C.F.R. § 1605.3(b)(3) (2008).

82. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993).

83. The cases in following Parts will explore this claim more thoroughly. *See infra* Part III.C; *Azimi v. Jordan's Meats, Inc.*, 456 F.3d 228, 246 (1st Cir. 2006).

time making such a showing in order to avoid employment discrimination liability based on religion or national origin.⁸⁴

E. Claims Based on National Origin

Often claims of employment discrimination are intertwined with national origin claims. National origin is defined broadly by federal regulation:

The Commission [EEOC] defines national origin discrimination broadly as including, but not limited to, 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. The Commission will examine with particular concern charges alleging that individuals within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations, such as (a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and (d) because an individual's name or spouse's name is associated with a national origin group. In examining these charges for unlawful national origin discrimination, the Commission will apply general Title VII principles, such as disparate treatment and adverse impact.⁸⁵

Under Title VII, an employer cannot discriminate on the basis of national origin, which includes denial of an employment opportunity based on birthplace, ancestry, culture, or linguistic characteristics (such as an accent).⁸⁶ To deny an employment opportunity based on a potential employee's accent, the employer must show a legitimate nondiscriminatory reason regarding whether the accent would have a detrimental effect on job performance.⁸⁷

Nearly every Muslim-American is vulnerable to national origin employment discrimination based on these outlined elements. Even second or third generation Muslims born in the United States, such as Osama,⁸⁸ can have Arabic-sounding names that subject them to such vulnerabilities.

F. Statistics on the Success Rates of Title VII Claims

Since the passage of the Civil Rights Act in 1964, employment-discrimination cases have been on the rise.⁸⁹ During the 1990s, federal court filings increased three-fold, accounting for nearly 10% of the cases filed in federal district

84. See discussion *infra* Part III.C.
85. 29 C.F.R. § 1606.1 (2008).
86. *Id.* See generally JASPER, *supra* note 4, at 57.
87. JASPER, *supra* note 4, at 58.
88. Interview with Osama Solieman, *supra* Introduction.
89. Selmi, *supra* note 77, at 557–58.

courts.⁹⁰ Because of this drastic increase in the number of claims, commentators have often commented and noted that employment cases are too easily filed and provide a windfall for plaintiffs.⁹¹ A closer look at the logic and statistics behind these cases shows that this is not the case.⁹² A recent article in the *New York Times* points out this fallacy in the context of Muslim-Americans, documenting that in 2007 only one victory (“if you can call it that”) resulted from approximately sixty-nine employment-discrimination cases filed by Muslim-Americans.⁹³

It is a difficult task to collect statistical evidence regarding employment discrimination cases in general.⁹⁴ The most significant observation about the outcome of employment-discrimination cases, then, is the long-run lack of success at trial for employment-discrimination plaintiffs, relative to other civil plaintiffs.⁹⁵ The gap in victory rates between employment-discrimination plaintiffs and other plaintiffs appears at all stages of litigation, including pretrial disposition, trial, and appellate decisions.⁹⁶ A brief look at these statistics, then, punctures the misperception that employment-discrimination cases provide windfalls to plaintiffs and are too easy to win, and indeed, presents evidence that proves just the opposite.⁹⁷

About 98% of employment-discrimination cases disposed of during pretrial motions are decided in favor of defendants.⁹⁸ This number illustrates that a high number of cases are summarily judged in favor of employers.⁹⁹ Comparatively, on average, other civil plaintiffs are successful in 22.23% of their

90. *Id.* at 558. The author notes that this increase is interesting considering the “extremely strong economy with the lowest post-World War II level of unemployment on record.” *Id.*

91. *Id.* at 557. See generally WALTER K. OLSON, *THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE* (1997).

92. Selmi, *supra* note 77, at 561.

93. Adam Liptak, *Impressions of Terrorism, Drawn from Court Files*, N.Y. TIMES, Feb. 19, 2008, at Sidebar. Liptak notes that:

[B]eyond the terrorism cases, two trends are clear: the number of civil cases brought by Muslim plaintiffs is growing fast, and the plaintiffs almost always lose. There were, for instance, 69 employment discrimination decisions involving Muslim plaintiffs in 2007. Only one involved a victory, if you can call it that.

Id. The case referred to as a victory by Liptak is discussed later in this Note, and it truly cannot be referred to as even a victory. See *infra* Part III.C; *Azimi v. Jordan’s Meats, Inc.*, 456 F.3d 228 (1st Cir. 2006).

94. See Clermont & Schwab, *supra* note 30, at 430. Here, the authors used a government database to conduct an examination of employment discrimination in federal cases from 1979 to 2001. The data included mainly Title VII claims, but also other employment discrimination claims. *Id.*

95. *Id.* at 443.

96. *Id.*

97. Selmi, *supra* note 77, at 560–61.

98. *Id.* at 560. This figure is compared to a 95% rate in personal injury and a 66% rate in insurance cases in favor of defendants. *Id.*

99. *Id.* Statistics provided by other authors are comparable, showing that Title VII plaintiffs are successful in 1.96% of their pretrial dispositions. Clermont & Schwab, *supra* note 30, at 445.

pretrial dispositions.¹⁰⁰ Undoubtedly, these statistics at least beg the question as to why employment-discrimination plaintiffs have such a greater challenge moving past the pretrial motion stage.

Employment-discrimination plaintiffs are also less likely to succeed during a jury trial, with about a 36.3% chance of victory.¹⁰¹ Compared to the approximate 50% success rate in other civil claims, employment-discrimination plaintiffs do not fare well in trial court either.¹⁰² In addition, plaintiffs are half as likely to succeed in cases tried before a judge as compared to jury trials.¹⁰³ This difference in success rates between bench trials and jury trials has led some scholars to conclude that judges bring a bias against employees to their analysis in employment-discrimination cases.¹⁰⁴

Based on these statistics, employers have less of an incentive to settle discrimination claims because they are more likely to win at the pretrial stage if they proceed with the claim.¹⁰⁵ Compared to plaintiffs in other civil claims, employment-discrimination plaintiffs are less likely to obtain an early settlement from employers and are more likely to “slog onward to trial.”¹⁰⁶ On the off chance that a plaintiff is able to succeed in those trials, appellate reversal rates present yet another obstacle to ultimate victory.¹⁰⁷ Of those trial decisions appealed to federal appellate courts, 10.72% are reversed in favor of the employee, while 52.29% are reversed in favor of the employer.¹⁰⁸

This creates a situation in which employers who receive a favorable judgment from the trial court can rest assured that its ruling will stand.¹⁰⁹ On the other hand, employees that manage to succeed at trial should be wary of the possibility of appellate reversal.¹¹⁰ In essence, as Professors Clermont and Schwab

100. *Id.* at 444.

101. *Id.* at 445. Other statistics show a 39.9% success rate. Selmi, *supra* note 77, at 560.

102. *Id.* at 560. Clermont and Schwab put the figure of success rates in bench trials at 19.29%. Clermont & Schwab, *supra* note 30, at 444. Despite the discrepancy in percentages, both statistics show that employment discrimination claims tried before a judge are less likely to succeed than those tried before a jury.

103. Selmi, *supra* note 77, at 560. Here, the author notes that only claims filed by prisoners tend to have a lower success rate than employment discrimination claims. *Id.* at 561.

104. *See, e.g., id.* at 561–62. *But see* Clermont & Schwab, *supra* note 30, at 443 (finding that “the most plausible explanation of the data lies in small differences between judges’ and juries’ treatment of cases and, much more substantially, in the parties’ varying the case selection that reaches judge and jury”). Whether judges are generally biased when analyzing employment discrimination claims is not a subject that this Note will attempt to tackle.

105. *Id.* at 440–41.

106. *Id.*

107. *Id.* at 449–50.

108. *Id.* at 450.

109. *Id.*

110. *Id.*

put it so eloquently, “[E]mployment discrimination plaintiffs must swim against the tide—at pretrial, trial, and appeal.”¹¹¹

Along with the misperception that employment-discrimination claims often result in windfalls, an explanation put forward for the low rate of success in such claims is that employment-discrimination claims tend to be frivolous.¹¹² This is very unlikely considering that attorneys are usually interested in financially benefitting from the cases they take on.¹¹³ Because employment-discrimination claims are statistically difficult to win and there is a potential cap of \$300,000 to damage awards, it would seem unlikely that an attorney would be willing to work on a frivolous lawsuit.¹¹⁴ Instead, the claims that attorneys decide to file are probably those that have potential. Even those attorneys that are motivated by cause litigation rather than monetary benefit would probably only want to take cases that are meritorious and have a probability of success.¹¹⁵ Therefore, the low success rates in employment-discrimination cases cannot be attributed to the reasoning that the majority of such claims are frivolous or non-meritorious lawsuits.

II. THE PROBLEM WITH TITLE VII CLAIMS THROUGH MUSLIM-AMERICANS’ EYES

A. *Subtlety of Discrimination in the Twenty-First Century*

Employment discrimination is not what it was in 1964, when the Civil Rights Act was first legislated.¹¹⁶ Today, employers are more sophisticated and have an understanding of what actions to avoid in order to evade Title VII liability.¹¹⁷ This has allowed for continued discrimination that is often based on national origin or religion, usually without much consequence for those employers.¹¹⁸ Scholars in the area have recognized not only the emergence of subtle and unconscious discrimination, but also its pervasiveness in modern society.¹¹⁹ Research in cognitive psychology has also shown that modern

111. *Id.* at 456.

112. Selmi, *supra* note 77, at 569–70.

113. *Id.*

114. *Id.* at 570; 42 U.S.C. § 1981.

115. *Id.* at 569–70.

116. See Chen, *supra* note 12, at 899 (pointing out that research in cognitive psychology shows that discrimination in the workplace is more subtle and complex than traditional models of employment discrimination).

117. *Id.* at 915.

118. See *id.*

119. See Franita Tolson, *The Boundaries of Litigating Unconscious Discrimination: Firm-Based Remedies in Response to a Hostile Judiciary*, 33 DEL. J. CORP. L. 347, 349–50 (2008) (“Unconscious discrimination is based on a subconscious aversion to minorities, women, and other individuals protected by antidiscrimination statutes, such as older workers and those with disabilities. There is considerable disagreement about which term is appropriate—subtle bias or unconscious discrimination. The definition of ‘subtle bias’ could be read to involve a certain level of intent on the part of the employer, or the term could refer to the act of discrimination, rather than the employer’s intent, as being covert.”) (footnote omitted); Michael Selmi, *Subtle Discrimination: A Matter of Perspective*

discrimination in the workplace is more subtle and complex than traditional modes of employment discrimination.¹²⁰ As early as 1973, courts took notice of the changing nature of employment discrimination.¹²¹ Because of the subtlety of modern forms of discrimination, both the pretext and mixed-motive theories fall short of remedying discrimination in the workplace due to a misplaced focus on employer intent.¹²² Plaintiffs find it difficult to prove intent without a “smoking gun,” such as repeated discriminatory comments or a written memo.¹²³ This is part of the reason why plaintiffs bringing employment-discrimination claims generally fare worse in court when compared to other civil plaintiffs.¹²⁴

Presented below are the types of cases, from a Muslim-American perspective, that may succeed as well as the types that usually fail. The analysis illustrates the difficulty in successfully making a Title VII claim without the “smoking gun.” From a survey of employment-discrimination cases involving claims made by Muslim-Americans, it is apparent that cases are only successful when there is obvious and direct evidence of discrimination. This analysis can be, and is, found to apply to employment-discrimination cases in general.¹²⁵

B. Cases that Succeed

In *Elries v. Denny’s*, an Arab plaintiff was able to establish a prima facie case against his former employer under Title VII and therefore avoid summary judgment.¹²⁶ Elries met this burden by bringing forth both direct and indirect evidence of discrimination.¹²⁷ The direct evidence showed that the employer had stated that she intended to “get rid of all the Arabs.”¹²⁸ In addition, indirect evidence showed that non-Arab employees were given a choice of work assignments and days off, whereas the plaintiff and other Arab employees were not.¹²⁹

Rather than Intent, 34 COLUM. HUM. RTS. L. REV. 657, 658–59 (2003); Chen, *supra* note 12, at 915; Michael Selmi, *Discrimination As Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233, 1235–43 (1999); ROY L. BROOKS, RETHINKING THE AMERICAN RACE PROBLEM 40 (1990) (finding that employment discrimination is often “sophisticated or unconscious”). *But see* Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1134 (1999) (arguing that Title VII should not be expanded to encompass claims of unconscious discrimination based on economic impracticality).

120. Chen, *supra* note 12, at 900.

121. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (taking note that women still face pervasive, although at times more understated, discrimination in the workplace); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801(1973) (stating that Title VII tolerates no racial discrimination, “subtle or otherwise”).

122. Chen, *supra* note 12, at 913–15.

123. *Id.*

124. *See* Clermont & Schwab, *supra* note 30, at 429.

125. Chen, *supra* note 12, at 915.

126. *Elries v. Denny’s, Inc.*, 179 F. Supp. 2d 590, 597–98 (D. Md. 2002).

127. *Id.* at 597.

128. *Id.*

129. *Id.* at 594. The plaintiff also presented affidavits from coworkers that management had joked about his Arab descent and called him derogatory names. *Id.*

Elries was also terminated despite the fact that several witnesses signed affidavits saying he was performing his job satisfactorily.¹³⁰ That case represents a clear-cut example of apparent discrimination occurring in the workplace. The presence of the “smoking gun,” the employer’s adverse comments about a specific group of employees based on their race, is a clear violation of Title VII and can possibly provide for the making of a successful claim at trial under the pretext theory.¹³¹

Similarly, in *EEOC v. Alamo Rent-A-Car*, the plaintiff was also able to establish a prima facie case of religious discrimination in violation of Title VII, allowing for partial summary judgment in the plaintiff’s favor.¹³² During the Muslim holiday of Ramadan, the plaintiff continued to wear her hijab¹³³ despite warnings from her employer that she would be subjected to progressive disciplinary action.¹³⁴ She was finally terminated because she had repeatedly violated the company’s official dress policy.¹³⁵ Again, this is a clear-cut case of discrimination where the employee was able to show that she had a bona fide religious belief that could be accommodated without “undue hardship.”¹³⁶ The actions of the employer in this case echo a clear message of unwillingness to accommodate religious differences and intentional discrimination against such a religious practice. Although the case makes no mention of the possible reasons for the employer’s pursuance of this discrimination, aside from employer’s proffered reasons,¹³⁷ it is no leap to assume that the defendant’s concern with the appearance of the hijab was closely related the events of September 11th. Nonetheless, the

130. *Id.* at 597. A coworker attested that plaintiff provided “prompt service and received no customer complaints.” *Id.* A regular customer submitted an affidavit saying that the plaintiff “was a very nice and hard working server.” *Id.*

131. 42 U.S.C. § 2000e-2 (2006); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

132. *EEOC v. Alamo Rent-A-Car, LLC*, 432 F. Supp. 2d 1006, 1016 (D. Ariz. 2006).

133. A hijab is a religious head-scarf worn by Muslim women.

134. *Id.* at 1009. The defendant had allowed plaintiff to wear the headscarf in the back office but was to take it off at the renting counter at the front of the office. *Id.* The employer, however, refused to excuse plaintiff from working at the renting counter during the Ramadan holiday. *Id.*

135. *Id.* Alamo terminated the plaintiff’s employment on December 6, 2001 for violation of company rules (note the proximity to the catastrophic events of September 11th). *Id.* The termination form indicates that the plaintiff was not eligible for re-hire. *Id.*

136. 42 U.S.C. § 2000j (2006). This Note will not delve into religious accommodation under Title VII. Nonetheless, some discussion of religious accommodation is necessary in order to understand the premise of religious discrimination. The regulations regarding religious discrimination under Title VII read in part: “[I]t [is] an unlawful employment practice under section 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.” 29 C.F.R. § 1605.2(b)(1) (2008).

137. The only undue hardship that the employers cited in this case was that “any deviation from [Alamo’s] carefully cultivated image is a definite burden.” *Alamo Rent-A-Car*, 432 F. Supp. 2d at 1015.

“smoking gun” in this case is the repeated admonitions against the plaintiff for wearing the hijab and then terminating her employment for that very reason.¹³⁸

Both of the above cases represent instances of obvious employment discrimination within the workplace. There was direct evidence of the employers’ intent to discriminate in both situations, and therefore the pretext theory works well in remedying the discrimination with positive results for the two plaintiffs. Unfortunately, these types of obvious employment-discrimination cases are few and far between.¹³⁹

C. Cases that Fail

Plaintiffs who are not blessed with direct evidence of employment discrimination do not fare as well when bringing a Title VII employment-discrimination claim.¹⁴⁰ This is because it is more difficult to prove an employer’s intention to discriminate when the evidence available is circumstantial. In such instances, it is difficult to discern for certain what the employer’s motivation for the adverse employment action was in order to establish a prima facie case.¹⁴¹ Even when plaintiffs are able to establish the elements of a prima facie case, it is even more difficult to show that an employer’s proffered reasons for the adverse action were pretextual and to show that the true reason was discriminatory.¹⁴² The following cases demonstrate how this point has become a reality for Muslim-Americans in the workplace.

138. *Id.* at 1011.

139. *See* Chen, *supra* note 12, at 900. Based on independent research of Title VII cases involving Muslim-Americans, the majority of the cases do not survive the pretrial motion stage for failure by plaintiffs to establish prima facie cases. These cases are examined in Section C in this Part.

140. *See generally* Chen, *supra* note 12, at 900; Krieger, *supra* note 74, at 1164 (arguing that the failure of courts to develop a model of analysis that remedies subtle and unconscious racism is due to an assumption that such disparate treatment is motivational rather than cognitive). The following is an insightful excerpt from Krieger’s article that further illuminates this point:

In the years that followed, I became increasingly uneasy about the enterprise in which I, as a Title VII lawyer for over a decade, had engaged. As I encountered more offended, defensive decision makers accused of discrimination, and as I counseled and consoled more embittered employees who knew they had been treated differently because of their race or gender or ethnicity but could not, as the law requires in such cases, prove that their employer harbored a discriminatory motive or intent, I became convinced that something about the way the law was defining and seeking to remedy disparate treatment discrimination was fundamentally flawed.

Krieger, *supra* note 74, at 1164.

141. *Id.* at 1168–77.

142. The cases discussed in this Section will further explore this suggestion.

D. Blockades to Proving a Prima Facie Case

In *Makky v. Chertoff*, the plaintiff was an American citizen and a Muslim of Egyptian national origin.¹⁴³ Dr. Wagih Makky became a prominent researcher and professor in the field of aviation security and was an employee at the Federal Transportation Security Administration (TSA) since 1990.¹⁴⁴ Dr. Makky was indefinitely suspended without pay after his reapplication for the renewal of his top-secret security clearance card was denied.¹⁴⁵ The notice of denial cited several security concerns, the most important of which was his foreign relatives and associates.¹⁴⁶ He claimed that no material changes occurred between his first application for the security clearance card in 1987 (when it was approved) and his reapplication in March of 2002.¹⁴⁷ Makky attributed the denial of his reapplication to its proximity to the September 11th terrorist attacks.¹⁴⁸

As a result, he filed a Title VII claim under the mixed-motive theory against his employer based on national origin and religious discrimination.¹⁴⁹ The court held that the plaintiff failed to establish a prima facie case of employment discrimination because, as a result of his loss of security clearance, he failed to meet the minimal qualifications required for the employment position.¹⁵⁰ The court stressed that in its analysis of Dr. Makky's claim, it could not question the motivation behind the decision to deny the security clearance card.¹⁵¹ While the Third Circuit acknowledged that Dr. Makky was otherwise subjectively qualified to continue his employment and perhaps was subject to employment prejudice, there could be no remedy because he did not have all the components necessary to show he qualified for the position objectively.¹⁵²

Makky presents a case of possible employment discrimination without remedy that is unique to the Muslim-American experience. The judiciary's inability to review reasons for the revocation of Dr. Makky's security clearance card inadvertently creates a loophole in Title VII jurisprudence. If the motivation

143. *Makky v. Chertoff*, 541 F.3d 205, 207–08 (3d Cir. 2008).

144. *Id.* at 208.

145. *Id.* at 208–09.

146. *Id.* at 209.

147. *Id.* at 208–09. Dr. Makky's job performance reviews rated him as "exceptional" and "outstanding" as well as "exemplary." *Id.* at 208. In his complaint, Dr. Makky cites that while his application for renewal was pending, he came under the supervision of Burke, Deputy Administrator of the Security Lab. *Id.* Burke took an "unusual interest" in plaintiff's national origin and Burke singled out Dr. Makky for a one-on-one meeting to inquire about his national background. *Id.*

148. *Id.* at 208. According to Dr. Makky's complaint, the person who hired Makky told him that it was a mistake to hire someone of Arab descent. *Id.* Following the September 11, 2001 attacks, Dr. Makky faced increased prejudice and hostility at work. *Id.*

149. *Id.* at 212–13.

150. *Id.* at 215.

151. *Id.* at 213.

152. *Id.* at 215. The court notes that while a security clearance may not be as objective a qualification as, for example, a medical license, the grant or denial of a security clearance takes on an objective quality because of the lack of judicial review power of the underlying reasons for the decision. *Id.* at 216 n.5.

for the revocation was discriminatory, and there is evidence to support this contention, then Dr. Makky had no means of remedying the adverse employment action.¹⁵³ Dr. Makky could not question the revocation of his security clearance card, and therefore could not make a successful employment-discrimination claim under Title VII of the Civil Rights Act.¹⁵⁴ The employer, in this case, did not have to respond to Dr. Makky's allegations or give reasons as to why it took such great interest in his national origin.¹⁵⁵

E. Obstacles in Showing Pretext

However, even in the instances where the plaintiff is able to satisfy the elements of a prima facie case under either the pretext or mixed-motive theories, employers are able to rebut such cases very easily absent strong direct evidence to the contrary. *Azimi v. Jordan's Meats* highlights this point.¹⁵⁶ Plaintiff Azimi was a Muslim immigrant from Afghanistan who worked at the defendant's meat packing plant from November 1999 to November 2001.¹⁵⁷ During his time of employment, he was subjected to harsh discriminatory behavior by both his co-workers and supervisors.¹⁵⁸ Plaintiff brought, among other claims, a Title VII claim alleging he suffered racial, religious, and ethnic harassment during his employment with defendant.¹⁵⁹ The jury found that plaintiff had suffered such harassment, but did not award compensatory damages, finding that plaintiff had not suffered any harm worthy of damages.¹⁶⁰

In addition, the trial court granted summary judgment in favor of the employer for the Title VII claim of wrongful discharge, which was brought under the pretext theory.¹⁶¹ While none of the parties denied that Mr. Azimi established a prima facie case, the employer rebutted the presumption by claiming that the reason for the discharge was that Mr. Azimi had harassed another co-worker, Mrs.

153. *Id.*

154. *Id.* at 212. The court notes that in *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988), the Supreme Court held that there is no judicial review of the merits of a security clearance determination and that the denial of a security clearance is not an "adverse action."

155. *Id.* at 215.

156. *Azimi v. Jordan's Meats, Inc.*, 456 F.3d 228 (1st Cir. 2006).

157. *Id.* at 231–32.

158. *Id.* at 232. Reports of this discriminatory behavior include a supervisor blocking him from washing his hands when they were swollen from handling frozen meat while allowing other coworkers access to use the hot water; a coworker making reproachful comments about the Muslim religion, including statements such as "if you eat pork and pussy, you become strong like me;" a coworker grabbing plaintiff and attempting to shove pork in his mouth as well as picking plaintiff up and dangling him by his arms while other coworkers watched and laughed; and receiving an unsigned note on his locker with a swastika on one end and the words "why don't you go back to your own country you don't belong here you f***** musselum [sic]" scrawled on the other side. *Id.* These instances of discrimination were only some of the disparaging situations plaintiff faced. *Id.*

159. *Id.* at 231.

160. *Id.*

161. *Id.* at 241.

Manning, in the meat packing parking lot.¹⁶² Mr. Azimi was not able to succeed in showing that the employer's proffered reasons were pretext for discrimination based on his religion, despite the evidence he put forward.¹⁶³ One of the plaintiff's more compelling arguments was discussed in the administrative decision by the Maine Department of Labor (MDOL). The MDOL found that Mrs. Manning's allegations against Mr. Azimi were beyond her comprehension given her limited English comprehension skills.¹⁶⁴

In this case, despite strong evidence of the countless discriminatory actions against the plaintiff, the appellate court was not willing to second-guess the employer's decision to terminate.¹⁶⁵ The employers shrewdly documented all actions and conducted what appeared to be a thorough investigation.¹⁶⁶ Even though the MDOL concluded the findings of that investigation were questionable, this was not enough to show pretext to discriminate.¹⁶⁷ When coupled with other evidence that the plaintiff presented, the proof was still not enough to satisfy a showing of possible pretext to pass the summary judgment phase.¹⁶⁸ The court's analysis highlights the limitations of the pretext theory in situations where the employer offers a reasonable justification for the employee's discharge, even when the evidence casts serious doubts upon that justification.

Similarly, in *EEOC v. Omni Hotels Management Corp.*, the plaintiff was not able to show pretext in order to prove his Title VII employment-discrimination claim despite convincing evidence of possible pretextual motive.¹⁶⁹ Omni Hotels employed plaintiff Elmougy from 1986 until January 11, 2002.¹⁷⁰ On November 13, 2000, he was promoted to the position of General Manager (GM) of the Mandalay, one of Omni's larger, more prestigious, and higher-tiered hotels.¹⁷¹

162. *Id.* at 242. Mr. Azimi denied these allegations, but the employer's investigation found that the plaintiff had threatened a female coworker before work, and lied when confronted with the allegations of the threat. *Id.* The court was not concerned with whether the plaintiff was telling the truth about the allegations, but instead asked whether the employer had substantial reason to believe that plaintiff had engaged in the supposed misconduct. *Id.* at 245.

163. Azimi offered as evidence his own deposition testimony, which denied his coworker's allegations; an administrative decision by the Maine Department of Labor (MDOL) that had determined that the coworker's English skills were so limited as to undermine the employer's account of the allegations; that he was terminated for misconduct while others were not disciplined for equivalent misconduct; and that he was fired two months after the September 11th attacks. *Id.* at 245–46. Azimi argued that the MDOL's reasoning raised a material dispute of fact about the credibility of his employer's explanation for terminating him, showing pretext for discrimination. *Id.* at 246.

164. *Id.* at 247.

165. *Id.* at 246.

166. *Id.*

167. *Id.* at 247.

168. *Id.* at 246–47.

169. 516 F. Supp. 2d 678, 701–02 (N.D. Tex. 2007).

170. *Id.* at 686.

171. *Id.*

Prior to September 11, 2001, Omni renovated the restaurant at Mandalay, converting it into an upscale Italian eatery.¹⁷² Elmougy was placed in charge of ensuring that the opening of the restaurant was successful, yet when the president dined there in December 2000, he was not pleased with the wait staff's communication skills.¹⁷³ The president requested that Elmougy fix the problem by either retraining the wait staff on effective communication with patrons, or by reassigning the staff who had difficulties communicating and placing them in other departments.¹⁷⁴ Elmougy responded by asserting that he did not think it was a good, ethical, or legal thing to do, and explained that he felt that the president wanted him to fire the Moroccan and Hispanic waiters and to replace them with Caucasians.¹⁷⁵

In February 2001, a meeting was scheduled that included Elmougy and the director of sales and marketing.¹⁷⁶ The facts stipulate that the Mandalay was facing concerns regarding revenue and occupancy.¹⁷⁷ At the meeting, Elmougy voiced his disagreement with the corporate sales team's involvement and suggestions.¹⁷⁸ According to Omni representatives, revenues continued to decline in the next four months.¹⁷⁹ On June 27, Elmougy agreed that the sales direction needed a change, but he insisted on maintaining control of the sales.¹⁸⁰

172. *Id.* at 687.

173. *Id.* In his brief opposing summary judgment, Elmougy described that he was told to "recast" the wait staff, and if he couldn't then he should "help them out" which in his experience at the Mandalay meant "help them out the door." EEOC's Brief in Support of its Response In Opposition to Defendant's Motion for Summary Judgment at 6-7, EEOC v. Omni Hotels Mgmt. Corp., 516 F. Supp. 2d 678 (N.D. Tex. 2007) (No. 3-04CV-1778-K) [hereinafter Plaintiff's Brief].

174. *Omni Hotels Mgmt.*, 516 F. Supp. 2d at 687. It appears from the manner in which the facts are presented by the court that, in the president's opinion, the wait staff referred to had accents that interfered with their ability to communicate with patrons. In his deposition, the plaintiff emphasized that the wait staff spoke English and that he had never received a complaint from a customer about communication with wait staff. Plaintiff's Brief, *supra* note 173, at 6-7.

175. *Omni Hotels Mgmt.*, 516 F. Supp. 2d at 687. Here, the court opinion suggests that the president did not know the national origins of the wait staff. *Id.* I take issue with this suggestion, as it is not difficult to ascertain whether a waiter is of a type of national origin, especially when those persons have accents as they appeared to have in this case. The EEOC had administratively determined that Elmougy "refused to implement discriminatory job assignment practices prescribed by [Omni]." *Id.* at 688. The district court, however, assigned "little, if any, weight" to this determination after considering the evidence and Omni's witness' credibility. *Id.* Whether or not Omni encouraged Elmougy to implement such practices is open to debate; however, it does seem that the president at least hinted that Elmougy should get rid of those waiters that had accents.

176. *Id.* at 688-89.

177. *Id.* at 689.

178. *Id.* Elmougy "demanded his independence to oversee the sales functions of the hotel without any Corporate interference." *Id.* In response, the senior vice-president of operations told the team to give Elmougy autonomy in his sales strategy. *Id.*

179. *Id.* It is important to note here that the hospitality industry was experiencing a "softening . . . prior to 9/11," as admitted by Omni officials. Plaintiff's Brief, *supra* note 173, at 15 (internal quotation marks omitted). The Omni Park West index, which is in the

In late August 2001, Elmougy's supervisor decided to allow the corporate sales team to oversee the sales at Mandalay to turn the hotel's performance around.¹⁸¹ Before he was able to inform Elmougy of this decision, however, the September 11th attacks occurred, and the hotel industry suffered immediate setbacks as a result.¹⁸²

To complicate the situation, Elmougy was the president of the Dallas/Fort Worth Chapter of the Council on American–Islamic Relations (“CAIR”) from early 2000 until 2002.¹⁸³ After September 11th, he participated in several interviews regarding the attacks in his capacity as president of the area's CAIR chapter.¹⁸⁴ In several of these articles, he was identified as Elmougy and as the GM of Omni Mandalay.¹⁸⁵ As a reaction to the increased exposure of Elmougy's name, one of the employees at Omni became concerned.¹⁸⁶

Omni officials subsequently expressed concerns about his role as president of CAIR, especially when Omni's name appeared in a newspaper article, and a meeting was arranged with Elmougy for September 19, 2001, to discuss his appearances in the media.¹⁸⁷ During the meeting, Elmougy was told that several managers feared for their safety as a result of Elmougy's visibility in the media.¹⁸⁸ As a result, he was advised not to mention Omni while speaking publicly about anything related to September 11th.¹⁸⁹ Elmougy was also confronted about holding a meeting at Omni Park West which was attended by federal agency officials and leaders of the Muslim community.¹⁹⁰

Despite the concerns Omni officials said they had about Elmougy's CAIR activities, the CEO reported that he was not aware of any Omni Hotel that experienced any threat against it after September 11th.¹⁹¹ In addition, one official expressed in his deposition that he would prefer that Elmougy express his beliefs

same “competitive set” as the Mandalay, was more below its market share than the Mandalay was, yet nothing was done to its GM. *Id.* In addition, in early 2001 the economy was facing a recession which began in March of 2001. *It's Official: 2001 Recession Lasted Only 8 Months*, USATODAY.COM, July 17, 2003, http://www.usatoday.com/money/economy/2003-07-17-recession_x.htm. This may have factored into the overall decline of revenue and sales at the Mandalay.

180. *Omni Hotels Mgmt.*, 516 F. Supp. 2d at 689.

181. *Id.* at 690.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Plaintiff's Brief, *supra* note 173, at 8.

188. *Id.* Not all staff members were concerned, and the Assistant Controller wrote to Elmougy saying that she was inspired by his speaking out in the press. *Id.*

189. *Omni Hotels Mgmt.*, 516 F. Supp. 2d at 690.

190. Plaintiff's Brief, *supra* note 173, at 8. During this meeting, Elmougy became emotional, saying that he felt that he was “being singled out because of . . . my religion and because of the activities that I do outside of here, and that I'm being kicked while I'm down by the company that I've been loyal to for 16 years.” *Id.*

191. *Id.*

“in his mosque” and that he did not want people who had strong religious beliefs to make “statements that alienates [sic] a piece of the business.”¹⁹²

In the beginning of December 2001, the officials at the Omni Mandalay decided to transfer Elmougy to a lower position at the Omni Shoreham in Washington, D.C.¹⁹³ While informing Elmougy of the news, his supervisor said that he had “bad news.” He informed Elmougy that he was required to either transfer or to take a severance package, and that he had until the end of the day to make a decision.¹⁹⁴ Elmougy asked for more time, and eventually his supervisor allowed him more time to make the decision.¹⁹⁵

Elmougy found that he could not accept the transfer because his father was dying and he was about to purchase a hotel in Texas for his wife to manage.¹⁹⁶ Omni officials knew of his father’s illness prior to offering him the transfer position.¹⁹⁷ Elmougy argued that Omni officials knew he would not be able to or want to take the offer and that, even if he did, he would likely be removed as leader of the Muslim community in Dallas.¹⁹⁸ Because of this, on December 28, 2001, Elmougy left his supervisor a message letting him know that his attorney would handle all matters from that point on. Elmougy eventually concluded that he could not take the transfer position and therefore took a severance package.¹⁹⁹ Elmougy argued that he was constructively discharged from his position.²⁰⁰

Despite the strengths of Elmougy’s case, and the implications of pretextual intent on the part of Omni or at least a mixed motive with a discriminatory intent, the court held that Elmougy did not prove that he was constructively discharged,²⁰¹ that Omni satisfied its burden of articulating legitimate non-discriminatory reasons for removing Elmougy’s sales responsibilities and removing him from the Mandalay,²⁰² and that Elmougy did not present enough evidence that Omni’s reasons were pretextual to prove discrimination under either a pretext or mixed-motive analysis.²⁰³ In essence, the

192. *Id.* In addition, other officials reported to Human Resources that they were “very upset” with Elmougy’s media interviews. Comparatively, two Omni officials had previously openly espoused their Christian views at work and stated publicly on a radio talk show that their Christian faith “undergird[ed]” every business decision. *Id.*

193. *Id.* at 10. *But see Omni Hotels Mgmt.*, 516 F. Supp. 2d at 694 (Omni believed that there were no substantive changes in the position and was considered by Corporate to be a promotion).

194. Plaintiff’s Brief, *supra* note 173, at 10.

195. *Id.*

196. *Omni Hotels Mgmt.*, 516 F. Supp. 2d at 695.

197. *Id.* (the officials claimed that they did not know the seriousness of that illness).

198. Plaintiff’s Brief, *supra* note 173, at 18.

199. *Omni Hotels Mgmt.*, 516 F. Supp. 2d at 695–96.

200. Plaintiff’s Brief, *supra* note 173, at 18.

201. *Omni Hotels Mgmt.*, 516 F. Supp. 2d at 699 (finding that the law will not hold an employer accountable for constructive discharge when factors personal to the employer and unrelated to the job cause him to refuse a transfer).

202. *Id.* at 700 (emphasizing that the employer’s burden is one of production and not proof which involves no “credibility assessments”).

203. *Id.* at 701.

court was convinced that the economic reasons that Omni proffered, along with concerns about Elmougy's managerial style, were the real reason for the offered transfer.²⁰⁴ The court also found that Elmougy was not able to show that any of the Omni officials "harbored or exhibited animosity towards Elmougy based on his national origin or religion."²⁰⁵

While it is certainly debatable whether or not the reasons proffered by Omni were pretextual, the court opinion gave no credence to any of Elmougy's allegations and held that they were without merit.²⁰⁶ The court further pointed out that even though Elmougy presented believable evidence regarding the reasons for low revenue and sales at Mandalay, this was not enough to show discrimination. As long as Omni officials could show that their perception of Elmougy's performance, accurate or not, was the motive for transferring him, then they fulfilled their obligation under the pretext theory.²⁰⁷

The emphasis on motive by the court in this case makes it virtually impossible to show pretext in such a situation. Omni certainly had the monetary figures to bolster its argument of a non-discriminatory reason. The court's reluctance to question that reason, even when presented with evidence exposing the misleading nature of those figures, created a situation where the only way Elmougy could have shown pretext was if his supervisor had specifically, perhaps repeatedly, made derogatory comments about Elmougy's religion or national origin.²⁰⁸

As demonstrated by the cases discussed in this Part, it is clear that Muslim-Americans have not had an easy time making successful Title VII employment-discrimination claims. This is especially true when attempting to show that an employer's proffered reasons for an adverse employment action are pretext for discrimination, based either upon religious or national origin or a mixture of both. Therefore, while the Title VII claim still presents a viable framework to combating discrimination in the workplace, it desperately needs modification in a manner that acknowledges the subtlety and continuing pervasiveness of today's discrimination, the difficulty in proving an employer's true motive, and the flimsy nature of the presumptions in both mixed-motive and pretext cases.

III. SUGGESTED MODIFICATIONS TO THE TITLE VII CLAIM

Modifications to the Title VII framework would first and foremost have to take into consideration the subtlety of discrimination today.²⁰⁹ The pretext and mixed-motive theories have laid out a solid foundation for impeding workplace discrimination. Employers falling under the definition of "employer," however, are much more sophisticated, usually with in-house counsel, and less likely to utter

204. *Id.* at 702.

205. *Id.* at 697.

206. *Id.*

207. *Id.* at 702.

208. *See, e.g.,* Elries v. Denny's, Inc., 179 F. Supp. 2d 590, 597 (D. Md. 2002) (where employer said she "intends to get rid of all Arabs"), discussed *supra* Part II.B.

209. *See supra* Part II.A.

their true reasons for an adverse employment action.²¹⁰ In situations where the employer plays it smart and leaves little evidence pointing towards a discriminatory intent, the plaintiff is left without any recourse or remedy.

Modifications made by both the legislature and judiciary are imperative. It is up to Congress to amend Title VII to reflect a scheme tailored to more modern forms of employment discrimination. At the same time, the judiciary must take notice of the statistical nature of employment-discrimination claims and the apparent bias that exists in such cases. Courts should perform the analysis under Title VII theories in a manner sensitive to those realities.²¹¹

This is especially true when courts are presented with a minority or social group that is experiencing increased instances of discrimination or harassment. Muslim-Americans are such a group, where after September 11th, the frequency of reported civil rights violations increased dramatically.²¹² Judges should be sensitive to this fact, realizing that an employer does not have to utter “I want to get rid of all the Arabs” in order for discrimination to be present in a particular claim.

A. Shifting the Focus Away from Intent

A Title VII plaintiff must prove purposeful discriminatory intent in both pretext and mixed-motive analysis in order to successfully bring a claim.²¹³ Of course, clear proof of an employer’s intent simplifies a Title VII case. For the most part, however, cases with proof are few and far between.²¹⁴ This does not mean that claims that lack solid proof of an employer’s intent are illegitimate or frivolous. Instead, a better understanding of the way discrimination works in the twenty-first century, as well the cognitive process of such discrimination, highlights the importance of shifting the focus away from employer intent.²¹⁵

210. 42 U.S.C. § 2000e (2006). *See generally* Chen, *supra* note 12, at 915.

211. *See supra* III.C for discussion of statistical information regarding employment discrimination claims.

212. *See supra* Introduction. While I could not find statistics of success rates specifically regarding Muslim-American plaintiffs when bringing employment discrimination claims, the incidence reported to CAIR dramatically increased, yet the survey of cases I found reflected a very low victory rate as described in Part III.

213. Krieger, *supra* note 74, at 1171.

214. *Id.* at 1173 (“Seldom is an employer willing to admit, or a plaintiff able to prove, that the decisionmaker consciously used race or national origin as a proxy for some job-related trait.”).

215. Chen, *supra* note 12, at 913–15. *See generally* Krieger, *supra* note 74, at 1170 (emphasis omitted):

To say that a decisionmaker made an employment decision because of someone’s race or sex is not the same as saying that the decisionmaker meant to take that group status into account. An employee’s group status may have affected the decisionmaker in completely nonconscious ways by affecting what he saw, how he interpreted it, the causes to which he attributed it, what he remembered, and what he forgot. Yet under current doctrine, if the factual record leads us to believe that race, gender, or national origin “made a difference,” we must either find that the

The trouble with the pretext and mixed-motive analyses is that they force the trier of fact to take a “snapshot” of the employer’s mental state at the moment when the adverse employment action is taken.²¹⁶ If the discriminatory intent is not present at that moment, then the employer is not liable under Title VII.²¹⁷ Therefore, discriminatory comments made at the workplace that are not directly related to the employment action are deemed irrelevant.²¹⁸ This approach by the courts has erected an immense obstacle that must be modified so that it may take into account all relevant circumstances when analyzing a Title VII claim.

B. Stronger Presumptions and Consequences

As the doctrine stands today, the pretext theory does not require that a trier of fact’s rejection of a defendant’s proffered reasons for an adverse employment decision compel a judgment for the plaintiff.²¹⁹ Instead, once the presumption shifts to the defendant, all that is required is “some response” to the plaintiff’s prima face case in order for that presumption to drop, and whether the presumption is successfully rebutted does not involve a credibility assessment.²²⁰

Such a scheme is not sufficient to combat the subtlety of workplace discrimination today. Instead, the rebuttable presumption under the pretext theory should be statutorily modified so that if the employer’s proffered reasons for the adverse employment actions are not credible, then a judgment for the plaintiff should be compelled. This is because if an employer is not able to articulate legitimate reasons for such an action, and the employee has already established a prima face case, then the employer should not prevail.

Similarly, in mixed-motive cases, a court is not obligated to grant damages or issue an order to remedy the adverse employment action even when the employee is able to show that a discriminatory reason played a role in the decision to take action.²²¹ Perhaps the reasoning behind this statutory scheme was to prevent a windfall to plaintiffs by disallowing an employee to recover when the employer can show that it would have taken the same action despite the existence of a discriminatory intent.²²² In a sense, then, an employer still has leeway under the mixed-motive theory to avoid the full consequences of discriminating against an employee, as long as the discriminatory reason was not the deciding factor. While this Note does not argue that plaintiffs are entitled to such a windfall, I do think that it is more sound policy to always discourage discrimination in the workplace, and therefore punish any employer that factors a discriminatory motive into an employment decision.

decisionmaker intended to discriminate or that no discrimination occurred. Disparate treatment doctrine is simply structured that way; these are the only two stories it knows how to tell.

216. Krieger, *supra* note 74, at 1183.

217. *Id.*

218. *Id.*

219. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

220. *Id.* at 509–11.

221. 42 U.S.C. § 2000e-5(g)(2)(B)(i)–(ii) (2006).

222. *Id.*

Any amount of illegitimate discriminatory motivation for taking an adverse employment action against an employee should be more heavily discouraged by modifying the statutory scheme. If such an affirmative defense is not available to employers, then the incentive to make decisions which factor in discriminatory reasons will be removed.²²³ Title VII should focus on discouraging employers from factoring any discriminatory intent into their decisions by allowing for damages in any instances where discrimination is proven. In order to successfully put a halt to workplace discrimination, the very idea of having any discriminatory motive should not be sanctioned.

C. The Solution: Totality of the Circumstances

Perhaps the most important modification that should be made to Title VII jurisprudence is taking a totality of the circumstances approach to analyzing discrimination claims rather than focusing on intent. In taking such an approach, courts should consider the minority or social group in question and the historical timing of the adverse employment action in question. In the case of Muslim-Americans after September 11th, then, a court would take into consideration the circumstances surrounding Muslims in the United States and the overall environment at the time.

In addition to these considerations, courts will also be able to take into account discriminatory statements not directly related to the employment action, as well as other relevant factors brought up by the parties. In order to weed out subtle forms of discrimination, courts may have to make inferences that are not available under either the pretext or mixed-motive theories. The flexibility that a totality of circumstances type of analysis affords will give plaintiffs a fighting chance when bringing their claims to court.

D. Guarding Against Possible Pitfalls

Modifying the statutory scheme of Title VII and the analysis by the judiciary may cause anxiety amongst those afraid of a flood of frivolous claims or the possibility of windfalls to plaintiffs. In addition, employers may fear that changes to Title VII will undermine their ability to make subjective judgment calls regarding their actions with employees.

By examining the totality of circumstances when presented with Title VII claims, courts may take into account the objective and subjective needs of the employer. Such a test would not exclude such considerations, and it takes into account factors affecting both the employer and the employee. A totality of the circumstances test levels the playing field for both parties to present all relevant factors. Such a test, however, will not suddenly transform frivolous claims into meritorious ones: the plaintiff still has the burden of proving employment discrimination in the workplace in order to make a successful claim.

223. *Id.*

CONCLUSION

Muslim-Americans have faced many challenges to their basic civil liberties as a result of the September 11th attacks on the World Trade Centers. One of the areas in which Muslim-Americans have felt the most discrimination is in the workplace. Many who did not take notice of Muslims prior to the attacks now have a heightened sensitivity to their presence. The situation of Muslim-Americans has highlighted the inadequacies of Title VII in protecting against the subtle nature of modern workplace discrimination. Title VII should be modified to reflect the reality of this subtle employment discrimination in order to fulfill the promises of the Act: “[t]o eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.”²²⁴

224. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).