Filling The Gap: Immigrant Status As Title VII's Missing Piece

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I. INTRODUCTION

The gardener's story is just one example of the various workplace violations impacting immigrants. Throughout history, immigrants faced workplace abuses, many of them not finding fair employment because of their immigrant status. The issue of immigrant status discrimination arises because Title VII of the Civil Rights...
Act of 1964 ("Title VII"), which applies to private and public employers, only prohibits employment discrimination “based on race, color, religion, sex and national origin” during the course of hiring and firing. [7] Understanding the interrelation of immigration and employment law demands taking a close look at statistics, such as the study by the National Employment Law Project ("NELP") showing that immigrants are an integral part of the workforce. [8] The relationship between immigration and employment law encompasses a lengthy history where immigrants disproportionately occupy the lower echelon of the economy; this relationship resulted in legislation that fail to provide adequate representation to victims of immigrant status discrimination.

The Court hesitates to grant immigrants complete protection because immigration belongs in the realm of national security and foreign policy, which falls under the plenary authority of Congress. Further, the Supreme Court in Espinoza determined that national origin does not embrace immigrant status discrimination. [9] The possibility of including Title VII under the national origin or the race category creates a gap that leaves victims of immigrant status discrimination open to exploitation, because an employer may not always base his employment decision on the person’s national origin or race.

To compensate for the gap in Title VII, the Immigration Reform Act of 1986 ("IRCA") was developed to handle immigrant status discrimination. Another federal statute, Section 1981, arguably embraces immigrant status discrimination, but the federal circuits are too divided on the issue. Both IRCA and Section 1981 have gaps that fail to provide the degree of protection possible under Title VII. Due to inadequate protections, many immigrant workers keep labor abuses quiet when employers threaten them with deportation. Also, some immigrant employees might not report labor abuses because their employer’s knowledge of the law compounded with the possibility of losing a job they cannot afford to live without outweighs vindicating their rights. [10] Even legal immigrants fear threats because an employer, through false accusations, can frame them and potentially ruin their chances of citizenship. [11]

This Paper seeks to analyze the symbiotic relationship between the antidiscrimination aims of Title VII and IRCA, while analyzing cases and legislative history to understand the reasons for guarding against immigrant status discrimination and the disadvantages of doing so. It delves into the inadequacy of legal protection available to immigrants under Title VII by demonstrating the deficiency of relying on the available protected classes; although Title VII extends some protections to immigrants, such protections rely on arguments based on the five classes protected by Title VII. By limiting the types of Title VII claims that may be brought, the legitimate claims individuals may have regarding discrimination on the basis of immigrant status fail to receive sufficient attention. As a result, Title VII does not fulfill its purpose of reducing artificial barriers in the workplace.

In short, immigrant status is an immutable characteristic that should be included under Title VII’s scope of protection because the gaps in other federal statutes fail to provide adequate protections and the full scope of remedies afforded by Title VII. Also, immigrant status discrimination does not fit well under any of the current
categories found under Title VII. Inadequate avenues of relief for immigrants provide incentives for employer exploitation of immigrants. Since no sound decisions are made without clarity, antidiscrimination jurisprudence and a more cohesive study on immigration-status discrimination will lead to clearer guidelines that may one day enable the amendment of Title VII to embrace immigrant status as one of its protected classes.

II. BACKGROUND

A. What is Immigrant Status Discrimination?

Immigrant status discrimination occurs when an employer treats an employee differently because of his or her status as an immigrant. However, it is not a cognizable action under Title VII, but IRCA recognizes it as actionable. It differs from national origin discrimination in that the employer does not base his disparate treatment on the employee’s country of origin or on that employee’s ancestors. Instead, an employer shows a preference for citizens only, choosing to hire individuals from different countries so long as they are native-born or naturalized; therefore, permanent residents and temporary residents with a work visa may not be hired because they are not born in the United States. Another form of discrimination on the basis of citizenship status takes place when the employer imposes stricter policies on permanent residents, but places more lenient restrictions on employees with temporary work visas.

Immigration protections in the workplace remain limited, which warrants attention because employment stands as one of the primary reasons immigrants come to the United States. Thus far, immigration history reveals the discriminatory behavior towards immigrants and the detrimental effects on the immigrant employees.

B. Brief History of Immigration Legislation

Throughout immigration history, many immigrants were viewed as indispensable workers. Therefore, the rich yet tumultuous literature of immigration sheds light on the relationship immigration shares with labor and antidiscrimination laws; more importantly, it reveals how legislation shapes their identity. Although immigration adds to diversity, in an effort to protect against potential national security threats and to ensure the economic well being of domestic workers, the government implemented stringent restrictions, especially after September 11, 2001. While reasons, such as national security, justify strict regulations on non-citizens, no reason compensates for the levels of discrimination immigrants face in the workplace. While legislation improved the conditions for immigrants over the years through the Immigration and Nationality Act of 1952 (“INA”) and IRCA, which amended the INA, it was only the beginning of a tortuous battle for equality.

Immigration history reveals not only the uphill battle that immigrant employees faced, but also that legislation began to recognize the gravity of unfairness
burdening immigrant employees.

Restrictions that upheld racial discrimination against immigrants began with the 1790 Naturalization Act granting citizenship to any free, white immigrant, while the 1882 Chinese Exclusion Act was directed at excluding immigrating Chinese laborers from the United States. The number of limitations mounted between 1917 and 1924 with the passage of laws instituting a quota system and requiring immigrants to have passports. The 1952 act established the current U.S. immigration system, a quota system with limitations based on country of origin. Overall, history shows a trend of discriminations against immigrants, not merely because they came from a different country, but because of their status as immigrants, a term that held derogatory connotations.

Presently, victims of immigrant status discrimination are falling through the cracks because Title VII fails to recognize it as a class and IRCA provides limited protection; if no law provides them with the protection to which they are entitled, and the system leaves them vulnerable to discrimination, then the system perpetuates an injustice that flies against the integrity of our nation and its principles.

C. Historical Misconceptions and Its Impact on Immigrant Status Discrimination

The public’s misconception of immigrants promotes inequalities in the system. As history reveals, some perceive immigrants as those who take away jobs from natives, a notion supported by the Director of Research at the Center for Immigration Studies, Steven A. Camarota. For instance, he stated that immigrants reduce the labor market prospects for natives, creating “a burden... because they are less educated, hold lower paying jobs, and have larger families than natives.” Such opinions create stereotypes that hurt the opportunities of immigrants to procure employment and impact an employer’s decision to hire an immigrant employee. Further, one scholar, Sladan Sinanovic, stated that stereotypes about immigrants contribute to hiring inequalities. While these stereotypes overlap with the national origin and race categories under Title VII, these stereotypes contribute to the formation of the immigrant identity that affects an employer’s decision to hire an immigrant employee. For instance, Sinaovic explains that:

Foreign-sounding names may generate the discriminatory effect because of...a) the perception of the lack of desire to assimilate to the mainstream society, b) psychological discomfort caused by the inability...to pronounce uncommon names, or c) deeper forms of antagonism against sociocultural minorities.

This statement reveals that some employers may not hire an immigrant employee because the employee’s status as an immigrant makes him or her different from the work culture.

In connection with the view that immigrants take over the labor market, Camarota
uses statistics to show that the employment rate increased for immigrants, and not native-born adults, when he stated all the net growth in jobs went to immigrant workers. [26] In fact, he states that he finds “it striking that half of employment growth has gone to the foreign-born.”[27] While this tends to show favoritism for immigrant laborers, the reality is that some employers may show a preference for immigrant employees because it allows them to pay lower wages and provide lesser benefits. [28] Therefore, such statistics reveal one main reason employers take advantage of an immigrant’s status. Overall, these perspectives contribute to immigrant-status discrimination because it promotes the belief that the influx of immigrants will lead to economic inequality, take away jobs from citizens, and drive wages down.

D. Espinoza Exposes the Shortcomings of Title VII

The Supreme Court’s decision in Espinoza makes it unlikely, but not impossible, that Title VII will include immigrant status discrimination when it held that no provisions under Title VII prohibits discrimination on the basis of citizenship or alienage. This case revealed the shortcomings of the Title VII categories; a plaintiff cannot frame her immigrant-status discrimination claim as a national origin claim because the legislative history and definition behind the term national origin will cause her claim to fail. [29] Therefore, it is important to expand Title VII to embrace immigrant status discrimination so that victims of immigrant status discrimination can vindicate their rights.

In Espinoza, the plaintiff was a lawful permanent resident who was denied employment, not because of her national origin, but because of her lack of U. S. citizenship.[30] The court determined that national origin does not apply to a claim based on immigrant status because national origin refers to “the country where a person was born, the country from which his or her ancestors came.”[31] Ultimately, the court argued that Congress did not intend to expand the bounds of national origin to immigrant status discrimination based on how national origin is defined. [32]

Justice Douglas, dissenting, observes that Farah fostered a citizens-only policy, which he called a “de facto policy of preferring those who were born in this country.”[33] He contends that the respondent showed discriminatory animus when the respondent admitted she denied Espinoza’s application without considering Espinoza’s job qualifications. [34] Further, Justice Douglas argues that the Equal Employment and Opportunities Commissions (“EEOC”) deserves greater deference, considering that it is the agency imbued with the authority to handle employment claims.[35] The EEOC finds that:

Discrimination on the basis of alienage always has the effect of discrimination on the basis of national origin. Refusing to hire an individual because he is an alien is discrimination based on birth outside the United States and is thus discrimination based on national origin in violation of Title VII.[36]

Justice Douglas makes a strong argument when he notes that to rule as the majority
did goes against the Congressional policy of removing “artificial...barriers to employment.” [37] Considering that his findings are based on Congressional policy and the EEOC, such insight should receive greater recognition to contribute to the growing pool of evidence reflecting anti-immigrant sentiments.

III. WHY TITLE VII IS THE PROPER VEHICLE TO ADDRESS IMMIGRANT STATUS DISCRIMINATION

Despite Title VII’s commitment to equality in the workplace, its current framework fails to meet its egalitarian ideal when legal immigrants, a group that faces a greater risk of deprivation of rights than citizens, receive inadequate protection. The concept of fitting a claim not covered by Title VII under one of its five protected classes presents numerous obstacles, largely because fitting under a category only provides indirect protection; the goal, however, should be to give marginalized immigrant employees direct protection under Title VII.

It is a mistake to assume that discrimination not explicitly protected under Title VII can always be implied or placed as a subcategory under one of the protected classes; while fitting under one of the categories may work in certain instances, Espinoza recognized that national origin does not encompass immigrant status discrimination. This shortcoming results in a lack of a comprehensive employment discrimination framework, which fails to grapple with the various ways discrimination operates; this failure stems from the fact that discrimination at times happens at a subconscious level and may be present in the neutral policies of the employer. Courts lack the time to investigate every behavioral norm in the workplace that is discriminatory. Nevertheless, a Congressional action needs to be taken to better regulate immigrant-status discrimination, because immigrant status discrimination rises above a mere subconscious bias. In an effort to keep Title VII from enshrining intolerance, providing protections under Title VII would reduce the flagrant abuses immigrants face in the workplace.

In dissecting the existence of immigrant status discrimination not only lies the issue of pinpointing its potential relation to the immigrant’s national origin, but also requires weighing numerous factors, such as human sensibilities and varying personalities, and other external factors. In combatting discrimination, a framework built on suppositions to interpret such a complex issue cannot succeed in accomplishing its goal. For this reason, Title VII’s framework needs to be reworked to allow for direct protections for those who fall prey to immigrant status discrimination.

Title VII is the proper vehicle to combat immigrant status discrimination because other federal statutes, IRCA and Section 1981, do not provide the extensive protections found under Title VII. Further, immigrant status is an immutable characteristic that Title VII has the capacity to protect.

A. Gaps in IRCA Fail to Protect Against Immigrant Status Discrimination

Presently, IRCA, which focuses on curtailing illegal immigration, applies to employers with four or more employees and prohibits unfair employment practices against immigrants, imposing civil and criminal penalties against employers who
hire unauthorized workers. The founder of ACLU Immigrants’ Rights Project, Lucas Guttentag, notes that IRCA protects against discrimination on the basis of national origin and citizenship status. Congress included citizenship status protection to reduce discrimination against employees who appear foreign. Its language borrows heavily from Title VII since it was created to compensate for the lack of coverage in other federal statutes. Specifically, it forbids discrimination “against U.S. citizens, U.S. nationals, and the following classes of aliens with work authorization: permanent residents, refugees, and asylees.” In short, IRCA is limited to only “citizens” and “intending citizens.” Although IRCA is necessary, it is flawed when it comes to protecting against immigrant status discrimination because it does not provide as many avenues of relief or remedies as found under Title VII.

1. **Limited Remedies under IRCA Leads to Legal Vulnerability**

As Professor Ruben J. Garcia noted in his book *Marginal Workers: How Legal Fault Lines Divide Workers and Leave Them Without Protection*, “even though IRCA may prohibit some discrimination on the basis of citizenship status with respect to hiring, firing, and retaliation, it does not provide Title VII’s range of protection (e.g., with respect to discipline or discriminatory working conditions not resulting in discharge) or remedies (e.g., front pay, injunctive relief).” To be more precise, under Title VII a plaintiff has various remedies such as, injunctive relief, promotion, reinstatement, back pay, compensatory damages, punitive damages, front pay, and attorney’s fees and costs, whereas IRCA provides only back pay, lost wages, a cease and desist order, and attorney’s fees. Further, Professor Garcia pinpointed one problem with IRCA and its impact on hiring practices when he explained that employers, fearing sanctions under IRCA, would only hire citizens. As such, even those immigrants with a legitimate visa may not be considered for employment. In light of this gap, Professor Garcia argues that employment laws are failing vulnerable immigrants because there are barriers that divide citizens from non-citizens, and doctrinal borders that “prevent the EEOC and the DOJ from exercising concurrent jurisdiction over the [certain] claims [such as] on the basis of national origin discrimination.” In short, due to limited protections, immigrant employees might not take advantage of bringing forth their claims because the likelihood of success is slim.

2. **IRCA Lacks a Disparate Impact Claim Provision**

Another shortcoming present in IRCA is its lack of disparate impact claims. When President Reagan signed IRCA into law, he stated that the statutory scheme of IRCA would include only a basis for disparate treatment claims. The exclusion of disparate impact claims places victims of immigrant status discrimination at a disadvantage because not all discrimination claims are obvious. Under the disparate impact theory, the courts may look to ostensibly neutral employment policies to ascertain discrimination. The Supreme Court in *Griggs* articulated the essence of the disparate impact theory when it stated that “the good intent or absence of discriminatory intent does not redeem employment procedures or testing
mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.” Since not all claims reflect direct discrimination, especially when dealing with law-savvy employers who can find loopholes in the law, the disparate impact theory is invaluable to victims of workplace discrimination; however, under IRCA, victims of immigrant status discrimination are deprived of this powerful tool to protect against workplace discrimination, leaving them vulnerable to exploitation.

B. Gaps in Section 1981 Fail to Protect Against Immigrant Status Discrimination

Section 1981 states that “all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts... as is enjoyed by white citizens.” Historically, as described by one scholar, Barry Sullivan, it served the initial purpose of protecting African Americans during the Civil War period where persons of African descent lacked citizenship status and economic rights. Scholar, Angela M. Ford, further notes that Section 1981 mirrors the language of the thirteenth and fourteenth amendment.

Based on Section 1981’s history that centers on preserving the sanctity of contracts, the Supreme Court held that Section 1981 extends to private actions. Section 1981 applies to racial and national origin discrimination. While Section 1981 covers all employers, it only applies to intentional discrimination and does not cover disparate impact claims. Also, it is unlikely that it can handle mixed-motive cases since the Supreme Court chose to not to allow mixed-motive claims in provisions outside of Title VII.

While Section 1981 does not explicitly mention immigrant status discrimination, movement in the federal courts suggests that Section 1981 may one day evolve to embrace immigrant status discrimination; presently, however, the federal courts are too divided on the issue. In a recent federal appellate decision, the Second Circuit attempted to address the confusion among the federal courts when it held that Section 1981 prohibits private employers from discriminating on the basis of alien status. In that case, plaintiff, a lawful immigrant from Jamaica was removed from his position when his employer realized that he was not a U. S. citizen. On appeal, the court evaluated whether Section 1981 covered private alienage discrimination. The court found that although Section 1981 applies mostly to race, it recognized that Section 1981(c) prohibits alienage discrimination based on the history and language of the statute; in its analysis the court examined the meaning of “citizens” and “persons” and concluded that the use of “persons” implied a prohibition of alienage discrimination.

When the Second Circuit analyzed the language and history of Section 1981, it analyzed the term “persons” under a 14th Amendment framework, because Section 16 of the 1870 Act, from which Section 1981 is derived, extended its protection to aliens. This is important because it impacts the way immigrants are perceived. Although the Constitution abstains from extending certain rights to immigrants, such
as voting, immigrants still receive protection under the 14th Amendment. The 14th amendment states that no State “shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.” The Supreme Court noted that “any person” applies to all persons "without regard to any differences of race, of color, or of nationality," and to "an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here." Ford states that the Second Circuit in Anderson only resolved the issue that Section 1981 covers alienage discrimination, but the extent to which it does has yet to be decided; she states that the Supreme Court granted certiorari to decide the limitations of Section 1981, but since the parties settled, the issue remains unresolved.

While Section 1981 shares similar remedies to Title VII and is more expansive in some respects, it is not the appropriate vehicle to provide redress for the grievances of immigrant status discrimination victims; due to the split among the circuits and the lack of recognition of disparate impact claims, Section 1981 does not harbor the same protective powers as Title VII.

The intersection of federal statutes fails to meet the aim of administering justice effectively, because it creates a gap that leaves immigrant workers legally vulnerable

C. Immigrant-Status Discrimination: An Immutable Characteristic

The political battles surrounding immigration will make amending Title VII to include immigrant status as a class difficult due to conflicting beliefs on how lenient or restrictive the law should be regarding immigrant rights. Instead, victims of immigrant status discrimination who seek protection under Title VII have one resort: fitting under one of Title VII’s five protected classes. The concept of “fitting” gives the plaintiff the chance to fashion his or her claim to fall beneath one of the protected classes. However, “fitting” has its limitations because the categories under Title VII were not intended to embrace every nuance in the law. Instead, Title VII was intended to protect immutable characteristics.

Professor Sharona Hoffman in The Importance of Immutability in Employment Discrimination Law, recognizes that citizenship status can be an immutable characteristic. Specifically, Professor Hoffman asserts that citizenship status becomes an immutable characteristic for those not eligible for naturalization because the “eligibility and conditions and timing of naturalization are dictated by law.” She provides two definitions for immutable characteristics. First, she states that an immutable characteristic is an “accident of birth,” that is, that one’s trait is unalterable since it is congenital or an inherent characteristic that is present since birth. In that respect, she defines citizenship status as an “accident of birth,” because “legal immigrants must wait a number of years before becoming citizens.” Second, she asserts that an immutable characteristic is defined as “one that either is beyond the power of an individual to change or that is so fundamental to [individual identity] or conscience that’ that it is...unalterable.”
Therefore, citizenship status also meets the second definition when, for example, a legal immigrant has to wait to become naturalized and, consequently, loses control over their status.

In short, Professor Hoffman’s argues that an immutable trait should be protected because no individual should be discriminated against on the basis of a characteristic over which they have no control, and ultimately states that this is the goal of antidiscrimination laws and a matter of public policy. In agreement with Professor Hoffman, immigrant status is an immutable characteristic deserving of protection because it is a fundamental part of their identity and, as explained by Professor Hoffman, unalterable.

In enacting Title VII, Congress intended to protect discrimination against inherent characteristics possessed by individuals that cannot be controlled or easily altered. However, Title VII only indirectly protects immigrants and provides no relief for discrimination on the basis of immigrant status. The immigration system, being flawed and rampant with numerous restrictions, results in a lengthy process that makes attaining U. S. citizenship a difficult task. As such, it is crucial to take the obstacles of obtaining U. S. citizenship into account and not minimize the importance of extending adequate protections to those who genuinely are attempting to abide by the law in order to gain their citizenship. Failure to provide protection is anathema to the law in order to gain their citizenship. Failure to provide protection is anathema to the primary purpose of Title VII.

IV. CONCLUSION

Discrimination on the basis of immigrant status remains prevalent in society despite attempts to fit it under one of Title VII’s five protected classes. Title VII fails to recognize the complexity of the modern day workplace by not protecting a prominent group in the United States, immigrant employees. Fitting under one of Title VII’s protected classes proves ineffective in practice because it only provides indirect protection; this results in the unaddressed wrongs against immigrants with a legitimate claim. After all, the reality is not always that an employer discriminates against an immigrant employee because of his national origin or race. Further, the Supreme Court has declined to expand the definition of national origin to include immigrant status. The federal statutes, IRCA and Section 1981, that touch on immigrant status discrimination have gaps that do not provide the full scope of protections of Title VII. Title VII provides two theories of liability, that of disparate treatment and disparate impact; neither IRCA nor Section 1981 recognizes the disparate impact theory of liability, an invaluable tool for victims of discrimination in the workplace. Also, Title VII provides more remedies than IRCA, making Title VII a more appropriate vehicle to address immigrant status discrimination.

Since immigrant status is an immutable characteristic, it deserves more than indirect protection under Title VII. By understanding the extent of harm caused by immigrant status discrimination, we can attempt to reduce the deleterious impact on victims of such discrimination. Through clearer legislation, we can truly provide equal opportunity to individuals in the workplace.

[1] Id. at 19.
[2] Id.

[3] Id.

[4] Id.

[5] Id.

[6] Id.


[11] See Smith & Cho, *supra* note 4, at 7 (“Due to the growing federal-local collaboration on immigration enforcement, immigrant workers who are falsely accused of crimes often have no recourse and... end up in deportation proceedings after blowing the whistle on labor violations”).


[13] Id.

[14] Id.

[15] Id.

[16] Id.


[20] Id.
[21]Id.


[25]Id. at 41.


[27]Id. at 6.


[30]Id. at 87-88.

[31]Id. at 88.

[32]Id. at 89.

[33]Id. at 96.

[34]Id.

[35]Id. at 97.

[36]Id.

[37]Id. at 98.


[39]Id.

Guttentag, supra note 45, at 31.


Garcia, supra note 61, at 72.

Garcia, supra note 61, at 52, 73.

Guttentag, supra note 45, at 33.

Guttentag, supra note 45, at 33.

See also, Griggs v. Duke Power Co., 401 U. S. 424, 430 (1971) (finding that under Title VII, “practices...neutral on their face...cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices”).

Griggs, supra note 56, 432.


Sullivan, supra note 59, at 546.

St. Francis Colleges v. Al-Khazraji, 481 U. S. 604, 613 (1987) (defining the scope of Section 1981 to include “race, ethnic characteristics or ancestry”).


Gross v. FBL Financial Services, Inc., 557 U. S. 167, 186 (2009) (holding that since “the 1991 Act amended only Title VII and not the ADEA with respect to mixed-motives claims, the Court...declines to apply the amended provisions to the ADEA”).


*Anderson*, *supra* note 65, at 168.

*Anderson*, *supra* note 65, at 169.

*Anderson*, *supra* note 65, at 172-78.

*Ford*, *supra* note 60, at 463 (noting that “it is clear that the language of the 1870 Act, granting its protection to “[a]ll persons within the jurisdiction of the United States,” was meant to encompass all aliens”).


U. S. Const. amend. XIV.

*Hopkins*, *supra* 63, at 369.

*Ford*, *supra* note 60, at 471.


*Id.* at 1516.

*Id.* at 1515.

*Id.*

*Id.* at 1517.

*Id.* at 1520-21. (asserting that “The employment discrimination laws’ focus on immutable characteristics, understood broadly to include traits that are theoretically alterable but fundamental to individual identity, establishes incentives and disincentives that advance the public policy goals of justices....Employers are prohibited from punishing applicants and employees for possessing traits that are outside of their control or from pressuring them”).
