

Supreme Court Nixes Landmark Racial Profiling Fine but Leaves Door Open to Future Claims



Racial profiling, or suspecting individuals of posing security threats solely on the basis of their race, ethnicity or religion, is discrimination and employers who engage in it are in clear violation of employment discrimination laws. What's less obvious is how you can also get into trouble by relying on the racial profiling carried out by law enforcement and government agencies in the name of security. A groundbreaking new case from the Supreme Court of Canada sheds light on the liability risks of factoring racial profiling by government agencies into your own employment decisions.

THE CASE

What Happened: In 2004, 3 years after 9/11, Bombardier offered a US/Canadian-licensed pilot of Pakistani origin training at its Dallas training centre. But when the pilot couldn't get the necessary security clearance from the US government, Bombardier refused to train him at either its Dallas or Montreal facility. The pilot sued Bombardier for discrimination in Québec. The Québec Human Rights Tribunal found Bombardier guilty of national origin discrimination and awarded the pilot \$319,000, including a record \$50,000 in punitive damages. The Québec Court of Appeal reversed.

What the Court Decided: The Supreme Court of Canada said the Court of Appeal was right to throw out the case.

How the Court Justified Its Decision: The pilot contended that the US government had engaged in racial profiling and that his Pakistani origin was the only reason he didn't get a security clearance. And since the US government committed national origin discrimination, he argued that relying on its decision made *Bombardier* guilty of national origin discrimination. But the Court said there

was no evidence that national origin had factored into the US government's denial. So Bombardier didn't commit discrimination by relying on that decision.

Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc., 2015 SCC 39, July 23, 2015

WHAT IT MEANS

Even though the employer won, the *Bombardier* case may actually work against employers going forward. Had the pilot been able to make his racial profiling charges against the US government stick, he would have had Bombardier dead to rights. In other words, the Court took issue not with the pilot's logic, but his evidence—or lack thereof. More precisely, he lost because he couldn't prove that his national origin had anything to do with the US government's decision not to grant him a security clearance. As the Court stated:

"We wish to make it clear that our conclusion in this case does not mean that a company can blindly comply with a discriminatory decision of a foreign authority without exposing itself to liability [discrimination]. Our conclusion flows from the fact that there is simply no evidence in this case of a connection between a prohibited ground and the foreign decision in question."

These same principles would also presumably apply to *domestic* authorities.

The bottom line: Relying on racial profiling to make employment decisions may expose you to discrimination liability risks even if that profiling is conducted by police departments and other government authorities.