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### Do English-Only Rules Have a Place in the Workplace?

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***DO ENGLISH-ONLY RULES HAVE A  
PLACE IN THE WORKPLACE?***

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## I. INTRODUCTION

### A. Background

Frozen Custard. This delicious cold confection is at the epicenter of the latest battle over English-only policies in the workplace. On May 17, 2016, Joey Sanchez was waiting on line to purchase frozen custard at Leon's Frozen Custard located in Milwaukee's south side, a neighborhood with a high percentage of Latinos. Sanchez overheard an employee whisper to a Spanish-speaking customer ahead of him, "I'm not allowed to speak to you in Spanish." Sanchez placed his order in Spanish and received the same response. Sanchez decided to speak with the owner to explore his rationale for the policy—"I'm trying to understand or find the why. I need to hear from him to hear why he has this policy." Katie Long and Ashley Sears, *Custard Compromise: LULAC says Leon's workers can speak to customers in Foreign Language* (June 2, 2016 5:01PM), <http://fox6now.com/2016/06/02/custard-compromise-lulac-says-leons-workers-can-speak-to-customers-in-foreign-language/>.

The owner, Ron Schneider, told FOX6 News, "I specifically tell [my employees] that I really don't want you to speak anything other than English at the window, because a good number of people who might come up and talk Spanish also speak English." *Id.* A couple of days later, in what he referred to as a "clarification," of the policy, Schneider told FOX6 News by telephone that while speaking English is "easier, [i]f you don't speak English, we will do everything we can to communicate with you." According to Schneider this includes speaking Spanish. He referred to this not as a change in his policy, but as a clarification. *Id.* Schneider told another news outlet that "although he prefers that employees speak

English, they are free to speak Spanish to each other.” Jesse Garza, *Latino organization says dispute with custard stand resolved* (June 2, 2016), <http://www.jsonline.com/news/milwaukee/latino-organization-says-dispute-with-custard-stand-resolved-b99737290z1-381715211.html>.

The League of United Latin American Citizens (“LULAC”) subsequently urged the Equal Employment Opportunity Commission (“EEOC”) to launch an investigation of the business, in order to ensure that the business was in compliance with all federal civil rights laws. *Id.* Despite the presence of protestors outside of Leon’s, the line to purchase custard remained long, with several customers telling FOX6 News that learning English was necessary to live and do business in the United States. Long and Sears, *supra*. Schneider worked with LULAC to end the controversy, and on June 2, 2016, LULAC released the following statement to FOX6 News:

“Following our consultation with the owners of Leon’s Frozen Custard and its counsel, we are pleased that Leon’s Frozen Custard is concluding a thorough review of all personnel policies to ensure they are in compliance with existing EEOC guidance and civil rights law. We are also pleased that Leon’s has documented their policy which allows Leon’s Frozen Custard employees to speak to their customers in the customer’s desired language if the employee is able. We appreciate the goodwill ownership has demonstrated in working with us to bring this issue to a close to the benefit of our community.” *Id.*

LULAC also stated that Leon’s is concluding a review of all of its personnel policies to ensure that they are consistent with the law, though Schneider contends that his policies have always been in compliance with federal civil rights laws and EEOC guidances. *Id.* (Note: throughout this guide, the terms EEOC guidance and EEOC guidelines will be used interchangeably, as they are in the source materials). The English-only policy

adopted by Leon's Custard perfectly demonstrates the tensions inherent in these cases where bilingual or non-English-speaking employees are employed in businesses where many of the customers are primarily English speakers.

According to the U.S. Census Bureau, 38.4 million U.S. residents five and older spoke Spanish at home in 2013. This is a 120 percent increase since 1990 when it was 17.3 million. This number constitutes 13 percent of U.S. residents five and older. More than half of these Spanish speakers also speak English "very well." <http://www.census.gov/newsroom/facts-for-features/2015/cb15-ff18.html>.

It is not only native Spanish speakers that are negatively impacted by English-only rules. The Equal Employment Opportunity Commission (EEOC) settled the case of *EEOC v. Central Calif. Found. for Health d/b/a Delano Regional Medical Center and Delano Health Associates, Inc.*, (E.D. Cal. Sept. 17, 2012) for \$975,000 on behalf of Filipino-American hospital workers who were forbidden from speaking Filipino languages like Tagalog or Ilocano. The Filipino-American employees were forced to comply with the hospital's English-only policy, although non-Filipino workers were allowed to speak their native languages. <https://www.eeoc.gov/eeoc/history/50th/milestones/2012.cfm>.

According to the EEOC website, there were 6,712 national origin discrimination charges filed in 1997, representing 8.3% of all EEOC filings. By 2015, such charges had risen to 9,438, representing 10.6% of all such filings. <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

As the diversity of the American workforce continues to grow, the resolution of these claims will only become more important. This research guide will provide guidance to those who delve into this area of law, and help researchers examine different judicial approaches to this unsettled

debate. The guide provides the user with research strategies, as well as citations to and summaries of the leading primary and secondary source materials relevant to this topic. This will help the reader understand the varying approaches courts have taken in interpreting the language of Title VII and the EEOC guidances regarding English-only rules.

## **B. Overview of Argument**

Whether and when employers may limit the use of foreign languages in the workplace is a frequent area of conflict due to our ever-more diverse work force. Employers institute these rules for many reasons, most commonly because they believe that they will provide a safer workplace. Other reasons employers have stated for such rules are to make supervision of workers simpler, and to improve co-worker relations. Employees have frequently challenged these policies. Claims brought challenging so-called English-only rules are generally brought pursuant to Title VII, arguing that the rule constitutes discrimination based on national origin. 42 U.S.C. § 2000(e)-2 (Westlaw through P.L. 114-165).

Most commonly the claims are brought as disparate impact claims, though they have also been brought under a disparate treatment or hostile-work environment theory. It is easier for a plaintiff to recover under a disparate impact theory because the plaintiff must only show that the policy has a disparate impact on the class of workers effected (i.e. non-English speakers). The plaintiff does not have to prove that the employer *intended* for there to be a disparate impact on the class; rather the burden then shifts to the employer to prove that there was a business necessity for the policy. *Montes v. Vail*, 497 F.3d 1160 (10th Cir. 2007), fn 15 (acknowledging that most English-only cases are brought under a disparate impact theory. This case was brought under a hostile environment theory,

which requires animus; disparate impact does not. The Court specifically states that, “[b]ecause our analysis is confined to a hostile work environment claim in which animus is required, we offer no views regarding what might have been the appropriate outcome of this case under a disparate impact theory.”).

Some employers limit the speaking of foreign languages at all times, others permit it at certain times, such as on breaks. The regulations promulgated by the EEOC draw a distinction between the two types of policies, clearly disfavoring ones that apply at all times. The EEOC has issued a regulation which states that:

. . . [a] rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual’s employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates title VII and will closely scrutinize it. 29 C.F.R. § 1606.7 (a) (current through June 2, 2016).

The EEOC takes a slightly more liberal view of English-only rules that apply only at certain times: “An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.” 29 C.F.R. § 1606.7 (b) (current through June 2, 2016). Section 13 of the EEOC Compliance Manual acknowledges that English-only rules may be adopted for non-discriminatory reasons, but even under those circumstances there must still be a business necessity. The Manual goes on to define some of the

characteristics that a properly drafted rule might contain, as well as considerations that an employer must factor in prior to adopting the rule:

Even where an English-only rule has been adopted for nondiscriminatory reasons, the employer's use of the rule should relate to specific circumstances in its workplace. An English-only rule is justified by "business necessity" if it is needed for an employer to operate safely or efficiently. The following are some situations in which business necessity would justify an English-only rule:

- For communications with customers, coworkers, or supervisors who only speak English
- In emergencies or other situations in which workers must speak a common language to promote safety
- For cooperative work assignments in which the English-only rule is needed to promote efficiency
- To enable a supervisor who only speaks English to monitor the performance of an employee whose job duties require communication with coworkers or customers.

In evaluating whether to adopt an English-only rule, an employer should weigh business justifications for the rule against possible discriminatory effects of the rule. While there is no precise test for making this evaluation, relevant considerations include:

- Evidence of safety justifications for the rule
- Evidence of other business justifications for the rule, such as supervision or effective communication with customers
- Likely effectiveness of the rule in carrying out objectives
- English proficiency of workers affected by the rule

Before adopting an English-only rule, the employer should consider whether there are any alternatives to an English-only rule that would be equally effective in promoting safety or efficiency. EEOC Compliance Manual, Section 13: National Origin Discrimination (December 2, 2002), <https://www.eeoc.gov/policy/docs/national-origin.html#VC>.

Finally, the EEOC guidelines seek to ensure that workers are aware of the rule and it has been communicated to them in a proper manner:



(c) Notice of the rule. It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin.

29 C.F.R. § 1606.7 (c) (current through June 2, 2016).

Where have the courts come down on all of this? Surprisingly the Supreme Court has never spoken on the matter and only three circuit courts have directly addressed the issue, though there has been an abundance of decisions from the district courts. The Fifth Circuit was the first to address the issue in the case of *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980). Mr. Garcia, a bilingual employee (fluent in English and Spanish) was prohibited from speaking Spanish, except to Spanish-speaking customers. The stated reason for this rule was that English-speaking customers had complained about employee's communicating in Spanish. Mr. Garcia was subsequently fired for responding to a question by another employee in Spanish. He brought a disparate treatment claim, claiming that the denial of his right to speak Spanish constituted national origin discrimination. The Fifth Circuit disagreed, finding that, "[l]anguage may be used as a covert basis for national origin discrimination, but the English-only rule was not applied to Garcia by Gloor to this end or with this result." *Id.* at 268. The Court pointed out that unlike race or national origin, the language used by a bilingual person is not an immutable characteristic, but rather a preference. There is no legal right which allows an employee to

use a certain language simply because they prefer to. The Court found that *Gloor*'s policy was valid and non-discriminatory and rejected the EEOC's view that such a policy must be drafted in the least restrictive manner. *Id.* at 270. As a reaction to *Garcia*, the EEOC drafted the guidelines found at § 1606.7. This effort has met with mixed results.<sup>1</sup>

In 1993, bilingual employees at a meat packaging factory sued after the employer implemented an English-only policy for work related activities; the policy was implemented after English-speaking employees expressed concerns that they were being spoken about by their Spanish-speaking co-workers. *Garcia v. Spun Steak*, 998 F.2d 1480 (9th Cir. 1993). The Ninth Circuit refused to adopt "a per se rule that English-only policies always infect the working environment to such a degree as to amount to a hostile or abusive work environment." *Id.* at 1489. While the Court did not "foreclose the prospect that in some circumstances," the rules could be discriminatory, such a finding can only be reached after a court has looked at the "totality of the circumstances." *Id.* The Court chose to reject the EEOC guidelines, and adopt the analysis of the *Gloor* Court. *Id.* See also *Jurado v. Eleven-Fifty Corp.*, 630 F. Supp. 569 (C.D. Cal. 1985), *aff'd*, 813 F.2d 1406 (9th Cir. 1987) (plaintiff disc jockey was completely fluent in English and chose not to comply with rule that he speak only English on the air. Radio station had implemented the rule as a programming decision when ratings revealed that using Spanish phrases on air did not increase listenership by Spanish speakers).

The Tenth Circuit took more of a mixed approach. *Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006) (overruled on other grounds by

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<sup>1</sup> A general discussion of the amount of deference that courts should pay to administrative regulations is beyond the scope of this guide. Rather, the deference issue is discussed within the context of each case.

*Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 n. 2 (10th Cir.2006)). The City of Altus implemented an English-only policy for employees, requiring them to conduct all work-related communications in English. The District Court granted summary judgment for defendants. Acknowledging the lower court's reliance on *Spun Steak* and its rejection of the guidelines, the Circuit Court said that "we need not resolve the validity of that presumption." *Id.* at 1304. Rather, the *Maldonado* Court chose to treat the guidelines as persuasive authority and with "respect . . . not as an indication of governing law, but as an indication of what a reasonable, informed person may think about the impact of an English-only work rule on minority employees, even if we might not draw the same inference." *Id.* at 1306. The Court, in reversing the grant of summary judgment, went on to state that while it was not suggesting that the guideline be admissible at trial or part of a jury instruction, a reasonable juror might be able to find for the plaintiffs under the standard laid out in the guidelines. *Id.*

The numerous district court cases that have addressed the issue have been all over the map. Most courts that have addressed the issue have found English-only rules that apply to bilingual employees are not discriminatory, because the employee has the ability to speak English if they choose. Other courts have focused less on the language skills of the employee, but rather have found the English-only rule to be a legitimate business necessity. A smaller number of courts have either declined to find a business necessity, or found there were fact issues as to whether or not a particular policy ran afoul of federal law. A thorough analysis of these cases appears later in this guide. One thing that is clear from a review of the case law is that the lack of judicial clarity in this area makes it impossible to predict the outcome in a given case.



## II. RESEARCH STRATEGY

The best place to start with research on this area of the law is with secondary sources. Because the legal structure of this topic is somewhat complicated—statutes, regulations, EEOC guidances and a myriad of cases from different courts—a good secondary source will help the researcher to sort through the thicket of authority. A legal encyclopedia or treatise will provide a relatively in-depth treatment of the subject matter, as well as citations to leading statutory and case authorities. Because there are many decisions related to this area of law, be certain to consult the supplement either online or in hard copy. Similarly, law reviews will give a good overview of the topic, and will provide the researcher with the analytical framework for suits of this type. Law reviews will also provide valuable citations to the relevant statutes and the most significant cases. It is important to remember that since law review articles are not updated, the citations may not reflect the most recent cases on the subject. That is particularly true when researching this topic since some of the articles date back to the early 1990s. However, identifying and locating the cases and statutes that are cited in the leading law reviews will provide you with the most important cases in the subject area.

Once you have identified and reviewed the best articles and the cases and statutes cited therein, it is imperative to update all of the cases. This will not only provide you with more recent cases in the subject area, it will also ensure that the earlier cases are still good law. Updating these cases may also lead to other useful secondary sources. For example, legal encyclopedias on employment law will likely have entries on this subject,

and will also prove to be a valuable resource in terms of both analysis and citations.

Whenever one is are dealing with a statutory problem, it is well worthwhile to consult an annotated version of the statute itself. While there are thousands of cases that have been decided pursuant to Title VII, if using additional search terms such as “English-only” and “workplace” will help to locate the decisions that are most relevant. Be certain to read the cases to see which other cases those courts have relied on; they will help you to determine the leading cases.

Examining the EEOC website will also be critical to ensuring that your research is complete. Not only does the website contain the text of the EEOC guidance, it also contains the EEOC Compliance Manual which provides important background on the EEOC’s views as to how the guidance should be interpreted and applied. The website also contains press releases about settlements the Commission has reached in English-only cases, as well as other writings on national origin discrimination, some of which touch on English-only rules specifically.

A researcher would be remiss in ignoring cost-free research options online. General searches relating to English-only rules may turn up ways in which the topic has arisen outside of traditional legal channels. For example, the Leon’s Custard story which appears at the beginning of this guide was found through a Google search. Google Scholar provides free access to many law review articles and cases. It is critical to understand that since Google Scholar does not have a mechanism for updating cases, a careful researcher must be certain to ensure that the cases that they have found are still good law.

### III. SECONDARY SOURCES

There is a vast array of secondary material available on this topic, perhaps because it is one that is frequently litigated but is still lacking a “final word” from the Supreme Court or Congress. Legal encyclopedias and some employment law treatises address this issue, and citations for the most significant ones are provided below. There is a truly staggering number of law review articles that have been written on this topic dating back to the early 1990s. Listed below are the citations for the most relevant articles from roughly 2000 to the present. They are listed from newest to oldest. While many of the earlier ones are not technically outdated as a matter of law, because of their age they do not include many of the newer cases and so are less helpful.

#### A. Law Reviews

Jasmine B. Gonzales Rose, *Race Inequity Fifty Years Later: Language Rights under the Civil Rights Act of 1964*, 6 Ala. Civ. Rts. & Civ. Liberties L. J. 167 (2014)

Gonzales argues that language is not “race-neutral,” it is “race laden.” The article summarizes the Civil Rights Act’s “treatment of language discrimination and suggests ways that the statute can better protect against such discrimination.” English-only rules are discussed at length. The author ultimately concludes that the Act must be amended to specifically include language discrimination in order to satisfy its intended purpose of eradicating workplace discrimination.

Braden Beard, *No Mere “Matter of Choice”: The Harm of Accent Preferences and English-Only Rules*, 91 Tex. L. Rev. 1495 (May 2013)

The article discusses the difficulty non-native English speakers have in complying with English-only rules because language is an immutable characteristic. The author also discusses the importance of language and accent to an employee's identity, which is why English-only rules are so burdensome to immigrants. The author states that:

[T]he jurisprudence surrounding English-only rules and accent discrimination does not do justice to Title VII's prohibition of discrimination on the basis of national origin. Courts generally do not find a significant discriminatory impact in forcing an employee to comply with an English-only rule or passing him over for a job because of his foreign accent, possibly because the judges themselves do not place much value on other languages or manners of speech. These courts fail to appreciate how language and accent are connected to one's sense of national origin identity. 91 Tex. L. Rev. at 1524.

Carlo A. Pedrioli, *Respecting Language as Part of Ethnicity: Title VII and Language Discrimination at Work*, 27 Harv. J. Racial & Ethnic Just. 97 (Spring 2011)

The author takes the position that "in the absence of a legitimate, non-discriminatory reason or a business necessity, Title VII . . . can protect employees from language-based discrimination in the workplace." He concludes by stating that "[l]anguage is a part of one's ethnicity, which refers to one's culture. Ethnicity, much as race already does, should receive protection under Title VII."

James Leonard, *The Zero-Sum Game of Language Accommodations in the Workplace*, 33 Cardozo L. Rev. 1 (Oct. 2011)

The author reviews the statutory and regulatory history of English-only rules. He then puts forth his argument against "culturally-based language accommodations," and goes on to explain why he believes the major arguments in favor of language-based accommodations should not prevail. The author urges the abandonment of the EEOC guidelines for the following reasons:



Title VII's antidiscrimination mandate provides the legal muscle against such unfair treatment, creating equality among old-line citizens and newcomers in the competition for economic success. The same act goes a step too far, however, when its implementing regulations impose duties of cultural accommodation and tolerance on employers and workplaces. I have attempted to demonstrate in this Article that minority language rights as conceived by the EEOC guidelines do not pertain to business necessity and, more importantly, favor the cultural views of some workers at the expense of employers and other workers. Such tradeoffs are impossible to reconcile with our prevailing norms of individual control over culture free from coercion by sovereign authorities. It would be wise, therefore, to abandon the scheme created by the EEOC guidelines. 33 *Cardozo L. Rev.* 51–52.

Janet Ainsworth, *Language, Power and Identity in the Workplace: Enforcement of "English-Only" Rules in the Workplace*, 9 *Seattle J. for Soc. Just.* 33 (2010)

The author discusses how English-only rules are a civil rights issue because the burden of such rules "fall disproportionately on workers based on their race or national origin." The article discusses the unconscious nature of code-switching and the difficulty that many bilingual people have in speaking only one language. The author argues for protection of linguistic minorities in order to explicitly protect bilingual workers.

Andrew J. Robinson, *Language, National Origin and Employment Discrimination: The Importance of the EEOC Guidelines*, 157 *U. Penn. L. Rev.* 1513 (2009)

The article discusses the circuit split and disparity of treatment of English-only rules in the district courts. The author also focuses on the ever-increasing number of foreign workers in the American workforce and the rise in national origin discrimination claims. He urges the Supreme Court to act on this issue, and to find that the EEOC's guidelines are deserving of deference. Such a decision would

be consistent with the stated purpose of Title VII: “to achieve equality of employment opportunities and to remove barriers that have operated in the past to favor an identifiable group . . . over other employees.”

Robin S. Stoter, *Discrimination & Deference: Making a Case for the EEOC’s Expertise with English-Only Rules*, 53 Vill. L. Rev. 595 (2008)

After reviewing the statutory and regulatory background of claims of this type, the author concludes that the present state of the law does not adequately protect non-native English-speaking employees. The author states that “[j]udicial refusal to adhere to the EEOC guidelines perpetuates national origin discrimination.” She urges Congressional action—either specifically stating that the EEOC guidelines apply or amending Title VII to explicitly address language discrimination. Such actions, in her view, fairly protect employees but also protect employers who need only prove a business necessity for the rule.

Katie Klaeren, *Moving Toward a More Protective Interpretation of National Origin Discrimination under Title VII?: Maldonado v. City of Altus*, 77 Cinn. L. Rev. 349 (Fall 2008)

This note analyzes the *Maldonado* case in detail, and argues that “the court’s recognition of the stigma imposed on employees subjected to English-only rules offers an opportunity to re-characterize English-only rules as a practice deserving of Title VII protection, rather than a benign employer prerogative.” The author contends that to a large extent the *Maldonado* Court adopted the EEOC guidelines, and that this case should be used as a framework in analyzing future claims of this type.

Melissa Meitus, *English-Only Policies in the Workplace Compared to the EEOC Guidelines*, 84 Denv. L. Rev. 901 (2007)

In addition to reviewing Title VII and the EEOC guidelines, the author addresses various cases decided under the disparate treatment

analysis versus the disparate impact analysis. The author concludes that the disparate impact theory is the one that is most consistent with the EEOC guidelines, and the one that “properly balances the rights of employers and employees, unlike the EEOC guidelines, because disparate impact protects language as a part of national origin, while also allowing employers to run safe and efficient businesses.” The paper also argues that “the disparate impact approach is consistent with the legislative intent of Title VII.”

Prescott Natalie, *English Only at Work, Por Favor*, 9 U. Pa. J. Lab. & Emp. L. 445 (Spring 2007)

Prescott addresses two major competing policy concerns with regards to instituting a workplace-based English-only rule: “employers’ rights to impose the rule pursuant to business necessity and the reasons some employees feel that a broad English-only rule is unfair to bilingual workers.” The author also looks at necessary “steps that the employers must take to ensure that the rule is narrowly tailored and fairly applied.”

The author, herself a multi-lingual immigrant, “discusses a recent cultural shift from language assimilation to language accommodation and the negative impact of this accommodation on the workplace.” After examining “the crucial role of English in cultural assimilation,” and “analyz[ing] the consequences that language accommodation has on workers who are not native English speakers, concentrating on those intimately related to the lower socioeconomic status of workers with poor English skills,” she concludes that “although language accommodation may be important in education and public spheres, an English-only rule in the workplace is necessary because it ensures employees’ ability to improve their socioeconomic status and allows employers to foster a harmonious and productive work environment.”

Weeden, Darnell L., *The Less Than Fair Employment Practice of an English-Only Rule in the Workplace*, 7 Nev. L. J. 947 (Summer 2007)

Here, the author advocates for deference to the EEOC guidelines and their interpretation of Title VII. He argues that the discriminatory impact of English-only rules “ought to be beyond rational debate,” and urges that it be the employer, rather than the employee, who must meet the burden of proof in these cases. Weeden believes that the employee’s right to speak English and the importance of cultural diversity “should be protected more than the production of a plausible business justification.”

Rodriguez, Cristina M., *Language Diversity in the Workplace*, 100 Nw. U. L. Rev. 1689 (Summer 2006)

The author starts her piece with a discussion of the actions of a manager at a Dunkin’ Donuts in Yonkers, New York in 2005, who posted a sign urging customers to complain to management if they heard workers speaking in a language other than English. The manager had posted the sign in reaction to some complaints from customers who felt disrespected by employees who were speaking Spanish behind the counter.

Interestingly, there was a huge outcry to his posting of the sign, not by the workers at the site, but by members of the local community of all ethnicities; and defending the Latino, Filipino and Egyptian workers at the store. Dunkin’ Brands (the parent company) also disassociated itself from the manager’s actions, stating that while it is their policy for all employees to be fluent in English, addressing customers in their own language “can be a key element in creating a hospitable environment.”

The author uses this anecdote as the basis of her thesis that:

[T]he consequences of the English-only rule with which we should be most concerned are social, not individual, in nature. The interest we should focus on protecting in the workplace is not the individual worker’s freedom of expression—the interest courts routinely dismiss in rejecting challenges to English-only rules—but his or her interest in free association and social bonding, both with fellow workers and with the community beyond the workplace. Securing this freedom will require pro-

protecting the individual characteristics or behaviors that facilitate association, which will include establishing a legal presumption against English-only rules. Such a presumption ultimately will promote the social objective that animates this Article—the idea that the cultural burdens of immigration and pluralism must be shared by all members of the population.” 100 Nw. L. Rev. at 1691–92.

Crowe, Amy, *May I Speak? Issues Raised by Employer’s English-Only Policies*, 30 Iowa J. Corp. L. 593 (Spring 2005)

Workplace rules that direct employees to speak English-only do not promote “workplace harmony,” rather they “dichotomize the workplace between monolingual English speakers and bilingual speakers because they make bilingual speakers feel unnecessarily targeted and subject to reprimand or termination.” The author provides some practical suggestions for actions that an employer might take to harmonize these two competing policies, particularly where safety considerations are involved.

McCalips, Rosanna, *What Recent Court Cases Indicate about English-Only Rules in the Workplace: A Critical Look at the Need for a Supreme Court Ruling on the Issue*, 4 U. Pa. J. Lab. & Emp. L. 417 (Winter 2002)

The comment focuses on the inconsistent legal authority nationwide and looks favorably on the “trend in recent years . . . toward the use of psycho-linguistic evidence to show that language is not a volitional choice and that, therefore, policies which punish employees for their use of a language other than English impose a disparate impact on them.” The author continues on to argue that a ruling on the issue by the Supreme Court:

would vitiate the need to present the same psycho-linguistic evidence over and over again in order to show that language is not a volitional choice, but is rather the product of one’s national origin and a psychological phenomena. By showing that language use does not involve choice, the theory that the volitional

choice severs the link between language and national origin—which some courts have relied on to find that language does not implicate national origin—would be invalidated. 4 U. Pa. J. Lab. & Emp. L. at 437.

Colon, Mark, *Line Drawing, Code Switching, and Spanish as Second-Hand Smoke: English-Only Workplace Rules and Bilingual Employees*, 20 Yale L. & Pol’y Rev. 227 (2002)

Colon takes the position that many of the courts that have examined this issue have misunderstood the “nuances” of what it means to be bilingual. He states that:

The leading federal appellate court decisions on English-only workplace rules have set up a false dichotomy by distinguishing “fully” bilingual from monolingual national origin minorities, including in the latter group those plaintiffs with limited English-language proficiency . . . these cases have understated the discriminatory impact of English-only workplace rules on all national origin language minorities, particularly those that the leading cases describe as fully bilingual . . . [T]he EEOC’s guidelines on National Origin Discrimination—demonstrating a truer understanding of language practices among bilingual national origin minorities—more accurately fulfill Congress’ objective to eliminate discriminatory workplace practices than does the analysis of the leading cases. 20 Yale L. & Pol’y Rev. at 229–30.

The Note concludes by suggesting some benefits that would follow from the adoption of the guidelines by the federal circuits.

Jacobson, Jacqueline M., *English-Only Rules and the Effect of the Business Necessity Defense on the Small Business Employer*, 5 J. Small & Emerging Bus. L. 265 (Summer 2001)

This article focuses on the heightened importance of the business necessity defense when it is applied in the case of a small business. In support of this rationale, the author argues that:

The safety and productivity of a small business are uniquely tied to its employees, in contrast to a large employer. Because there are so few employees in a small business, lack of communica-

tion among the workers can be far more directly detrimental to the output and function of the business. A large employer has a greater number of employees and resources with which to accommodate a variety of work environments. A large employer has the capacity to transfer disgruntled employees, or to provide training to ease in-house conflict. The small employer's need for an English-only rule heightens when worker safety, productivity, or effective supervision are jeopardized because of his inability to provide quick and effective solutions to employee conflict and worker safety issues. 5 J. Small & Emerging Bus. L. at 267.

### **B. Legal Encyclopedias and Treatises**

Deborah F. Buckman, Annotation, *Requirement that Employees Speak English in Workplace as Violative of Federal Constitutional and Statutory Law*, 24 A.L.R. Fed. 2d 587 (originally published in 2007)

45 Am. Jur. 2d *Job Discrimination* § 153 (2016)

45B Am. Jur. 2d *Job Discrimination* § 870 (2016)

3 Emp. Discrimination L. and Litig. § 28.11 (2015)

3-60 Larson on Employment Discrimination § 60.07 (2015)

3-60 Larson on Employment Discrimination § 60D.07 (digest of additional cases 2015)





## **IV. PRIMARY SOURCES**

### **A. Federal Statutes**

#### **42 U.S.C. § 2000(e)-2. Unlawful employment Practices:**

##### **(a) Employer Practices**

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise 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.

##### **(k) Burden of Proof in disparate impact cases**

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

## **B. Federal Regulations and EEOC Manual**

### **EEOC GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN**

#### **29 C.F.R. § 1606.7 Speak-English-only rules.**

(a) When Applied at All Times. A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it.

(b) When Applied Only at Certain Times. An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.

(c) Notice of the Rule. It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin.

## **EEOC Compliance Manual Section 13 – National Origin Discrimination (December 2, 2002)**

<https://www.eeoc.gov/policy/docs/national-origin.html#VC>  
(footnotes omitted—consult EEOC website for footnotes).

### **C. English-Only Rules**

Some employers have instituted workplace policies restricting communication in languages other than English, often called “English-only rules.” In fiscal year 2002, the Commission received 228 charges challenging English-only policies. The application of Title VII to such rules is discussed below.

#### **1. Application of Title VII to English-Only Rules**

Title VII permits employers to adopt English-only rules under certain circumstances. As with any other workplace policy, an English-only rule must be adopted for nondiscriminatory reasons. An English-only rule would be unlawful if it were adopted with the intent to discriminate on the basis of national origin. Likewise, a policy that prohibits some but not all of the foreign languages spoken in a workplace, such as a no-Navajo rule, would be unlawful.

#### **EXAMPLE 19.**

#### **ENGLISH-ONLY RULE: INTENTIONAL DISCRIMINATION**

XYZ Textile Corp. adopts a policy requiring employees to speak only English while in the workplace, including when speaking to coworkers during breaks or when making personal telephone calls. XYZ places Hispanic workers under close scrutiny to ensure compliance and replaces workers who violate the rule with non-Hispanics. Jose, a native Spanish speaker, files a charge with the EEOC alleging that the policy discrimi-

nates against him based on his national origin. XYZ states that the rule was adopted to promote better employee relations and to help improve English skills. However, the investigation reveals no evidence of poor employee relations due to communication in languages other than English. Nor are proficient English skills required for any of the positions held by non-native English speakers. Because XYZ's explanation is contradicted by the evidence, the English-only rule is unlawful.

Even where an English-only rule has been adopted for nondiscriminatory reasons, the employer's use of the rule should relate to specific circumstances in its workplace. An English-only rule is justified by "business necessity" if it is needed for an employer to operate safely or efficiently. The following are some situations in which business necessity would justify an English-only rule:

- For communications with customers, coworkers, or supervisors who only speak English
- In emergencies or other situations in which workers must speak a common language to promote safety
- For cooperative work assignments in which the English-only rule is needed to promote efficiency
- To enable a supervisor who only speaks English to monitor the performance of an employee whose job duties require communication with coworkers or customers

The following is an example of a narrowly crafted English-only rule promoting safety in the workplace.

**EXAMPLE 20.**

**PERMISSIBLE ENGLISH-ONLY RULE: PROMOTING SAFETY**

XYZ Petroleum Corp. operates an oil refinery and has a rule requiring all employees to speak only English during an emergency. The rule also requires that employees speak in English while performing job duties in laboratories and processing areas where there is the danger of fire or explosion. The rule does not apply to casual conversations between employees in the laboratory or processing areas when they are *not*

performing a job duty. The English-only rule does not violate Title VII because it is narrowly tailored to safety requirements.

## **2. Best Practices**

In evaluating whether to adopt an English-only rule, an employer should weigh business justifications for the rule against possible discriminatory effects of the rule. While there is no precise test for making this evaluation, relevant considerations include:

- Evidence of safety justifications for the rule
- Evidence of other business justifications for the rule, such as supervision or effective communication with customers
- Likely effectiveness of the rule in carrying out objectives
- English proficiency of workers affected by the rule.

Before adopting an English-only rule, the employer should consider whether there are any alternatives to an English-only rule that would be equally effective in promoting safety or efficiency.

### **EXAMPLE 21. ENGLISH-ONLY RULE: NONDISCRIMINATORY ALTERNATIVE**

At a management meeting of XYZ Electronics Co., a supervisor proposes that the company adopt an English-only rule to decrease tensions among its ethnically diverse workforce. He reports that two of the employees he supervises, Ann and Vinh, made derogatory comments in Vietnamese about their coworkers. Because such examples of misconduct are isolated and thus can be addressed effectively under the company's discipline policy, XYZ decides that the circumstances do not justify adoption of a facility-wide English-only rule. To reduce the likelihood of future incidents, XYZ supervisors are instructed to counsel line employees about appropriate workplace conduct.

An employer should ensure that affected employees are notified about an English-only rule and the consequences for violation. The employer

may provide notice by any reasonable means under the circumstances, such as a meeting, e-mail, or posting. In some cases, it may be necessary for an employer to provide notice in English *and* in the other native languages spoken by its workers. A grace period before the effective date of the rule also may be required to ensure that all workers have received notice.

#### **D. State Statutes**

Many states have passed laws relating to English-only policies in various settings, e.g. mandating that English is the official state language. Rules of that nature are beyond the scope of this guide. Rather listed below are statutes that certain states have enacted relating specifically to English-only rules in the workplace. It is likely that legislators will continue to be active in this area, so a wise researcher would continue to monitor this area.

##### **California**

Cal. Gov. Code § 12951 (West current through Ch. 22 of 2016 Reg.Sess.)

The California statute appears to go beyond the federal regulation found in § 1606.7 and define “business necessity” even more narrowly, thus making it harder for an employer to justify the policy.

##### **Colorado**

Colo. Code Regs. § 708-1:70.2 (West current through CR, Vol. 39, No. 10, May 25, 2016)

This regulation acknowledges that a person’s native language is often an essential “national origin characteristic,” and that such policies are “discouraged” and “presumed to create a discriminatory environment.” The Regulation goes on to state that such policies are permissible if applied at certain times and where there is a business necessity in order for a business to operate “safely or efficiently.” The standard

states that such policies should only be adopted after other options have been considered. It goes on to adopt the examples from the EEOC Compliance Manual as situations where such a policy might satisfy the business justification exception.

## **Illinois**

75 Ill. Comp. Stat. Ann. § 2-102(A-5) (West current through P.A. 99-506 of the 2016 Reg. Sess.)

Illinois' policy is directed more to the breadth of the policy—these policies are unlawful in that state when they bar an employee from communicating in their native language in “communications that are unrelated to an employee’s duties.”

## **Tennessee**

Tenn. Code Ann. § 4-21-401 (West current with laws from the 2016 Second Reg. Sess., eff. through March 24, 2016)

Tennessee’s statute does not presume that these policies are presumptively discriminatory; rather they state that a speak-English policy which is in effect at certain times is lawful if necessary for the “safe and efficient operation of the business.” The statute also requires that effective notice of the policy be given to employees.

## **E. Cases**

### ***Summary of Legal Issue***

Title VII does not specifically prohibit discrimination based on an employer’s failure to allow an employee to speak their native language. However, the relevant EEOC guidelines state that a rule which requires employees to speak English at all times presumptively violates Title VII, while rules that apply only at certain times may pass muster if there is a demonstrable business necessity for the rule. These regulations make it much easier for a

plaintiff to recover than under a more traditional Title VII analysis. The courts have not applied either burden of proof consistently in these types of cases, and since the overwhelming number of the cases in this area are at the District Court level, there is no clear judicial guidance as to which burden should be applied. This guide will first examine cases decided under the guidelines, and will next analyze those resolved pursuant to a Title VII analysis.

### **CASES DECIDED UNDER THE EEOC GUIDELINES, WHICH PRESUME DISPARATE IMPACT**

The first group of cases relates to § 1606.7(a) of the Speak-English-only rules, regarding rules that are applied at all times. The EEOC presumes that such rules are a “burdensome term and condition of employment,” and thus are presumptively discriminatory. Yet some of these policies are so vaguely written it is impossible to tell whether they apply full time or not. This is a critical factor because under the guidelines, full time rules are presumptively discriminatory. Section two looks at rules that are applied only some of the time, as discussed under 1606.7(b). The final section examines cases decided under § 1606.7(c), which discusses giving proper notice of the rule to employees. The adequacy of notice section to the employee is a frequent point of contention.



## **1. Did the English-only Rule Apply at All Times?**

***No, so it was not presumptively discriminatory.***

*Pacheco v. New York Presbyterian Hospital*, 593 F. Supp. 2d 599 (S.D.N.Y. 2009)

Plaintiff, who was bilingual, was a patient representative at a hospital. Patients repeatedly complained to hospital administrators that they were uncomfortable when hospital employees spoke Spanish around them, because they felt that they were being talked about. Plaintiff's supervisor told him to speak only English around non-Spanish-speaking patients. He complained to human resources, who took no action, and he sued. The district court found in favor of the hospital because the rule did not apply at all times, and there was a legitimate reason for the rule—namely promoting customer satisfaction.

*EEOC v. Sephora, U.S.A.*, 419 F. Supp. 2d 408 (S.D.N.Y. 2005)

Sephora's sales representatives were required to speak English-only on the sales floor when speaking with customers, unless the customer requested otherwise. Employees were permitted to speak their chosen language at other times, including breaks. Court upheld the rule as justified by business necessity.

*Roman v. Cornell University*, 53 F. Supp. 2d 223 (N.D.N.Y. 1999)

After numerous office incidents involving plaintiff, including ones in which she would speak about other employees in front of them in Spanish, she was instructed not to engage in conversations in Spanish in front of non-Spanish-speaking persons. Her use of Spanish was never explicitly prohibited. The Court found that this vague policy did not constitute an "applied at all times" rule, and thus was not presumptively discriminatory.

*Prado v. Luria*, 975 F. Supp. 1349 (S.D. Fla. 1999)

The policy was vague as to whether or not it was applied at all times. While Prado claimed that she believed that the policy applied at all times, there was no evidence proffered that she had been instructed to speak English away from the sales floor or business offices. The Court found that this vague policy did not justify imposition of the “applied at all times” presumption.

***Yes, so there is a presumption of discrimination.***

This argument is based on the plain meaning of the guidelines rather than on case law. However, there are a couple of cases that have analyzed the “applied at all times” rule, and chosen to apply it to the benefit of the plaintiff.

*EEOC v. Premier Operator Services*, 113 F. Supp. 2d 1066 (N.D. Texas 2000)

Relying on *Synchro-Start*, the Court held that the employer’s blanket policy of requiring that English be spoken exclusively, except when communicating with non-English-speaking customers, constituted disparate treatment.

*EEOC v. Synchro-Start Products*, 29 F. Supp. 2d 911 (N. D. Ill. 1999)

Synchro-Start required all of its employees to speak only English during working hours. The Court found that under the EEOC guidelines, such a rule was presumptively discriminatory, and shifted the burden of persuasion to the employer.

*Long v. First Union Corp.*, 894 F. Supp. 2d 933 (E.D. Va. 1995)

Although judgment in this case was ultimately for the defendant, the parties did not dispute that the English-only policy was applied at all times when it was applied at all times except when assisting non-English-speaking customers.

## 2. Did the English-only Rule Apply at Certain Times?

*Yes, so no presumption of discrimination.*

*Cosme v. Salvation Army*, 284 F. Supp. 2d 229 (D. Ma. 2003)

The employer's handbook stated that the purpose of the rule, which was only applied to employees working in public areas, was to, "promote workplace harmony by ensuring that employees are able to communicate with customers, coworkers and supervisors, to help managers monitor employees, and to improve productivity and efficiency." The Court, in finding for the employer, stated that the EEOC guidelines provide only guidance but are not binding and the mere existence of an English-only policy does not violate the regulations.

*Martinez v. Labelmaster*, 1998 WL 786391 (N.D. Ill. Nov. 6, 1998)

Martinez's supervisor informally imposed an "English only" rule which required non-English-speaking employees to speak English while at their work stations. The Court held that such a rule does not raise an inference that defendants' reason for Martinez's termination is false. The Court found, as did the magistrate judge, that while EEOC guidelines state that a rule requiring employees to speak only English at all times constitutes a presumptive violation of Title VII, this rule does not create such a presumption. The Court found that it is not a presumptive violation because: (1) the rule was enforced only at work stations; and (2) the purpose of the rule was to promote *esprit de corps* in that co-workers would not understand what their non-English-speaking co-workers were saying.

*Tran v. Standard Motor Co.*, 10 F. Supp. 2d 1199 (D. Kan. 1998)

The Court refused to even consider whether or not the EEOC guidelines should be applied since "there is no evidence . . . that defendant Standard's purported English-only policy was applied at all times."

*Long v. First Union Corp.*, 894 F. Supp. 2d 933 (E.D. Va. 1995)

Court notes that the EEOC “presumes that an employer’s English-only rule is national origin discrimination if the rule is enforced at all times, but permits such a rule provided that is enforced only at certain times. . .”

***No, but the presumption of discrimination should still apply.***

*EEOC v. Synchro-Start Products*, 29 F. Supp. 2d 911 (N.D. Ill. 1999)

The Court considered the English-only policy under subsection (b) of the EEOC regulation, but still found that the existence of an English-only policy creates a presumption of disparate impact.

*Garcia v. Spun Steak*, 998 F.2d 1483 (9th Cir. 1993)

The partial dissent by Judge Boochever provides support for the proposition that the EEOC guidelines shift the burden to the defendant once the English-only policy is shown to exist.

***The hybrid approach.***

*Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006) (overruled on other grounds by *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 n. 2 (10th Cir. 2006)).

The City of Altus implemented an English-only policy for employees, requiring them to conduct all work related communications in English. There was some factual disagreement as to whether or not the policy applied at all times. The District Court granted summary judgment for defendants. Acknowledging the lower court’s reliance on *Spun Steak* and its rejection of the guidelines, the Circuit Court said that “we need not resolve the validity of that presumption.” *Id.* at 1304. Rather, the *Maldonado* Court chose to treat the guidelines as persuasive authority and with “respect . . . not as an indication of governing law, but as an indication of what a reasonable, informed person may think about the impact of an English-only work rule on

minority employees, even if we might not draw the same inference.” *Id.* at 1306. The Court, in reversing the grant of summary judgment, went on to state that while it was not suggesting that the guideline be admissible at trial or part of a jury instruction, a reasonable juror might be able to find for the plaintiffs under the standard laid out in the guidelines. *Id.*

### **3. Did the Employer Give Adequate Notice of the Rule; and Its Consequences?**

#### ***Notice of rule and its consequences were adequate.***

*Roman v. Cornell University*, 53 F. Supp. 2d 223 (N.D.N.Y. 1999)

The vague policy in this case which merely asked plaintiff to refrain from speaking Spanish in front of non-English speakers, and did not spell out any specific consequences, constituted sufficient notice of the rule.

*Martinez v. Labelmaster*, 1998 WL 786391 (N.D. Ill. Nov. 6, 1998)

Martinez’s supervisor informally imposed an “English only” rule which required non-English-speaking employees to speak English while at their work stations. Court held that supervisor provided Martinez with adequate notice since she informed her of the rule when she was hired.

#### ***Notice of rule and its consequences were inadequate.***

*EEOC v. Synchro-Start Products*, 29 F. Supp. 2d 911 (N.D. Ill. 1999)

Synchro-Start required its employees to speak English only at all times while on the premises. Synchro-Start did not explain to its employees the consequences of violating the rule prior to its inception. The Court found that under the guidelines, this constituted sufficient evidence to shift the burden of proof from the plaintiff to the defendant, who must demonstrate that there was a business necessity for the rule.

*Saucedo v. Brother's Well Service, Inc.*, 464 F. Supp. 919 (S.D. Tex. 1979)

In one of the first English-only cases, the Southern District of Texas held that English-only rules have a disparate impact on non-English speakers. About 50% of the employees at Brother's Well Service were Mexican-American, including the plaintiff. While Saucedo was employed by Brother's, his supervisor told him that the company did not allow any "Mesican talk." He was never directly informed about the company's English-only policy or that he could be terminated for speaking his natural language. He was subsequently terminated by the same supervisor for speaking two words of Spanish to a co-worker. The court found that Saucedo's employer had discriminatorily discharged him for violating an unwritten rule of which he had no knowledge.

**DID THE POLICY HAVE A DISPARATE IMPACT ON THE PLAINTIFF UNDER TITLE VII; AND IF SO, WAS THERE A BUSINESS NECESSITY WHICH JUSTIFIED THE APPLICATION OF THE POLICY?**

***Summary of Legal Issue***

This issue requires a strict Title VII analysis; unlike the guidelines, the statutory analysis first requires a determination of whether or not the policy had a disparate impact on the Plaintiff. If it did, an employer must then prove that they had a legitimate business necessity for the policy. Generally, it is the older cases that support English-only rules. It seems to be the more recent trend to find in favor of the employee, particularly where expert linguistic testimony is proffered.

## **1. Did the Policy Have a Disparate Impact on the Plaintiff?**

***The English-only policy did not have a disparate impact on the Plaintiff.***

*Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980)

In *Gloor*, a Mexican American salesman challenged a company rule that employees speak only English except when communicating with Spanish-speaking customers. Garcia claimed that his employer fired him when he responded in Spanish to another Mexican American employee's question, which was asked in Spanish. Garcia argued that his employer violated Title VII by firing him. The Fifth Circuit held that Garcia's claim did not fall within Title VII because the Act protects against discrimination based on "immutable" characteristics, not employee preferences. The court held that because the plaintiff was fluent in both Spanish and English, he could comply with the English-only policy by speaking English and his speaking Spanish was not "immutable." Therefore, the policy had no discriminatory impact on him. The court rejected the plaintiff's claim, insisting that there could be no disparate impact if the affected employee could comply with the rule but preferred not to. The EEOC responded to the *Gloor* decision by promulgating the guidelines on Discrimination Because of National Origin, discussed previously.

*Garcia v. Spun Steak*, 998 F.2d 1483 (9th Cir. 1993)

In *Garcia*, 24 of the 33 employees were Spanish/English bilingual. The company instituted a rule where Spanish could be spoken on break time only. The plaintiffs described the adverse effects of their employer's English-only rule in three ways: (1) it denies them the ability to express their cultural heritage on the job; (2) it denies them a privilege of employment that is enjoyed by monolingual speakers of English; and (3) it creates an atmosphere of inferiority, isolation, and intimidation. *Id.* at 1486–87. The court held that: (1) Title VII does not protect workers' expression of their culture in the workplace; (2) The employer had every right to include the workplace, including

requiring speaking English as an employment condition; and (3) the plaintiffs did not prove a hostile work environment.

***The English-only policy did have a disparate impact on the Plaintiff.***

*Gutierrez v. Municipal Court*, 838 F.2d 1031, vacated as moot, 490 U.S. 1016 (1989) (vacated because plaintiff quit her job during the pendency of the appeal).

The Ninth Circuit followed the EEOC Guideline, presuming that the Municipal Court's policy, requiring employees to speak English except when acting as translators or during breaks, discriminated on the basis of national origin. The employer offered several business justifications for the rule: (1) the United States is an English-speaking country and California an English-speaking state; (2) Spanish spoken among co-workers disrupts the workplace and turns it into a "Tower of Babel"; (3) the English-only rule promotes racial harmony; and (4) the English-only rule ensures supervisors know what their supervisees are saying. Ultimately, the court disagreed with each of these justifications and found that the English-only rule had a discriminatory impact. However, the decision in *Gutierrez* was vacated as moot when the plaintiff quit her job while her case was pending before the Supreme Court.

*EEOC v. Premier Operator Services*, 113 F. Supp. 2d 1066 (N.D. Texas 2000)

In *Premier*, the court relied heavily on the expert testimony of Dr. Susan Berk-Seligson, Professor of linguistics and Hispanic language and culture at the University of Pittsburgh. Dr. Berk-Seligson testified that:

adhering to an English-only policy is not simply a matter of preference and can be virtually impossible in many cases for bilingual speakers. According to Dr. Berk-Seligson, the code-switching phenomenon was discovered by psycho-linguists in the late 1990's. Code-switching is the phenomenon where "[b]ilinguals whose original language is a language other than English uncon-



sciously switch from English to their original or primary language when speaking informally with fellow members of their cultural group. This switching back and forth, formally known as “code switching” can occur in conversation even within a sentence or between sentences. The expert’s findings that the class members in this case were subject to code-switching was based not only on her knowledge and research in the field of linguistics, but also on her review of information elicited from the class members. *Id.* at 1069–70.

Dr. Berk-Seligson further testified, relevant to the facts of this case, that bilingual speakers will generally tend to continue to speak in the language in which they most recently spoke, as in a case where an Operator turns to speak to a fellow worker immediately following a conversation with a Spanish-speaking customer. The class members testified as to their automatic continued use of Spanish under these circumstances. *Id.*

In finding for the plaintiffs, the Court stated that:

While English-only rules may be seen as facially neutral, they disproportionately burden national origin minorities because they preclude many members of these groups from speaking the language in which they are best able to communicate, while rarely, if ever, having that effect on non-minority employees. Blanket English-only rules have a significant adverse impact on national origin groups whose primary language or language of national origin is not English. Further, even a tailored English-only rule must be justified by business necessity, if there is one that could conceivably exist, and in this case there is not. *Id.* at 1073.

*Montes v. Vail Clinic*, 497 F.3d 1160 (10th Cir. 2007)

Plaintiffs sued under a hostile-environment theory of discrimination, rather than disparate impact. The Court found for the defendant, and, relying on *Maldonado*, *Gloor*, and *Synchro-Start*, significantly noted in footnote 15:

Courts have primarily addressed the effect of an English-only policy under a disparate impact theory. [Citations omitted]. In

those cases, the courts were called to decide issues not raised before us—specifically, whether an English-only policy effected a disparate impact on Hispanic workers. Conversely, of course, a disparate impact theory does not require proof of discriminatory animus like the hostile work environment theory under which Ms. Escobedo chose to proceed in this case. Because our analysis is confined to a hostile work environment claim in which animus is required, we offer no views regarding what might have been the appropriate outcome of this case under a disparate impact theory. *Id.* at 1170.

## **2. Was There a Business Necessity for the Rule?**

***There was a legitimate business necessity for the rule.***

*Barber v. Lovelace Health Systems*, 409 F. Supp. 2d 1313 (D.N.M. 2005)

Employer's English-only rule, which applied at all times, was imposed as a result of fellow employees and one patient complaining that they felt uncomfortable when Spanish was spoken in front of them, because they thought they were being gossiped about. Court found that this constituted a legitimate, non-discriminatory reason for the policy and that employee did not proffer any less discriminatory policy than the one that was implemented.

*Garcia v. Spun Steak*, 998 F.2d 1483 (9th Cir. 1993)

Employees who did not understand Spanish claimed the use of Spanish by others distracted them while they were operating machinery. In response, the company president adopted an English-only policy, believing it would limit distractions. The company president also claimed that adopting the English-only policy improved the quality of its meat because the in-plant inspector from the U.S. Department of Agriculture spoke only English, and thus could not understand concerns that were raised in Spanish. The Court found there was a legitimate business necessity for the policy.

*Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980)

A company who employed eight salesmen, seven of whom were native Spanish speakers, adopted an English-only rule for the following reasons:

English-speaking customers objected to communications between employees that they could not understand; pamphlets and trade literature were in English and were not available in Spanish, so it was important for employees to be fluent in English apart from conversations with English-speaking customers; if employees who normally spoke Spanish off the job were required to speak English on the job at all times and not only when waiting on English-speaking customers, they would improve their English; and the rule would permit supervisors, who did not speak Spanish, better to oversee the work of subordinates. *Id.* at 267.

The court ruled for the employer, finding that the rule “did not forbid cultural expression,” and that there was a legitimate business necessity for the policy.

*Prado v. L. Luria*, 975 F. Supp. 1349 (S.D. Fla. 1999)

Plaintiff claimed that an English-only rule was discriminatory to her. Luria’s asserted two legitimate reasons for the policy: (1) to encourage store employees to speak English among themselves which would facilitate the practice of approaching customers first in English; and (2) to ensure that management understands what is being said in order to evaluate employees in all work related communications. The court held for the employer, stating that:

“an English-only workplace rule adopted with a principal purpose of providing for effective supervision and evaluation of employees furthers a legitimate business interest without violating protected rights . . . [a]n insistence that employees speak English in the workplace serves the . . . business purpose of minimizing the sense of alienation and resulting hostility felt by employees and customers who don’t speak or understand the foreign language.” *Id.* at 1357.

*Roman v. Cornell University*, 53 F. Supp. 2d 223 (N.D.N.Y. 1999)

The defendant did not entirely prohibit the plaintiff's use of Spanish in the workplace, but sought to prevent her from engaging in conversations in Spanish in the presence of those who were not Spanish-speaking because other employees had claimed that she was talking about them. The court accepted this justification.

*Kania v. Archdiocese of Philadelphia*, 14 F. Supp. 2d 730 (E.D. Pa. 1998)

The head cleric of a church prohibited all church employees from speaking Polish during business hours because he believed it was "offensive and derisive to speak a language which others do not understand." The court found the church had a "valid business justification" for the rule because it was "clear that the Church adopted its English-only rule to improve interpersonal relations at the Church, and to prevent Polish-speaking employees from alienating other employees, and perhaps church members themselves."

*Long v. First Union Corp.*, 894 F. Supp. 2d 933 (E.D. Va. 1995)

In *Long*, an employee complained to management that she felt it was rude when other employees spoke Spanish in front of non-Spanish-speaking employees. There had been complaints by a number of English-speaking employees that some Spanish-speaking employees had been talking about them and teasing them in Spanish, which made them uncomfortable. In dismissing the plaintiff's discrimination claims, the court found the policy "was enacted to prevent the employees from intentionally using their fluency in Spanish to isolate and to intimidate members of other ethnic groups."

*Tran v. Standard Motor Products, Inc.*, 10 F. Supp. 2d 1199 (D. Kan. 1998)

The employer required employees to speak English during working hours and during employee meetings "to prevent non-Vietnamese employees from feeling as if they were being talked about by Vietnamese employees." Another reason why the employer adopted its English-only policy was to help "prevent injuries through effective

communication on the production floor.” The court found these to be valid business reasons for the policy.

*Gonzalez v. The Salvation Army*, No. 89-1679-CIV-T-17, 1991 U.S. Dist. Lexis 21692 (M.D. Fla. May 28, 1991), aff’d, 985 F.2d 578 (11th Cir. 1993)

In *Gonzalez*, the employer received complaints from non-Spanish-speaking employees that conversations by employees in Spanish made them feel uncomfortable because they felt that they were being talked about. The director instituted an English-only policy so that he could better supervise what occurred in the workplace, and to avoid a morale problem. The court found that providing the “English speaking supervisors with the ability to manage the enterprise by knowing what was said in a work area” served a legitimate business purpose.

*Jurado v. Eleven-Fifty Corp.*, 630 F. Supp. 569 (C.D. Cal. 1985), aff’d, 813 F.2d 1406 (9th Cir. 1987)

Plaintiff was a bilingual disk-jockey who started sprinkling in some Spanish phrases on the air in order to increase Spanish listenership. The strategy failed and the program director told Jurado to return to his prior format, which did not include Spanish. When Jurado failed to do so, he was fired. Jurado sued, claiming national origin discrimination. The Ninth Circuit affirmed the lower court, relying on *Gloor*, and stating: “[a]n employer can properly enforce a limited, reasonable, and business-related English-only rule against an employee who can readily comply with the rule and who voluntarily chooses not to observe it as a matter of individual preference.”

***There was no legitimate business necessity for the rule.***

*EEOC v. Premier Operator Services*, 113 F. Supp. 2d 1066 (N.D. Texas 2000)

The English-only policy created a disparate impact on a class of employees based upon their national origin, which constitutes a viola-

tion of Title VII. Since the plaintiff had established a *prima facie* case, the burden then shifted to the defendant to prove a legitimate business necessity for the policy. The *Premier* court subsequently held that the defendant did not carry its burden on the issue of business necessity and ruled for the plaintiff, awarding \$650,000 in compensatory and punitive damages.

*Gutierrez v. Municipal Court*, 838 F.2d 1031 (10th Cir. 1988), vacated as moot, 490 U.S. 1016 (1989) (vacated because plaintiff quit her job during the pendency of the appeal).

The court relied on *Jurado* to distinguish the present case. The *Gutierrez* court reasoned that in *Jurado*, the radio station had a business necessity for implementing an English-only rule because the rule “pertained only to on-the-air broadcasting—the product the employer was offering to sell.” Unlike the employer in *Jurado*, the Municipal Court could not demonstrate a business necessity for implementing an English-only rule in order to reduce employee tensions and improve supervision; the court found that the justifications offered in this case did not satisfy the business-necessity standard.

## V. CONCLUSION

It is an unlawful employment practice under Title VII to discriminate against an employee on the basis of national origin. However, the statute is silent as to whether English-only rules constitute national origin discrimination. In an attempt to remedy this, the EEOC has promulgated guidelines that seek to make employers who implement such rules presumptively liable under the statute when the rules are implemented at all times; employers must prove a business necessity for the rule when it is not in effect at all times. Many defendants have successfully argued that these guidelines are inconsistent with the dictates of the statute.

The courts that have addressed this issue have been inconsistent in their approach and in their reasoning as to how they resolve these issues. With an ever more diverse work force, it is readily apparent that claims of this type will only increase, making increased clarity in this area of the law even more vital. The issues are more complicated than it might seem at first blush. There may well be safety reasons for crafting such a rule—for example in a hospital operating room or an air traffic control tower. However, the motivation for these rules in non-safety related contexts is much murkier and it is important that they not be used for discriminatory reasons.

It is surprising that in almost 40 years this issue has not yet been resolved by Congress or made it to the Supreme Court. It is clear that there is still great uncertainty in this area of the law, and that both employers and employees need guidance. Hopefully either Congress or the Supreme Court will resolve this issue in the coming years.