

**LANGUAGE RIGHTS/EEOC MEETING
MAY 14, 1999**

[illegible]

Slom
Carter
Appel
Jenny
Garcia

Edgar
Louis
Robert

What's the story
- new reg
- agreement

LANGUAGE RIGHTS/EEOC MEETING May 14, 1999

INTRODUCTIONS

- Review materials
- USSup. Ct. dismissed KZ can be leader of jurisdiction b/c can't look standing

BACKGROUND BY EEOC

- Title VII - nat'l origin discrimination. Have issued reg that consider case one TX, CA, KZ
- Garver - 5th Cir. 1980 - controlling - invalidated reg.
- Gutierrez - left her employer - most - 9th circuit - so no precedent - 12
- 11th - circuit - unpublished - no business necessity
- 4th - agreed with 9th no presumption of disparate

DISCUSSION, QUESTIONS, COMMENTS

3 Areas:

- (1) Accent discrimin
- (2) Fluency in English
- (3) Speak English Only Rules

NEXT STEPS

- What charges are you investigating based on - intake?
- It's a priority but not huge ↑ Despite this, trying to find info

Current Inventory

Since 1996 did not designate language/nat'l org. discrim.

138 197
139 198
110 1999

- significant ↑ probably b/c of i.c. outbreak - could go up to 2000.
- most are discharged, claimant or constructive discharge case like you have to sign & k or leave. Q/A - SD no of cases

- Harassment - terms + conditions - 50%.

- Hiring - ~~at~~ 3-4% - ~~low~~

- Discipline - 13% - reprimand, discharge

Lots of overlap

Nature of Charges - similar patterns.

Factors ↓ Charges

- Education/outreach

- Accessibility to EEOC - don't have staff in all geographic ~~and~~ areas.

- ^{lack of} Trust in govt

- most will not come forward while employed - fear ble of retaliation

- ~~Do~~ Do EEOC officers identify or ~~collect~~ out the issues.

- Cases are negative - Case laws are negative

What is current policy?

EEOC - of a blanket policy in the workplace, presumptively discriminatory
(but not law) ble disparate ^{impact} ~~impact~~. Business necessity
Ch say ~~to~~ significant ~~work~~ impact).

EEOC - If there is a cause out personal time, disparate ~~work~~ impact,
~~therefore~~ but justified safety + ~~efficiency~~ efficiency + harmony

Example of justification: - safety, efficiency

~~Re~~ - workers

- Bilingual - ~~consulting~~ Code-switching - (going to primary language.)

Current Activities

- Outreach to underserved community - Shetler (in agricultural camp)

- Education to el.

- Nat'l Enforcement Plan - I.R. priority

- Regional ~~case~~ ^{summary} ~~conflict~~ plans - ~~prohibit~~

- Chairwoman - NCLR, NACORE, ~~NH~~ Consortium, Unions, Civil Rights

B Base - who have a closer relationship - scope of problem, how manifest
in the summer

Commission meeting - on this issue in the Fall

TAP - Technical Assistance Programs to employees

Legal Strategy -

- Look for ~~to~~ ~~the~~ disparate impact ~~case~~ or wait get to business necessity.

- Develop ~~case~~ ~~case~~ case bc

- any difference in treatment = adverse impact.

Key - show harmful effects -

Need 2nd, 1st or 7th circuit

LANGUAGE RIGHTS/EEOC MEETING
May 14, 1999

INTRODUCTIONS

BACKGROUND BY EEOC

DISCUSSION, QUESTIONS, COMMENTS

NEXT STEPS

P

Hector GARCIA, etc., Plaintiff-Appellant,
v.

**Alton V. W. GLOOR et al., Defendants-
Appellees.**

No. 77-2358.

United States Court of Appeals,
Fifth Circuit.

May 22, 1980.

Mexican-American brought employment discrimination suit challenging his former employer's rule prohibiting employees engaged in sales work from speaking Spanish on the job. The United States District Court for the Southern District of Texas, Robert O'Connor, Jr., J., rendered judgment for the employer. Mexican-American appealed. After withdrawing an earlier opinion, 609 F.2d 156, the Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) a suggested class failed to meet the requirement that the class be so numerous that joinder of all members is impracticable, and (2) the employer's rule did not discriminate on the basis of national origin.

Affirmed.

Hatchett, Circuit Judge, concurred in the result.

[1] FEDERAL CIVIL PROCEDURE 174
170Ak174

Question of class certification is a procedural one, distinct from merits of the action. Fed.Rules Civ.Proc. Rule 23, 28 U.S.C.A.

[2] FEDERAL CIVIL PROCEDURE 161.1
170Ak161.1

Whether a class should be certified depends entirely on whether proposal satisfies requirements of class action rule. Fed.Rules Civ.Proc. Rule 23, 28 U.S.C.A.

[3] FEDERAL CIVIL PROCEDURE 163
170Ak163

In determining whether class is so numerous that joinder of all members is impracticable, basic question is practicability of joinder, not number of interested persons per se; practicability of joinder

depends on size of class, ease of identifying its members and determining their addresses, facility of making service and their geographic dispersion. Fed.Rules Civ.Proc. Rule 23(a)(1), 28 U.S.C.A.

[4] FEDERAL CIVIL PROCEDURE 184.10
170Ak184.10

Formerly 170Ak184

Where only 31 persons could possibly have been affected by employer's English-only rule, their identity and addresses were readily ascertainable, and they all lived in compact geographical area, suggested class in action challenging discriminatory employer's English-only rule failed to meet requirement that class be so numerous that joinder of all members is impracticable. Fed.Rules Civ.Proc. Rule 23(a)(1), 28 U.S.C.A.

[5] CIVIL RIGHTS 141
78k141

Formerly 78k9.10

Employer action does not violate Title VII merely because a reprobated reason plays some part in employer's decision, yet forbidden taint need not be sole reason for action in order to condemn it. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

[6] STATUTES 188
361k188

In interpreting statute, court starts with its plain words without pausing to consider whether statute differently framed would yield results more consonant with fairness and reason, and first consideration is the problem, not the answer.

[7] CIVIL RIGHTS 141
78k141

Formerly 78k9.10

The Equal Employment Opportunity Act does not prohibit all arbitrary employment practices but is directed only at specific impermissible bases of discrimination, namely, race, color, religion, sex, or national origin, which must not be confused with ethnic or sociological traits or unrelated status, such as citizenship or alienage, or poverty, or with activities not connected with national origin, such as labor agitation. Civil Rights Act of 1964, § 703 as amended 42 U.S.C.A. § 2000e-2.

[7] CIVIL RIGHTS ⚡158.1

78k158.1

Formerly 78k158, 78k9.14

The Equal Employment Opportunity Act does not prohibit all arbitrary employment practices but is directed only at specific impermissible bases of discrimination, namely, race, color, religion, sex, or national origin, which must not be confused with ethnic or sociological traits or unrelated status, such as citizenship or alienage, or poverty, or with activities not connected with national origin, such as labor agitation. Civil Rights Act of 1964, § 703 as amended 42 U.S.C.A. § 2000e-2.

[8] CIVIL RIGHTS ⚡141

78k141

Formerly 78k9.10

Save for religion, discriminations on which Equal Employment Opportunity Act focuses its laser of prohibition are those beyond the victim's power to alter, since no one can change his place of birth, place of birth of his forebears, his race or fundamental sexual characteristics. Civil Rights Act of 1964, § 703 as amended 42 U.S.C.A. § 2000e-2.

[8] CIVIL RIGHTS ⚡158.1

78k158.1

Formerly 78k158, 78k9.14

Save for religion, discriminations on which Equal Employment Opportunity Act focuses its laser of prohibition are those beyond the victim's power to alter, since no one can change his place of birth, place of birth of his forebears, his race or fundamental sexual characteristics. Civil Rights Act of 1964, § 703 as amended 42 U.S.C.A. § 2000e-2.

[9] CIVIL RIGHTS ⚡153

78k153

Formerly 78k9.10

Under Title VII, "disparate impact test" forbids use of any employment criterion, even when neutral on its face and not intended to be discriminatory, if, in fact, criterion causes discrimination as measured by impact on person or group entitled to equal opportunity; however, there is no disparate impact if criterion is one that affected employee can readily observe and nonobservance is matter of individual preference. Civil Rights Act of 1964, § 703 as amended 42 U.S.C.A. § 2000e-2.

[10] CIVIL RIGHTS ⚡142

78k142

Formerly 78k9.10

Equal Employment Opportunity Act forbids imposition of burdensome terms and conditions of employment as well as those that produce atmosphere of racial and ethnic oppression. Civil Rights Act of 1964, § 703 as amended 42 U.S.C.A. § 2000e-2.

[11] CIVIL RIGHTS ⚡142

78k142

Formerly 78k9.10

Employer's rule forbidding bilingual employees from speaking anything but English in public areas while on the job did not discriminate on basis of national origin where it was confined to the workplace and work hours and did not apply to conversations during breaks or other employee free time. Civil Rights Act of 1964, § 703 as amended 42 U.S.C.A. § 2000e-2.

[12] CONSPIRACY ⚡7.5(1)

91k7.5(1)

Formerly 91k7.5

Civil rights statute giving cause of action for damages to any person who is victim of conspiracy to deprive him of equal protection or equal privileges and immunities may reach purely private conspiracies. 42 U.S.C. (1976 Ed.) § 1985(c).

[13] CONSPIRACY ⚡7.5(2)

91k7.5(2)

Formerly 91k7.6

Employment discrimination complainants whose claim rested on violation of Equal Employment Opportunity Act could not invoke civil rights statute giving cause of action to any person who is victim of conspiracy to deprive him of equal protection or of equal privileges and immunities. Civil Rights Act of 1964, § 703 as amended 42 U.S.C.A. § 2000e-2; 42 U.S.C. (1976 Ed.) § 1985(c).

[14] FEDERAL COURTS ⚡901.1

170Bk901.1

Formerly 170Bk901

In action challenging employer's rule that prohibited employees engaged in sales work from speaking Spanish on the job, any error in excluding investigative reports and determinations of the Equal Employment Opportunity Commission and transcript of state proceedings concerning employee's unemployment compensation claims was harmless where, after weighing evidence actually admitted,

neither would have added appreciable weight to contention that rule was discriminatory. Fed.Rules Evid. Rule 103(a), 28 U.S.C.A.

[15] EVIDENCE ☞ 333(7)

157k333(7)

In action challenging employer's rule forbidding bilingual employee from speaking anything but English in public area while on the job, investigative reports and determinations of the Equal Employment Opportunity Commission should have been admitted under rule providing for admissibility of reports of public agency; however, that rule would have permitted introduction of transcript of state unemployment compensation proceedings only if transcript was properly authenticated. Fed.Rules Evid. Rules 803(8), 901, 28 U.S.C.A.

[15] EVIDENCE ☞ 366(2)

157k366(2)

In action challenging employer's rule forbidding bilingual employee from speaking anything but English in public area while on the job, investigative reports and determinations of the Equal Employment Opportunity Commission should have been admitted under rule providing for admissibility of reports of public agency; however, that rule would have permitted introduction of transcript of state unemployment compensation proceedings only if transcript was properly authenticated. Fed.Rules Evid. Rules 803(8), 901, 28 U.S.C.A.

[16] CIVIL RIGHTS ☞ 142

78k142

Formerly 78k9.10

Employer's rule forbidding bilingual employee to speak anything but English in public areas while on the job is not discrimination based on national origin as applied to person who is fully capable of speaking English and chooses not to do so in deliberate disregard of his employer's rule. Civil Rights Act of 1964, § 703 as amended 42 U.S.C.A. § 2000e-2.

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Edna E. Canino, Miami, Fla., for amicus League of United Latin American Citizens.

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Jerry Nugent, Austin, Tex., for Lumberman's Ass'n of Texas, amicus curiae.

Appeal from the United States District Court for the Southern District of Texas.

Before FAY, RUBIN and HATCHETT, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

IT IS ORDERED that this court's opinion reported at 609 F.2d 156 (5th Cir. 1980) be withdrawn and the following is substituted:

Invoking Title VII, the Equal Employment Opportunity Act, 42 U.S.C. s 2000e-2 (EEO Act), Hector Garcia, a native-born American of Mexican descent, challenges as discriminatory his employer's rule that prohibits employees engaged in sales work from speaking Spanish on the job. Because the group of employees Mr. Garcia sought to represent was not numerous enough to constitute a class, we affirm the trial court's denial of class action certification. We conclude that the "speak-only-English" rule, as it was applied to Mr. Garcia by his employer, does not discriminate on the basis of national origin. We therefore affirm the district court's judgment that Mr. Garcia's discharge for violating the rule was not unlawful.

I.

Hector Garcia, who was twenty-four years of age at the time of trial, completed the first semester of the tenth grade in Texas public schools. He speaks both English and Spanish. His grandparents were immigrants from Mexico; he is native-born, but he has always spoken Spanish in his own household.

In 1975, he was employed as a salesman by Gloor Lumber and Supply, Inc., in Brownsville, Texas.

His duties included stocking his department and keeping it in order, assisting other department salespersons and selling lumber, hardware and supplies. He had received compliments from management on his work and in May 1975 had received a bonus of \$250. However, there also was evidence that Mr. Garcia was not a satisfactory employee, that management's compliments were bestowed as incentives to better performance when, on occasion, his work showed some improvement and that a bonus was awarded to all employees at year-end without regard to merit.

Gloor had a rule prohibiting employees from speaking Spanish on the job unless they were communicating with Spanish-speaking customers. Most of Gloor's employees were bilingual, but some who worked outside in the lumber yard did not speak English. The rule did not apply to those employees. It also did not apply to conversation during work breaks.

Mr. Garcia testified that, because Spanish is his primary language, he found the English-only rule difficult to follow. He testified that on June 10, 1975 he was asked a question by another Mexican-American employee about an item requested by a customer and he responded in Spanish that the article was not available. Alton Gloor, an officer and stockholder of Gloor, overheard the conversation. Thereafter Mr. Garcia was discharged.

Mr. Gloor testified, and the district court found as a fact, that Mr. Garcia's discharge was for a combination of deficiencies failure to keep his inventory current, failure to replenish the stock on display from stored merchandise, failure to keep his area clean and failure to respond to numerous reprimands as well as for violation of the English-only rule. The court also found that the English-only policy was not strictly enforced but that Mr. Garcia had violated it *267 "at every opportunity since the time of his hiring according to his own testimony."

In addition to offering this evidence to justify firing Mr. Garcia, Mr. Gloor testified that there were business reasons for the language policy: 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. The district court found that these were valid business reasons and that they, rather than discrimination, were the motive for the rule.

An expert witness called by the plaintiff testified that the Spanish language is the most important aspect of ethnic identification for Mexican-Americans, and it is to them what skin color is to others. Consequently, Mr. Garcia contends, with support from the Equal Employment Opportunity Commission (EEOC), that the rule violates the EEO Act and the Civil Rights Acts, 42 U.S.C. ss 1981 and 1985(c).

Of the eight salesmen employed by Gloor in 1975, seven were Hispanic, a matter perhaps of business necessity, because 75% of the population in its business area is of Hispanic background and many of Gloor's customers wish to be waited on by a salesman who speaks Spanish. Of its 39 employees, 31 were Hispanic, and a Hispanic sat on the Board of Directors. There is no contention that Gloor discriminated against Hispanic-Americans in any other way.

The narrow issue is whether the English-only rule as applied to Mr. Garcia imposed a discriminatory condition of employment.

II.

[1][2] Mr. Garcia properly complains that the court arrived at its denial of class certification by deciding that he had no case on the merits. The question of class certification is a procedural one, distinct from the merits of the action. *Huff v. N. D. Cass Co.*, 5 Cir. 1973 (en banc), 485 F.2d 710; *Miller v. Mackey International, Inc.*, 5 Cir. 1971, 452 F.2d 424, 427- 28. Whether a class should be certified depends entirely on whether the proposal satisfies the requirements of Fed.R.Civ.P. 23. See generally 7 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* ss 1759-1770 (1972).

[3] However, the result reached by the trial judge was correct. A prerequisite for a class action is that the class be "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). "The *raison d'être* of the class suit doctrine is necessity, which in turn depends upon the question of number." 3B Moore's Federal Practice P 23.05, at 23-149 (2d ed. 1979). This depends on the facts of each case and no arbitrary rules have been established, 7 C. Wright and A. Miller, Federal Practice and Procedure: Civil, s 1762 (1972), nor indeed should be. The basic question is practicability of joinder, not number of interested persons *per se*. Practicability of joinder depends on size of the class, ease of identifying its members and determining their addresses, facility of making service on them if joined and their geographic dispersion. See *id.*; 3B Moore's Federal Practice P 23.05 (2d ed. 1979).

[4] Only thirty-one persons, those Gloor employees who were Hispanic, were affected by the English-only rule. Their identity and addresses were readily ascertainable, and they all lived in a compact geographical area. The suggested class therefore failed to meet the elementary requirement that supports the whole theory of class actions representation by one person of a group so numerous that joinder in one suit would be impracticable.

III.

Although the trial judge concluded that Mr. Garcia was fired for a number of reasons, *268 including deliberately speaking Spanish on the job in purposeful violation of Gloor's rule, the judge made no finding concerning the substantiality of the language violation in contributing to the matrix of motive. Perhaps under the evidence he could not, once the omelet had been cooked, determine what each egg had contributed to it.

[5] Employer action does not violate Title VII merely because a reprobated reason plays some part in the employer's decision, see *Rogers v. Equal Employment Opportunity Commission*, D.C.Cir. 1977, 551 F.2d 456; yet the forbidden taint need not be the sole basis for the action in order to condemn it. The record would support a finding that Mr. Garcia's use of Spanish was a significant factor and, therefore, rather than remand for a determination by

the trial court, we will assume for present purposes that it was. We turn then to the issue that appears to both parties and the several amici to be at the core of the case.

The EEO Act sought to assure equality of employment opportunity by making it unlawful for an employer "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. s 2000e-2(a).

[6] In interpreting the statute [FN1] we start with its plain words without pausing to consider whether a statute differently framed would yield results more consonant with fairness and reason. See B. Cardozo, *The Nature of the Judicial Process* 88-89 (1921). The first consideration is the problem, not the answer. See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527, 529-30 (1947). The statute forbids discrimination in employment on the basis of national origin. Neither the statute nor common understanding equates national origin with the language that one chooses to speak.[FN2] Language may be used as a covert basis for national origin discrimination, but the English-only rule was not applied to Garcia by Gloor either to this end or with this result.

FN1. While the EEOC has considered in specific instances whether a policy prohibiting the speaking of Spanish in normal interoffice contacts discriminates on the basis of national origin, (1972) *Empl.Prac. Guide* (CCH) P 6293; (1972) *Empl.Prac. Guide* (CCH) P 6173, it has adopted neither a regulation stating a standard for testing such language rules nor any general policy, presumed to be derived from the statute, prohibiting them. We therefore approach the problem on the basis of the statute itself and the case law.

FN2. The statute's legislative history concerning the meaning of "national origin" is "quite meager." See *Espinoza v. Farah Mfg. Co.*, 1973, 414 U.S.

86, 88, 94 S.Ct. 334, 337, 38 L.Ed.2d 287, 291.

Mr. Garcia argues that it is discriminatory to prohibit employees from speaking a foreign language on the basis of a thesis that, if an employee whose most familiar language is not English is denied the right to converse in that language, he is denied a privilege of employment enjoyed by employees most comfortable in English; this, necessarily, discriminates against him on the basis of national origin because national origin influences or determines his language preference. Whether or not this argument might have a tenable basis if made on behalf of all employees who are bilingual or if invoked against a rule that forbade all use of any language but English we need not consider. Mr. Garcia was fully bilingual. He chose deliberately to speak Spanish instead of English while actually at work. He was permitted to speak the language he preferred during work breaks.

No authority cited to us gives a person a right to speak any particular language while at work; unless imposed by statute, the rules of the workplace are made by *269 collective bargaining or, in its absence, by the employer. An employer's failure to forbid employees to speak English does not grant them a privilege. The refusal to hire applicants who cannot speak English might be discriminatory if the jobs they seek can be performed without knowledge of that language, but the obverse is not correct: if the employer engages a bilingual person, that person is granted neither right nor privilege by the statute to use the language of his personal preference. Mr. Garcia was bilingual. Off the job, when he spoke one language or another, he exercised a preference. He was hired by Gloor precisely because he was bilingual, and, apart from the contested rule, his preference in language was restricted to some extent by the nature of his employment. On the job, in addressing English-speaking customers, he was obliged to use English; in serving Spanish-speaking patrons, he was required to speak Spanish. The English-only rule went a step further and restricted his preference while he was on the job and not serving a customer.

[7] Let us assume that, as contended by Mr. Garcia, there was no genuine business need for the rule and that its adoption by Gloor was arbitrary. The EEO Act does not prohibit all arbitrary employment practices. It does not forbid employers

to hire only persons born under a certain sign of the zodiac or persons having long hair or short hair or no hair at all.[FN3] It is directed only at specific impermissible bases of discrimination race, color, religion, sex, or national origin.[FN4] National origin must not be confused with ethnic or sociocultural traits or an unrelated status, such as citizenship or alienage, *Espinoza v. Farah Manufacturing Co.*, 1973, 414 U.S. 86, 94 S.Ct. 334, 38 L.Ed.2d 287, or poverty, *Ybarra v. City of Los Altos Hills*, 9 Cir. 1974, 503 F.2d 250, 253, or with activities not connected with national origin, such as labor agitation, *Balderas v. La Casita Farms, Inc.*, 5 Cir. 1974, 500 F.2d 195, 198.

FN3. Cf. *NLRB v. Knuth Brothers, Inc.*, 7 Cir. 1976, 537 F.2d 950, 954 (employer may discharge employee for no reason at all so long as the motivation is not violative of the National Labor Relations Act).

FN4. See generally Note, Developments in the Law Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109 (1971).

[8] Save for religion, the discriminations on which the Act focuses its laser of prohibition are those that are either beyond the victim's power to alter, see *Willingham v. Macon Telegraph Publishing Co.*, 5 Cir. 1975, (en banc), 507 F.2d 1084 (employer's grooming code that required different hair lengths for males and females held not to constitute sex discrimination),[FN5] or that impose a burden on an employee on one of the prohibited bases. No one can change his place of birth (national origin), the place of birth of his forebears (national origin), his race or fundamental sexual characteristics. As this court said in *Willingham*, "Equal employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin. . . . But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity." 507 F.2d at 1091 (emphasis in original).[FN6]

FN5. Courts also have found discrimination in situations in which, although the basis of discrimination was not strictly immutable, a

(Cite as: 618 F.2d 264, *269)

fundamental right was thought to be involved. *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d at 1091. See *Phillips v. Martin Marietta Corp.*, 1971, 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (employment discrimination against women with pre-school age children); *Sprogis v. United Air Lines, Inc.*, 7 Cir. 1971, 444 F.2d 1194 cert. denied, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (rule prohibiting female stewardesses but not male stewards from getting married found discriminatory). Cf. *General Electric Co. v. Gilbert*, 1976, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (exclusion of pregnancy from disability benefits plan held not to be sex discrimination).

FN6. Some taxonomies, while ostensibly based on mutable characteristics, may be merely disguised discrimination either in intent or effect. Thus, employing only persons who have a high school degree when the job can adequately be performed by persons of lesser education can be concealed discrimination against racial groups whose numbers include fewer high school graduates. See *Griggs v. Duke Power Co.*, 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158. We need not here explore the extent to which the EEO Act forbids discrimination based on characteristics that are not immutable. For the purposes of this opinion, we accept the thesis that there may be a disparate impact based on some mutable conditions, such as where an employee lives. Religion is, of course, a forbidden criterion, even though a matter of individual choice.

*270 [9] The argument is made that the rule is discriminatory in impact, even if that result was not intentional, because it was likely to be violated only by Hispanic-Americans and that, therefore, they have a higher risk of incurring penalties. The disparate impact test has been applied to hiring criteria, *Griggs v. Duke Power Co.*, 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, and to on-the-job policies, *Nashville Gas Co. v. Satty*, 1977, 434 U.S. 136, 98 S.Ct. 347, 54 L.Ed.2d 356. It forbids the use of any employment criterion, even one neutral on its face and not intended to be discriminatory, if, in fact, the criterion causes discrimination as measured by the impact on a person or group entitled to equal opportunity. However, there is no disparate impact if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference. Mr. Garcia could readily comply with the speak-English-only rule; as to him

nonobservance was a matter of choice. In similar fashion, an employer might, without business necessity, adopt a rule forbidding smoking on the job. The Act would not condemn that rule merely because it is shown that most of the employees of one race smoke, most of the employees of another do not and it is more likely that a member of the race more addicted to tobacco would be disciplined.

[10] We do not denigrate the importance of a person's language of preference or other aspects of his national, ethnic or racial self-identification. Differences in language and other cultural attributes may not be used as a fulcrum for discrimination. However, the English-only rule, as applied by Gloor to Mr. Garcia, did not forbid cultural expression to persons for whom compliance with it might impose hardship. While Title VII forbids the imposition of burdensome terms and conditions of employment as well as those that produce an atmosphere of racial and ethnic oppression, see *Rogers v. Equal Employment Opportunity Commission*, 5 Cir. 1971, 454 F.2d 234, 238-39, cert. denied, 1972, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343, the evidence does not support a finding that the English-only rule had this effect on Mr. Garcia.

[11] The EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin. To a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex or place of birth. However, the language a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice. No claim is made that Garcia and the other employees engaged in sales were unable to speak English. Indeed, it is conceded that all could do so and that this ability was an occupational qualification because of the requirement that they wait on customers who spoke only English or who used that language by choice. Nor are we confronted with a case where an employee inadvertently slipped into using a more familiar tongue.

The rule was confined to the work place and work hours. It did not apply to conversations during breaks or other employee free-time. There is no evidence that Gloor forbade speaking Spanish to discriminate in employment or that the effect of

doing so was invidious to Hispanic Americans. We do not consider rules that turn on the language used in an employee's home, the one he chooses to speak when not at work or the tongue spoken by his parents or grandparents. In some circumstances, the ability to speak or the speaking of a language other than English might be equated with national origin, but this case concerns only a requirement that persons capable of speaking English do so while on duty.

*271 That this rule prevents some employees, like Mr. Garcia, from exercising a preference to converse in Spanish does not convert it into discrimination based on national origin. Reduced to its simplest, the claim is "others like to speak English on the job and do so without penalty. Speaking Spanish is very important to me and is inherent in my ancestral national origin. Therefore, I should be permitted to speak it and the denial to me of that preference so important to my self-identity is statutorily forbidden." The argument thus reduces itself to a contention that the statute commands employers to permit employees to speak the tongue they prefer. We do not think the statute permits that interpretation, whether the preference be slight or strong or even one closely related to self-identity.

Mr. Garcia and the EEOC would have us adopt a standard that the employer's business needs must be accomplished in the manner that appears to us to be the least restrictive. The statute does not give the judiciary such latitude in the absence of discrimination. Judges, who have neither business experience nor the problem of meeting the employees' payroll, do not have the power to preempt an employer's business judgment by imposing a solution that appears less restrictive. See *Furnco Construction Corp. v. Waters*, 1978, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957.

IV.

Having reached this point, it is unnecessary for us to consider the claims asserted under 42 U.S.C. s 1981 and 42 U.S.C. s 1985(c). Section 1981, which originated in the Civil Rights Act of 1866, assures "all persons" the same rights "enjoyed by white citizens" in making and enforcing contracts and in exercising other described rights. "Section 1981 is a parallel remedy against discrimination which may derive its legal principles from Title VII." *Blum v.*

Gulf Oil Corp., 5 Cir. 1979, 597 F.2d 936, 938. See *Johnson v. Alexander*, 8 Cir. 1978, 572 F.2d 1219, 1223 and n. 3, cert. denied, 439 U.S. 986, 99 S.Ct. 579, 58 L.Ed.2d 658. The facts here that preclude relief under Title VII also preclude a Section 1981 claim. See *Blum v. Gulf Oil Corp.*, 5 Cir. 1979, 597 F.2d 936, 938.[FN7]

FN7. We need not, therefore, now decide whether the provision in Section 1981 that "all persons" shall have those described rights and benefits accorded "white citizens" protects those who are denied these rights because they are Hispanic-Americans. See *Manzanares v. Safeway Stores, Inc.*, 10 Cir. 1979, 593 F.2d 968; cf. *Guerra v. Manchester Terminal Corp.*, 5 Cir. 1974, 498 F.2d 641, 653-54 (Section 1981 applies to aliens).

[12][13] Section 1985(c), which originated with the Civil Rights Act of 1871, gives a cause of action for damages to any person who is a victim of a conspiracy to deprive that person or a class of persons of equal protection of the laws or of equal privileges and immunities under the laws. Although the statute reaches purely private conspiracies, *Griffin v. Breckenridge*, 1971, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338, because Mr. Garcia's claim rests on a violation of Title VII he may not invoke Section 1985(c). *Great American Federal Savings & Loan Association v. Novotny*, 1979, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957.[FN8] Cf. *Johnson v. Railway Express Agency, Inc.*, 1975, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (aggrieved employee not limited to Title VII but may also sue for employment discrimination under Section 1981).

FN8. We do not reach the question whether Section 1985(c) was intended to cover only racial bias. See *McLellan v. Mississippi Power & Light Co.*, 5 Cir. 1977, (en banc), 545 F.2d 919; Comment, A Construction of Section 1985(c) in Light of its Original Purpose, 46 U.Chi.L.Rev. 402 (1979).

V.

[14] Some of Mr. Garcia's evidence was excluded by the trial judge: the investigative reports and determinations of the EEOC and the transcript of proceedings concerning Mr. Garcia's unemployment compensation claim conducted by the Texas Employment Commissioner's (TEC) Appeals Tribunal. If the exclusion of these was error, it was

harmless, for, after weighing *272 the evidence actually admitted, neither would have added appreciable weight to the contention that the rule was discriminatory. Fed.R.Evid. 103(a).

Most of the battle about the additional evidence appears to have been fought on the question of whether they were or were not business records. The admissibility of such official documents under the Federal Rules of Evidence is not determined by business records rules standards but by Rule 803(8), which provides for the admission of reports of public agencies.

[15] The district judge was, indeed, in error in refusing to admit the investigative report and determinations of the EEOC. See *Peters v. Jefferson Chemical Co.*, 5 Cir. 1975, 516 F.2d 447, 450; *Smith v. Universal Services, Inc.*, 5 Cir. 1972, 454 F.2d 154, 157-58. That error was, as we have said, harmless. The rule would permit the introduction of the transcript of the TEC proceedings, which was transcribed by the secretary of Mr. Garcia's lawyer, only if it were properly authenticated. Fed.R.Evid. 901. The court's rejection of the unauthenticated transcript of the TEC hearing as independent evidence was proper.

VI.

[16] Our opinion does not impress a judicial imprimatur on all employment rules that require an employee to use or forbid him from using a language spoken by him at home or by his forebears. We hold only that an employer's rule forbidding a bilingual employee to speak anything but English in public areas while on the job is not discrimination based on national origin as applied to a person who is fully capable of speaking English and chooses not to do so in deliberate disregard of his employer's rule. Even if we assume that the violation of the rule was a substantial factor leading to Mr. Garcia's discharge, we, therefore, affirm the district court's judgment that Mr. Garcia was neither discharged because of his national origin nor denied equal conditions of employment based on that factor; instead, he was discharged because, having the ability to comply with his employer's rule, he did not do so.

The judgment is AFFIRMED.

HATCHETT, Circuit Judge, concurs in the result.

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Garcia
v.
Gloor

77-2358

UNITED STATES COURT OF APPEALS Fifth
Circuit

8/20/80

S.D.Tex., 618 F.2d 264

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. The Fifth Circuit by rule sets forth criteria for publication, provides for affirmance without opinion in certain circumstances, and directs that if an unpublished opinion is cited, a copy shall be attached to each copy of the brief. Fifth Circuit Rules, Rule 47.5, 28 U.S.C.A.)

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UNITED STATES COURT OF APPEALS

Fifth Circuit

DENIALS OF REHEARING EN BANC

(Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12)

Group 1—Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Group 2—Denials after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Group 3—Denials on the Court's own motion after a poll requested by a member of the panel or a Circuit Judge in regular active service.

<u>Title</u>	<u>Docket Number</u>	<u>Date of Denial</u>	<u>Citation of Panel Decision</u>
GROUP 1			
Aycock v. Louisiana Aircraft, Inc.	78-2754	8/13/80	S.D.Miss., 617 F.2d 432
Corrugated Container Anti-Trust Litigation, In re	80-1284, 80-1307, 80-1338	8/14/80	S.D.Tex., 620 F.2d 1086
Earl v. Beaulieu	79-3984	8/21/80	M.D.Fla., 620 F.2d 101
Ford v. U. S.	78-2251	8/25/80	E.D.Tex., 618 F.2d 357
Gamza v. Aguirre	78-3041	8/26/80	W.D.Tex., 619 F.2d 449
Koehler, In re	78-3518	8/18/80	N.D.Tex., 619 F.2d 548
Koehler v. U. S.	78-3518	8/18/80	N.D.Tex., 619 F.2d 548
Long v. Arcell	78-2401	8/20/80	S.D.Miss., 618 F.2d 1145
Port of Jacksonville Maritime Ad Hoc Committee, Inc. v. Hayes	80-5105	8/19/80	M.D.Fla., 620 F.2d 567
Silva v. Vowell	79-2905	8/20/80	S.D.Tex., 621 F.2d 640
U. S. v. Progressive Drug Co.	79-1557	8/20/80	W.D.Tex., 620 F.2d 299
U. S. v. Roberts	79-5451	8/20/80	W.D.Tex., 620 F.2d 378
GROUP 2			
Garcia v. Gloor	77-2358	8/20/80	S.D.Tex., 621 F.2d 264
U. S. v. McCord	79-2333	8/20/80	N.D.Tex., 621 F.2d 378

Alva GUTIERREZ, Plaintiff-Appellee,
v.
**MUNICIPAL COURT OF the SOUTHEAST
JUDICIAL DISTRICT, COUNTY OF LOS
ANGELES,**
incorrectly sued as "County of Los Angeles, a
public entity; Porter de
Dubovay; John W. Bunnett; and Russell F.
Schooling, in their capacity as
officials having authority to issue personnel rules
for employees of the County
of Los Angeles at the Municipal Court of the
Southeast Judicial District,"
Defendants-Appellants.
Alva GUTIERREZ, Plaintiff-Appellee,
v.
**Porter DE DUBOVAY; John W. Bunnett; and
Russell F. Schooling, Defendants-
Appellants.**

Nos. 85-5931, 85-6532 and 86-5888.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 5, 1987.

Decided Jan. 27, 1988.
As Amended April 22, 1988.

Court employee brought suit and petition for preliminary injunction against municipal judges, after imposition and enforcement of English-only rule in court offices. The United States District Court for the Central District of California, Richard A. Gadbois, Jr., J., granted the preliminary injunction and denied judges' motion for summary judgment based on absolute and qualified immunity defenses. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) employee was entitled to preliminary injunction; (2) judges were not entitled to absolute legislative immunity; (3) District Court had jurisdiction over claim; (4) qualified immunity was not defense to intentional discrimination claim; (5) judges were proper parties to suit; and (6) remand was necessary to determine whether complaint alleged intentional discrimination sufficiently to avoid summary disposition.

Affirmed in part, reversed and remanded in part.

[1] CIVIL RIGHTS ⇨142

78k142

Formerly 78k9.10

Although an employer may have legitimate business reasons for requiring that communications be exclusively in English, an English-only rule is a burdensome condition of employment that is often used to mask national origin discrimination which must be carefully scrutinized; thus, while limited English-only rule may be permissible in some circumstances, no such rule will be deemed lawful unless employer can show that it is justified by business necessity and notifies employee of the general circumstances when speaking only in English is required and of consequences of violating the rule. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[2] CIVIL RIGHTS ⇨141

78k141

Formerly 78k9.10

Title VII of the Civil Rights Act is a broad remedial statute that was intended to strike at many forms of discrimination which may not be actionable under the Fourteenth Amendment. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a); U.S.C.A. Const.Amend. 14.

[3] CIVIL RIGHTS ⇨199.1

78k199.1

Formerly 78k199, 78k13.6

English-only speaking rules cannot be immunized from judicial scrutiny merely because employee challenging English-only rule is bilingual and can easily comply with it. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[3] CIVIL RIGHTS ⇨201

78k201

Formerly 78k13.6

English-only speaking rules cannot be immunized from judicial scrutiny merely because employee challenging English-only rule is bilingual and can easily comply with it. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[4] CIVIL RIGHTS ⇨146

78k146

Formerly 78k9.10

Fact that United States is an English-speaking country and California is an English-speaking state was insufficient to justify rule that bilingual translators in municipal courts speak English exclusively except when acting as translators or in personal conversations during breaks or lunch. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[5] CIVIL RIGHTS ☞146

78k146

Formerly 78k9.10

Municipal court rule, which required bilingual Spanish interpreters to speak English except during breaks, lunchtime, and when actually translating, was not justified under business necessity rule upon court's claim that restriction was necessary to prevent workplace from becoming "Tower of Babel" due to disruption caused by speaking Spanish, where Spanish was already being spoken as part of court's official business, and additional personal communication in that language would not detract from any office efficiency. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[6] CIVIL RIGHTS ☞146

78k146

Formerly 78k9.10

Failure of municipal court to demonstrate that its English-only rule, except for official translating purposes, or while on breaks or lunch, added to racial harmony of workplace, or that Spanish-speaking employees were using Spanish to hide derogatory remarks about non-Spanish speaking employees, precluded finding that English-only rule was justified on grounds that rule was necessary to promote racial harmony. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[7] CIVIL RIGHTS ☞146

78k146

Formerly 78k9.10

Even if there were evidence that a regulation mandating the use of English-only during working hours in municipal court would calm some employees' fears and thereby reduce racial tension to some extent, this reason would not constitute a business necessity for a rule that has an adverse

impact on other persons based on their national origin. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[8] CIVIL RIGHTS ☞142

78k142

Formerly 78k9.10

Existing racial fears or prejudices and their effects cannot justify a racial classification, nor may such fears or prejudice constitute business necessity for rule which burdens a protected class. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[9] CIVIL RIGHTS ☞146

78k146

Formerly 78k9.10

Municipal court rule, which required bilingual translator employees to communicate with each other during office hours in English-only, except during course of official translating, was not justified by claim that rule enabled non-Spanish speaking supervisors to correctly oversee that court information was being properly disseminated, since supervisors themselves were unable to follow that dissemination, because it occurred in Spanish. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[10] CIVIL RIGHTS ☞146

78k146

Formerly 78k9.10

Municipal court rule, which required bilingual translator employees to communicate with each other during office hours in English, except during course of translating, was not required by State Constitutional requirement that English be used in all official state business, where State Constitutional Amendment was primarily symbolic statement concerning importance of preserving, protecting and strengthening the English language, speech between translators during office hours was private speech, and where use of Spanish for official communications was not only permitted by state government in some instances, but expressly mandated as well. West's Ann.Cal. Const. Art. 3, §§ 6, 6(a); Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[11] CIVIL RIGHTS ☞141

78k141

Formerly 78k9.10

State enactment of constitutional provision or statute cannot constitute business justification for adoption of discriminatory rule in workplace, unless state measure itself meets business necessity test, otherwise, employees could justify discriminatory regulations by relying on state laws which encouraged or required discriminatory conduct; for purposes of federal law, it is immaterial whether inadequate justifications for discriminatory rules directly underly actions of a government agency, or incorporated in the Constitution of a state, because, if preferred justifications fail to meet business necessity test they are legally insufficient. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[11] CIVIL RIGHTS ☞146

78k146

State enactment of constitutional provision or statute cannot constitute business justification for adoption of discriminatory rule in workplace, unless state measure itself meets business necessity test, otherwise, employees could justify discriminatory regulations by relying on state laws which encouraged or required discriminatory conduct; for purposes of federal law, it is immaterial whether inadequate justifications for discriminatory rules directly underly actions of a government agency, or incorporated in the Constitution of a state, because, if preferred justifications fail to meet business necessity test they are legally insufficient. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[12] CIVIL RIGHTS ☞399

78k399

Formerly 78k46(10)

Failure of municipal court to justify its English-only speaking rule during office hours as business necessity, entitled bilingual employees to injunction suspending enforcement of rule during pendency of suit challenging the rule.

[13] CIVIL RIGHTS ☞399

78k399

Formerly 78k46(10)

Bilingual court employees were entitled to injunction suspending enforcement of municipal court English-only rule, upon court's failure to demonstrate business necessity for such rule, since deprivation of employees' right to speak Spanish in interoffice

communication was not compensable by money damages. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[14] CIVIL RIGHTS ☞399

78k399

Formerly 78k46(10)

Evidence, which demonstrated that imposition of English-only rule by municipal court has contributed to workplace atmosphere which derogates Hispanics, encourages discriminatory behavior by non-Hispanic supervisory and nonsupervisory employees, and heightened racial animosity between Hispanics and non-Hispanics, demonstrated that injury to Hispanic employees could not be fully recompensed by award of money damages; thus, Hispanic court employees were entitled to preliminary injunction suspending enforcement of English-only rule during pendency of suit challenging rule, upon court's failure to demonstrate business necessity which justified rule. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[15] CIVIL RIGHTS ☞399

78k399

Formerly 78k46(10)

Preliminary injunction, halting discriminatory employment practices, was within purpose of Civil Rights Act, so long as customary prerequisites for an injunction are met. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[16] CIVIL RIGHTS ☞141

78k141

Formerly 78k9.10

Public relations concerns do not constitute a business necessity under Civil Rights Act, because employers would be free to consider public prejudices when setting employment policies in determining employment practices, which would be wholly inconsistent with purposes of Act. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[17] FEDERAL COURTS ☞269

170Bk269

A suit against state officers in their official capacity is simply another method of suing a state and is forbidden by the Eleventh Amendment. U.S.C.A. Const.Amend. 11.

[18] MUNICIPAL CORPORATIONS ☞744
268k744

Under California law, members of legislative bodies, whether state, local or regional, have absolute immunity from suit based on their acts which are taken as part of the legislative function.

[18] STATES ☞28(2)
360k28(2)

Under California law, members of legislative bodies, whether state, local or regional, have absolute immunity from suit based on their acts which are taken as part of the legislative function.

[18] STATES ☞78
360k78

Under California law, members of legislative bodies, whether state, local or regional, have absolute immunity from suit based on their acts which are taken as part of the legislative function.

[19] STATES ☞79
360k79

Under California law, individuals who are not legislators but whose acts are sufficiently legislative in nature are absolutely immune from liability for those legislative acts.

[20] JUDGES ☞36
227k36

The promulgation of a rule governing the conduct of clerical employees is best characterized as an administrative function rather than a legislative or judicial one; thus, municipal court judges who promulgated English-only rule in interoffice communication were not entitled to assert defense of legislative or absolute immunity.

[21] CIVIL RIGHTS ☞214(1)
78k214(1)

Formerly 78k13.8(1)

A work rule is not transformed into legislation merely because employer is a public entity; when supervisors promulgate personnel rules, they act in their capacity as an employer, not in a legislative capacity, and may not assert defense of legislative or absolute immunity.

[22] CIVIL RIGHTS ☞111
78k111

Formerly 78k13.4(6)

Section 1981 Civil Rights Claim always requires

purposeful discrimination and cannot be based solely on a disparate-impact theory. 42 U.S.C.A. § 1981.

[23] CIVIL RIGHTS ☞110.1
78k110.1

Formerly 78k110, 78k13.4(6)

A claim brought pursuant to § 1983 may or may not require intent; the requirements for such a claim are same as those for establishing the underlined constitutional or statutory violations. 42 U.S.C.A. § 1983.

[24] CIVIL RIGHTS ☞153
78k153

Formerly 78k13.4(6)

Employee who alleges a § 1983 claim based primarily upon violation of equal protection clause was required to prove intentional discrimination on part of employer. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 14.

[25] FEDERAL COURTS ☞640
170Bk640

Because lower district court was not asked to rule on any motion to dismiss in civil rights action, Court of Appeals did not consider whether plaintiff had met requisite pleading requirements for her various causes of action; however, it may be necessary for district court to do so on remand.

[26] CIVIL RIGHTS ☞214(2)
78k214(2)

Formerly 78k13.8(1)

For purposes of determining whether government officials performing discretionary functions are entitled to qualified immunity, those officials are charged with knowledge of constitutional and statutory developments, including all available decisional law. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. §§ 1981, 1983, 1985(3).

[27] CIVIL RIGHTS ☞214(8)
78k214(8)

Formerly 78k13.8(5)

Guidelines adopted by the Equal Employment Opportunity Commission, which generally questioned the validity of English-only rules in the workplace, but which were adopted subsequent to contrary federal court precedent, did not serve to clearly establish the law regarding the validity of the English-only rule; thus, municipal court's adoption of such an English-only rule, was not in clear

violation of established case law and, absent discriminatory intent, court officers were entitled to qualified immunity from suit in so adopting the rule. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[28] CIVIL RIGHTS ☞214(2)

78k214(2)

Formerly 78k13.8(1)

In deciding whether a defendant is entitled to qualified immunity in cases in which unlawful motive is a critical element, the court must consider the actor's intent in carrying out the act that is alleged to have resulted in violation of the plaintiff's rights. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a); U.S.C.A. Const.Amend. 1; 42 U.S.C.A. §§ 1981, 1983, 1985(3).

[29] CIVIL RIGHTS ☞214(2)

78k214(2)

Formerly 78k13.8(1)

Qualified immunity is not a defense in cases involving intentional racial or other similar discrimination, including national origin, since, if plaintiff does not establish that discrimination was intentional the claim fails, and if plaintiff does establish such intent, there can be no qualified immunity. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[30] FEDERAL CIVIL PROCEDURE ☞1049.1

170Ak1049.1

Formerly 170Ak1049

Upon being served with a complaint which lacks sufficient nonconclusory allegations of evidence of unlawful discriminatory intent, a public official would ordinarily be entitled to raise a qualified immunity defense, and, if he wishes to avoid discovery, he may either move for dismissal for failure to state a claim or file an answer and move for judgment on the pleadings. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. §§ 1981, 1983, 1985(3); Fed.Rules Civ.Proc.Rule 12(c), (h)(2), 28 U.S.C.A.

[30] FEDERAL CIVIL PROCEDURE ☞1752.1

170Ak1752.1

Formerly 170Ak1752

Upon being served with a complaint which lacks sufficient nonconclusory allegations of evidence of unlawful discriminatory intent, a public official

would ordinarily be entitled to raise a qualified immunity defense, and, if he wishes to avoid discovery, he may either move for dismissal for failure to state a claim or file an answer and move for judgment on the pleadings. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. §§ 1981, 1983, 1985(3); Fed.Rules Civ.Proc.Rule 12(c), (h)(2), 28 U.S.C.A.

[31] FEDERAL COURTS ☞939

170Bk939

District court's failure to rule on sufficiency of employee's discrimination complaint, and failure of defendants to make any motion to dismiss and to call court's attention to any inadequacy in the complaint, confusing procedural posture of case, and unclear law regarding pleading of unconstitutional motive and qualified immunity, demonstrated that remand to district court would provide best vehicle for parties to have their pretrial disputes resolved in orderly and efficient manner, especially since district court judge was not afforded opportunity to consider these issues in an appropriate context.

[32] CIVIL RIGHTS ☞367

78k367

Formerly 78k38

District court did not lack jurisdiction over court employee's civil rights claim because employee filed action before receiving her right to sue letter, where no evidence in record supported contention that early filing interfered with conciliation attempts. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[33] CIVIL RIGHTS ☞367

78k367

Formerly 78k38

Lack of right-to-sue letter from Equal Employment Opportunity Commission, at time of filing a lawsuit, may be cured by later issuance of that letter. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[34] CIVIL RIGHTS ☞364

78k364

Formerly 78k41

Municipal court judges were proper defendants to civil rights claim brought to prevent enforcement of English-only rule in court offices, even though judges were not named individually in the Equal Employment Opportunity Commission charge, as

the judges had the supervisory control over the working conditions of the municipal court. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e-2, 2000e-2(a).

[35] CIVIL RIGHTS ⇨ 370.1

78k370.1

Formerly 78k370, 78k41

Municipal court judges were proper defendants to court employee's civil rights suit, seeking to challenge enforcement of English-only speaking rule in court offices, despite judges' contention that employee was employed by county, where judges had authority to control working conditions in the office, and even if not the direct employers, they exercised supervisory authority over the employees.

[35] CIVIL RIGHTS ⇨ 371

78k371

Formerly 78k41

Municipal court judges were proper defendants to court employee's civil rights suit, seeking to challenge enforcement of English-only speaking rule in court offices, despite judges' contention that employee was employed by county, where judges had authority to control working conditions in the office, and even if not the direct employers, they exercised supervisory authority over the employees.

*1036 Larry J. Roberts, Petersen & Ferguson, Santa Ana, Cal., for defendants-appellants.

Gerald Sato, Allred, Maroko, Goldberg & Ribakoff, Los Angeles, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before BROWNING, TANG and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

Alva Gutierrez, a Hispanic-American, brought an action challenging an English-only rule enacted by the Southeast Judicial District of the Los Angeles Municipal Court. The district court granted Gutierrez's motion for a preliminary injunction enjoining enforcement of the rule. Appellants challenge the issuance of the injunction and also appeal the district court's denial of their motion for summary judgment on Gutierrez's section 1981, 1983, and 1985(3) claims. Their motion was based

on the defenses of absolute and qualified immunity.

Because Gutierrez established both a likelihood of success on the merits and the possibility of irreparable injury, we hold that the district court did not abuse its discretion in entering the preliminary injunction. Further, we hold that appellants are not entitled to absolute legislative immunity. Finally, because the district court did not have the opportunity to consider whether Gutierrez's complaint satisfied the pleading requirements that apply when a qualified immunity defense is implicated, we remand for further proceedings.

FACTS & PROCEEDINGS BELOW

The Southeast Judicial District of the Los Angeles Municipal Court employs Alva Gutierrez and a number of other bilingual Hispanic-Americans as deputy court clerks. Gutierrez has held her position since 1978. Bilingual clerks, in addition to their other duties, translate for the non-English speaking public. In March, 1984, the Municipal Court promulgated a new personnel rule which forbade employees to speak any language other than English, except when acting as translators. In December, 1984, the rule was amended to exclude conversations during breaks or lunchtime. However, all other conversations conducted at work remained subject to the rule. The court's actions greatly disturbed Gutierrez and other Hispanic-American employees.

Gutierrez filed a complaint with the Equal Employment Opportunity Commission (EEOC) in December, 1984. Subsequently, in March 1985, she filed this action against Municipal Judges Porter de Dubovay, Russell F. Schooling, and John W. Bunnnett, and the Southeast Judicial District of the Los Angeles Municipal Court, seeking monetary damages, injunctive relief, and attorneys fees. [FN1] In her district court complaint, Gutierrez contends that the municipal court rule constitutes racial and national origin discrimination with respect to a term or condition of employment in violation of Title VII, 42 U.S.C. § 2000e-2(a), and that such discrimination denies her the right to make contracts equally with white persons in violation of 42 U.S.C. § 1981. She further asserts that the rule denies her equal protection of the laws and infringes upon her right to free speech in violation of the first and fourteenth amendments to the United States

Constitution, and seeks damages for interference with her constitutional rights under 42 U.S.C. §§ 1983 and 1985(3) [FN2]. The district judge, finding a likelihood that the rule violated Title VII, granted Gutierrez's request for a preliminary injunction and enjoined appellants from enforcing the rule. [FN3]

FN1. Gutierrez originally named Los Angeles County as a defendant. The district court dismissed the County apparently determining that the County, of which the Municipal Court is a part, did not promulgate and could neither rescind nor enforce the rule. The question of the appropriateness of that dismissal is not presently before us.

FN2. Appellants argue that Gutierrez lacked standing to seek preliminary injunction because her employment status was uncertain. They contend that it is unlikely that she will return to work. The record below was in dispute on this point and apparently the district court found in Gutierrez's favor. Even were we to review the record de novo (which we do not) we would not conclude that she lacks standing.

FN3. The injunction set forth an exception: it provided that the use of communications in a foreign language could be forbidden where the prohibition was necessary for valid business or public relations purposes and the reasons for the ban were articulated to the workforce in writing. We discuss the exception *infra* at 1045-46.

*1037 Later, Gutierrez sought to depose the three judges, but they refused to answer questions relating to their reasons for adopting the rule and moved for summary judgment. The judges asserted the defenses of absolute legislative immunity and qualified immunity to Gutierrez's non-Title VII claims--i.e., those brought under 42 U.S.C. §§ 1981, 1983, and 1985(3). The district court denied the motion for summary judgment, ruling first--as to absolute immunity--that the judges did not act as legislators in promulgating a personnel rule for the clerk's office, and second, and without further explanation, that the judges were not entitled to qualified immunity. The district judge then certified the immunity issues to this court. Prior to these rulings, a magistrate had entered an order compelling the Municipal Court judges to answer the questions relating to their motives. The district judge stayed that order pending our further action. We subsequently agreed to decide the immunity

issues along with the appeal from the preliminary injunction. [FN4]

FN4. The district court also certified, and we accepted, several Title VII jurisdictional issues for review. We discuss those issues in the last section of this Opinion.

ISSUES PRESENTED ON APPEAL

1. Whether the district court erred in issuing the preliminary injunction restricting enforcement of the English-only rule.
2. Whether the district court erred in determining that the municipal court judges were not entitled to absolute immunity.
3. Whether the district court erred in determining that the municipal court judges were not entitled to qualified immunity.
4. Whether the district court erred in asserting jurisdiction over Gutierrez's Title VII claim.

DISCUSSION

I. THE PRELIMINARY INJUNCTION AND THE TITLE VII CLAIM

Appellants contend that the district court erred in issuing a preliminary injunction enjoining the enforcement of a personnel rule that provides:

The English language shall be spoken by all court employees during regular working hours while attending to assigned work duties, unless an employee is translating for the non-English-speaking public. This rule does not apply to employees while on their lunch hour or work breaks.

Gutierrez challenges the English-only rule under Title VII using adverse impact and disparate treatment theories. [FN5] She asserts that a regulation mandating the speaking of English-only by its terms has a disproportionate adverse impact on Hispanics. She contends that the rule, although allegedly facially neutral, unfairly disadvantages Hispanics because their ethnic identity is linked to use of the Spanish language. She also notes that Hispanics constitute the vast majority of bilingual persons in the Southeast Judicial District. Gutierrez then separately avers that the rule was intentionally adopted for the purpose of discriminating against

Hispanics, that any neutral appearance is pretextual, and, thus, that the rule violates Title VII's proscription against disparate treatment.

FN5. In view of the result we reach with respect to Gutierrez's Title VII claim, we need not decide whether the preliminary injunction could also be based on her section 1983 claims that the rule denied her equal protection of the laws and violated her right to freedom of expression; nor, for the purposes of this part of our Opinion, need we consider whether her section 1981 and 1985(3) claims could justify issuance of the challenged order.

If Gutierrez is likely to succeed on the merits of her Title VII claim, under either a disparate impact or a disparate treatment theory, and she established the possibility of irreparable injury, or, if she raised serious questions for litigation regarding her Title VII claim and showed that the balance *1038 of hardships tipped sharply in her favor, she is entitled to a preliminary injunction. See *Dollar Rent A Car, Inc. v. Travelers Indemnity Co.*, 774 F.2d 1371, 1374 (9th Cir.1985); *Benda v. Grand Lodge of the International Association of Machinists & Aerospace Workers*, 584 F.2d 308, 314- 15 (9th Cir.1978), cert. dismissed, 441 U.S. 937, 99 S.Ct. 2065, 60 L.Ed.2d 667 (1979). In issuing its injunction, the district court determined that Gutierrez had shown a likelihood of success on the merits, and apparently ruled that irreparable injury could be presumed pursuant to *Berg v. Richmond Unified School District*, 528 F.2d 1208, 1212 n. 6 (9th Cir.1975), vacated on other grounds, 434 U.S. 158, 98 S.Ct. 623, 54 L.Ed.2d 375 (1977). Because *Berg* has been vacated it lacks precedential value. See *County of Los Angeles v. Davis*, 440 U.S. 625, 634 n. 6, 99 S.Ct. 1379, 1384 n. 6, 59 L.Ed.2d 642 (1979). Nevertheless, we will affirm the district court's order if Gutierrez met the criteria for the issuance of a preliminary injunction. See *Bruce v. United States*, 759 F.2d 755, 758 (9th Cir.1985).

A. Likelihood of Success on the Merits 1. Introduction

Title VII prohibits discrimination in employment based on race, color, sex, religion, and national origin, 42 U.S.C. § 2000e-2, and was intended to assure equality of employment opportunities, eradicate discrimination in employment, and make the victims of employment discrimination whole.

See generally *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 348, 97 S.Ct. 1843, 1861, 52 L.Ed.2d 396 (1977). Employment discrimination is not limited to discrimination in hiring, firing, or the payment of wages, but includes discriminatory terms and conditions of employment. 42 U.S.C. § 2000e-2(a). Title VII forbids not only intentional discrimination with respect to conditions of employment, but also facially neutral rules which have a disparate impact on protected groups of workers, see *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). A facially neutral rule which falls more harshly on a protected group--such as Hispanics--violates Title VII unless it is justified by business necessity, see *Pullman-Standard v. Swint*, 456 U.S. 273, 276, 102 S.Ct. 1781, 1783, 72 L.Ed.2d 66 (1982); *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir.1987) (en banc) [hereinafter cited as *Atonio I*], while a rule or practice that is adopted for the purpose of discriminating against a protected group violates the statute unless it meets the stricter bona fide occupational qualification test. See *Dothard v. Rawlinson*, 433 U.S. 321, 333, 97 S.Ct. 2720, 2728, 53 L.Ed.2d 786 (1977); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 387-88 (5th Cir.), cert. denied, 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267 (1971). The first type of case is generally said to present a disparate or adverse impact claim and the second a disparate treatment claim. A disparate treatment claim requires more of a showing by the plaintiff, but also requires the defendant to meet a greater burden in order to overcome that showing. See *Atonio v. Wards Cove Packing Co.*, 827 F.2d 439, 442 (9th Cir.1987) [hereinafter cited as *Atonio II*] and n. 8 *infra*. A plaintiff may bring both types of claims in the same proceeding where the facts alleged warrant relief under either theory.

2. Disparate Impact

In the United States, persons of Asian and Hispanic origin constitute large minorities. Numerous members of these two groups regularly communicate in a language other than English. For many of these individuals Spanish, Mandarin, Cantonese, or some other language is their primary tongue. Members of these minority groups have made great contributions to the development of our diverse multicultural society and its tradition of encouraging the free

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exchange of ideas. See generally Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L.Rev. 303, 361-69, 376-77 (1986) (discussion of assimilation, diversity, and American ideology). The multicultural character of American society has a long and venerable history and is widely recognized as one of *1039 the United States' greatest strengths. See *id.*; Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 Hous.L.Rev. 885, 898-900 (1986).

Few courts have evaluated the lawfulness of workplace rules restricting the use of languages other than English. Commentators generally agree, however, that language is an important aspect of national origin. See generally Piatt, *supra*, at 894-98 (discussing the relationship between language and culture); Karst, *supra*, at 351-57; Comment, *Language Discrimination Under Title VII: The Silent Right of National Origin Discrimination*, 15 J. Marshall L.Rev. 667, 676 (1982) [hereinafter Comment, *Language Discrimination*]; Note, "Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States, 100 Harv.L.Rev. 1345, 1354 (1987) [hereinafter Note, *Official English*]; 29 C.F.R. § 1606.7 (1987). The cultural identity of certain minority groups is tied to the use of their primary tongue. See Comment, *Native-Born Acadians and the Equality Ideal*, 46 La.L.Rev. 1151, 1165-67 (1986). The mere fact that an employee is bilingual does not eliminate the relationship between his primary language and the culture that is derived from his national origin. See Karst, *supra*, at 351-57. Although an individual may learn English and become assimilated into American society, his primary language remains an important link to his ethnic culture and identity. See *id.* The primary language not only conveys certain concepts, but is itself an affirmation of that culture. Piatt, *supra*, at 894-99.

From the standpoint of the Anglo-American, another person's use of a foreign language may serve to identify that individual as being of foreign extraction or as having a specific national origin. See Note, *Official English*, *supra*, at 1355; cf. *Carino v. University of Oklahoma Board of Regents*, 750 F.2d 815, 817, 819 (10th Cir.1984); *Berke v. Ohio Department of Public Welfare*, 30 Fair Empl.Prac.Cas. (BNA) 387 (S.D. Ohio 1978) (foreign accents identify persons as members of foreign national origins), *aff'd*, 628 F.2d 980 (6th

Cir.1980) (per curiam). [FN6] Because language and accents are identifying characteristics, rules which have a negative effect on bilinguals, individuals with accents, or non-English speakers, may be mere pretexts for intentional national origin discrimination. See McArthur, *Worried About Something Else*, 60 Int'l J.Soc.Language 87, 90-91 (1986).

FN6. This point was also made effectively in *Olagues v. Russoniello*, 797 F.2d 1511, 1520-21 (9th Cir.1986) (en banc), vacated on ground of mootness, --- U.S. ---, 108 S.Ct. 52, 98 L.Ed.2d 17 (1987). Although we agree with the analysis contained in the vacated opinion, we do not, of course, rely on it as precedent.

[1] Although Title VII does not specifically prohibit English-only rules, the EEOC has promulgated guidelines on the subject. [FN7] See 29 C.F.R. § 1606.7 (1987). The EEOC recognizes that "[t]he primary language of an individual is often an essential national origin characteristic," and that an English-only rule may "create an atmosphere of inferiority, isolation and intimidation." *Id.* § 1606.7(a); see also Piatt, *supra*, at 888, 897. Although an employer may have legitimate business reasons for requiring that communications be exclusively in English, an English-only rule is, according to the EEOC, a burdensome condition of employment that is often used to mask national origin discrimination and that must be carefully scrutinized. See, e.g., *Decision 83-7*, 31 Fair Empl.Prac.Cas. (BNA) 1861, 1862 (EEOC 1983); see also Piatt, *supra*, at 905; Note, *Official English*, *supra*, at 1358- 59. Accordingly, the EEOC concluded that while a limited English-only rule may be permissible in some circumstances, no such rule will be deemed lawful unless the employer can show that it is justified by business necessity and notifies the employees "of the general circumstances when speaking only in English is required and of the consequences of violating the rule." 29 C.F.R. § 1606.7(b, c) (1987). *1040 The EEOC's conclusion appears to be based on its determination that rules prohibiting use of foreign languages generally have an adverse impact on protected groups. [FN8]

FN7. We note that EEOC guidelines are generally entitled to considerable deference so long as they are not inconsistent with Congressional intent. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95, 94 S.Ct. 334, 339-40, 38 L.Ed.2d 287 (1973).

FN8. The EEOC guidelines distinguish between blanket prohibitions, which require English to be spoken at all times, and limited prohibitions, which require English to be spoken only at certain times or under certain conditions. See 29 C.F.R. § 1606.7(a, b) (1987). A blanket prohibition will rarely, if ever, be upheld. It is presumed invalid. Limited English-only rules fare only somewhat better. They will be held valid only if they pass the business necessity test. *Id.* § 1606.7(b). See discussion of test *infra* at 1041.

We agree that English-only rules generally have an adverse impact on protected groups and that they should be closely scrutinized. We also agree that such rules can "create an atmosphere of inferiority, isolation, and intimidation." *Id.* § 1606.7(a). Finally, we agree that such rules can readily mask an intent to discriminate on the basis of national origin. See Note, Official English, *supra*, at 137-58; Piatt, *supra*, at 894-95; Comment, Language Discrimination, *supra*, at 676 nn. 37, 38. The EEOC guidelines, by requiring that a business necessity be shown before a limited English-only rule may be enforced, properly balance the individual's interest in speaking his primary language and any possible need of the employer to ensure that in particular circumstances only English shall be spoken. The business necessity requirement prevents an employer from imposing a rule that has a disparate impact on groups protected by the national origin provision of Title VII unless there is a sufficient justification under the Civil Rights Act of 1964 for doing so. Accordingly we adopt the EEOC's business necessity test as the proper standard for determining the validity of limited English-only rules. [FN9]

FN9. We note that the part of the EEOC guidelines that refers to business necessity is, under general principles of equal employment opportunity law, applicable only to cases in which the employer has acted without invidious intent. Where a rule is shown to have been adopted for the purpose of discriminating against a protected group, the employer's conduct is permissible only if the discriminatory rule constitutes a bona fide occupational qualification (BFOQ) for the job. Thus, even a limited English-only rule must meet the stricter BFOQ test, see *supra* at 1038, if it is the product of discriminatory intent.

[2][3] Gutierrez asserts that the limited English-only rule she is challenging has a disparate impact on

Hispanic employees of the Southeast Judicial District. [FN10] There can be no doubt that the use of disparate impact analysis is appropriate here. See *Atonio I*, 810 F.2d at 1482-86 (majority op.) and 1489-91 (Sneed, J., concurring). [FN11] Appellants do not disagree. However, they argue, relying on *Garcia v. Gloor*, 618 F.2d 264 (5th Cir.1980), cert. denied, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981), that, whatever the impact of English-only rules in other circumstances, in this case the impact is not disparate or adverse because Gutierrez is bilingual and can easily comply with the rule. [FN12] Appellants assert that where an employee can readily observe an English-only rule, a failure to comply is nothing more than a matter of personal preference. For the reasons already given, we do not think English-only *1041 rules can so easily be immunized from judicial scrutiny.

FN10. The original version of the municipal court's rule provided for a blanket prohibition (notwithstanding the exception for translation duties). However, Gutierrez's action is directed at the amended rule which, by virtue of the lunchtime and break provisions, qualifies as a limited ban.

FN11. Because we conclude below that Gutierrez was entitled to a preliminary injunction on her disparate impact claim, we need not consider whether the order could be supported by her disparate treatment claim as well. In the event the parties proceed to a trial on the merits, Gutierrez is, of course, free to pursue both claims.

FN12. Appellants also claim that Gutierrez has not stated a claim under the fourteenth amendment, relying on *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir.1973), and therefore, that she cannot state a claim under Title VII, apparently arguing that Title VII is coextensive with the fourteenth amendment. We disagree. The *Carmona* case did not involve a Title VII claim, but rather a constitutional challenge. Title VII is a broad remedial statute that was intended to strike at many forms of discrimination that may not be actionable under the fourteenth amendment. See, e.g., *Griggs*, 401 U.S. at 431-33, 91 S.Ct. at 853-54.

We note that in *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1410-11 (9th Cir.1987), a case decided after oral argument, we cited *Garcia v. Gloor* in support of our decision that a radio station's English-only rule, with which its disc-jockey employee could readily comply, did not have an

adverse impact on that employee. However, the issues involved in Jurado were far different from the ones presently before us. The Jurado rule was considerably more restricted than and bore little or no resemblance, either in purpose or effect, to the edict of the Municipal Court judges. The Jurado rule was clearly a reasonable one that met the business necessity test: further, it had only a minimal impact on the protected group of employees. Jurado involved an order by a radio station to a single disc jockey to cease his occasional on- the-air use of Spanish because the station had determined that his interspersing of comments in a foreign language during his broadcasts confused the audience and was potentially damaging to the station's ratings. *Id.* at 1410. The Jurado order pertained solely to on-the-air broadcasting--the product the employer was offering the public. The employer did not require Jurado, or any other employee, to conduct his off-the-air conversations in English; it sought only to control the essential nature of its product. Clearly there can be no question that the employer in Jurado had the right to decide that it would offer its broadcasts entirely in the English language, and clearly the impact of its decision on the single affected employee was slight. [FN13]

FN13. Significantly, at the same place in Jurado that we cited *Garcia* we cited with approval the EEOC English-only guidelines, and specifically mentioned the business necessity requirement. 813 F.2d at 1411.

Also significantly, had Jurado had difficulty in complying with the English-only rule, that fact would not have affected our decision. A disc jockey may be required to speak English as a condition of employment and, as we concluded, may be required to broadcast exclusively in that language if the station owner so desires. The ability to speak the language in which the program is to be broadcast is obviously a bona fide occupational qualification for any broadcaster. Thus, despite our reference to *Garcia*, the determinative issue in Jurado was not the fact that Jurado was able to comply with the rule; it was that the employer had the right to insist that the broadcast be conducted exclusively in English.

In contrast, the English-only rule in the case before us is concerned primarily with intra-employee conversations, work-related and non-work-related. It is in no way limited to the sale or distribution of the employer's product [FN14] and there is no

contention that the employees' conversations among themselves in Spanish have any effect on those who use the courts. Yet, the prohibition on intra-employee communications in Spanish is sweeping in nature and has a direct effect on the general atmosphere and environment of the work place. Under these circumstances, ease of compliance has little or no relevance; certainly, it is not a factor that could preclude a finding of disparate impact.

FN14. In fact the rule does not appear to apply at all to contacts between employees and the public. To the contrary, the employees affected by the rule are compelled, as part of their job, to speak Spanish with members of the public on numerous occasions. Among their official duties is the answering of questions by, and the providing of information to, Spanish-speaking persons seeking access to the courts.

3. Business Necessity

We next address appellants' argument that their English-only rule is justified by business necessity. Appellants offer five alleged justifications. In examining these justifications, we begin with the proposition that business necessity means more than business purpose. See *Atonio II*, 827 F.2d at 442. In order to meet the business necessity exception the justification must be sufficiently compelling to override the discriminatory impact created by the challenged rule. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971) (cited with approval in *Atonio II*, 827 F.2d at 443). In addition, the practice or rule must effectively carry out the business purpose it is alleged to *1042 serve, and there must be available no acceptable less discriminatory alternative which would accomplish the purpose as well. *Id.* As the Tenth Circuit put it: "The practice must be essential, the purpose compelling." *Williams v. Colorado Springs School District No. 11*, 641 F.2d 835, 842 (10th Cir.1981) (quoted with approval in *Atonio II*, 827 F.2d at 442).

[4] The first justification offered by appellants is that the United States is an English-speaking country and California an English-speaking state. That self-evident fact provides little support for the restrictive rule the municipal court judges imposed on their Spanish-speaking employees. While appellants vigorously urge that there is a substantial state

interest in having a single language system, the prohibition of intra-employee Spanish communication does little to achieve that result, especially since as a part of their official duties the Court's bilingual employees are required to communicate in Spanish on a regular basis with numerous members of the non-English-speaking public. Thus, the rule cannot be said to effectively carry out the asserted purpose, and the first justification cannot support a finding of a business necessity. See *Blake v. City of Los Angeles*, 595 F.2d 1367, 1383 (9th Cir.1979), cert. denied, 446 U.S. 928, 100 S.Ct. 1865, 64 L.Ed.2d 281 (1980); *Robinson*, 444 F.2d at 798.

[5] Second, appellants contend that the rule is necessary to prevent the workplace from turning into a "Tower of Babel." This claim assumes that permitting Spanish (or another language) to be spoken between employees is disruptive. Even if appellants' unspoken premise were true, the argument fails in part for some of the reasons already suggested. Since Spanish is already being spoken in the Clerk's office, to non-English-speaking Hispanic citizens, part of the "babel" that appellants purport to fear is necessary to the normal press of court business. Additional Spanish is unlikely to create a much greater disruption than already exists. Because the "babel" is necessary and has an apparently permanent status, its elimination in the area of intra-employee communication cannot be termed essential to the efficient operation of the Clerk's office. See *Atonio II*, 827 F.2d at 442; *Robinson*, 444 F.2d at 798.

[6] Third, appellants assert that the rule is necessary to promote racial harmony. They contend that Spanish may be used to convey discriminatory or insubordinate remarks and otherwise belittle non-Spanish-speaking employees. Appellants, however, have failed to offer any evidence of the inappropriate use of Spanish. [FN15] In contrast, there is evidence indicating that racial hostility has increased between Hispanics and non-Spanish-speaking employees because Hispanics feel belittled by the regulation. There is also evidence that non-Spanish-speaking employees have made racially discriminatory remarks directed at Hispanics. As the EEOC has warned, prohibiting the use of the employees' native tongue may contribute to racial tension. 29 C.F.R. § 1606.7(a) (1987). Appellants' argument that the English-only rule fosters racial

harmony is unsupported by evidence and is otherwise generally unpersuasive. See *Piatt*, supra, at 897.

FN15. Three supervisors submitted affidavits on this aspect of appellants' case. However, all three supervisors acknowledge that they do not speak Spanish and therefore cannot know whether employees are using Spanish to convey discriminatory or insubordinate remarks. The affidavits, in the absence of any evidence of the misuse of Spanish, indicate only that the speaking of Spanish unnerves the supervisors. The supervisors' feelings toward the use of the Spanish language may reflect a prejudice toward the use of a tongue that they do not understand, and also may indicate a bias against Hispanic-Americans. Unfortunately, monolingual persons may be threatened by the speaking of a language that they themselves cannot speak. *Piatt*, supra, at 894-95.

[7][8] Appellants further contend that whatever the actual facts may be, non-Spanish-speaking employees believe that Spanish-speaking employees use Spanish to conceal the substance of their conversations and that the English-only rule is necessary to assuage non-Spanish-speaking employees' fears and suspicions. Appellants' contention is based on a single complaint*1043 allegedly made by an employee, a complaint based, at most, on suspicion. Again, there is simply no probative evidence of the Spanish language being used to conceal the substance of conversations. However, even if there were evidence that a regulation mandating the use of English during working hours would calm some employees' fears and thereby reduce racial tension to some extent, this reason would not constitute a business necessity for a rule that has an adverse impact on other persons based on their national origin. Existing racial fears or prejudices and their effects cannot justify a racial classification. *Palmore v. Sidoti*, 466 U.S. 429, 433-34, 104 S.Ct. 1879, 1882-83, 80 L.Ed.2d 421 (1984). Nor may such fears or prejudices constitute the business necessity for a rule that burdens a protected class. See *id.*; see also *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448, 450, 105 S.Ct. 3249, 3259, 3260, 87 L.Ed.2d 313 (1985).

[9] Fourth, appellants assert that the English-only rule is necessary because several supervisors do not speak or understand Spanish and cannot discern whether employees are correctly disseminating

information unless English is spoken. This argument is illogical as well as unpersuasive. Bilingual employees are required to speak Spanish when dealing with the non-English-speaking public; they are specifically hired for that purpose because Spanish is the primary tongue of the majority of the members of the public who use the courts in the Southeast Judicial District. Supervisors may well be unable to determine whether the information disseminated to the public by bilingual employees is correct but that is only because when the bilingual employees are communicating with the non-English-speaking public in the only language that those persons understand, the supervisors are incapable of following the discussion. The municipal court rule in question in no way enables supervisors more effectively to evaluate or control the dissemination of information to the public. Compare Decision 83-7, 31 Fair Empl.Prac.Cas. (BNA) at 1862 (limited English-only rule was necessary to ensure safe performance of emergency and abnormally hazardous procedures). It is apparent that the best way to ensure that supervisors are apprised of how well the bilingual employees are performing this part of their assigned tasks would be to employ Spanish-speaking supervisors. Because appellants are willing to allow persons who communicate with the public in Spanish to be supervised by non-Spanish-speaking employees, we find their explanation that supervisors must be able to understand intra-employee communications to be disingenuous at best.

[10] Next, appellants argue that the English-only rule is required by the California Constitution. Cal. Const. art. III, § 6. Appellants assert that section 6, added by the voters as a ballot initiative in 1986, requires the use of English in all official state business, and thus requires Hispanic employees to communicate in English while at work. [FN16]

FN16. Section 6 provides:

(a) Purpose

English is the common language of the people of the United States of America and the State of California. This section is intended to preserve, protect and strengthen the English language, and not to supersede any of the rights guaranteed to the people by this Constitution.

(b) ...

English is the official language of the State of California.

(c) Enforcement

The Legislature shall enforce this section by appropriate legislation. The Legislature and officials of the State of California shall take all steps necessary to insure that the role of English as the common language of the State of California is preserved and enhanced. The Legislature shall make no law which diminishes or ignores the role of English as the common language of the State of California.

(d) ...

Any person who is a resident of or doing business in the State of California shall have standing to sue the State of California to enforce this section....

Appellants' argument is unpersuasive for three basic reasons. First, a fair reading of section 6 does not support appellants' interpretation of the measure. Section 6 does not provide that English must be spoken under the circumstances specified in *1044 the municipal court's rule, or even suggest that such should be the general policy of the state. Section 6 declares only that "English is the official language of the State of California," Cal. Const. art. III, § 6(b), and mandates only that "[t]he Legislature shall enforce this section by appropriate legislation," Cal. Const. art. III, § 6(c). While section 6 may conceivably have some concrete application to official government communications, if and when the measure is appropriately implemented by the state legislature, it appears otherwise to be primarily a symbolic statement concerning the importance of preserving, protecting, and strengthening the English language. Cal. Const. art. III, § 6(a); cf. *Puerto Rican Organization for Political Action v. Kusper*, 490 F.2d 575, 577 (7th Cir.1973).

Second, appellants contend, relying on the arguments contained in the ballot initiative, that section 6 was intended to require that all communication occurring at a governmental place of business be conducted in English. [FN17] Accordingly, they reason, section 6 applies, inter alia, to casual intra-employee or supervisor-employee conversations. Even giving the broadest possible construction to the legislative history of section 6, as set forth in the ballot initiative materials, [FN18] and even assuming we would give that history conclusive weight, we cannot agree. Although the precise question of private conversations among public employees was not addressed in the ballot arguments, it appears that the distinction the proponents attempted to draw was between official communications and private affairs.

While the initiative addressed, and arguably may have sought to regulate, the former subject, most if not all of the speech barred here would fall in the latter category. Again, we note that, ironically, while the English-only rule at issue here totally bars private speech in Spanish during on-duty periods, use of the Spanish language for official communications is not only permitted by the government employer, but in a large number of instances is expressly mandated. [FN19]

FN17. Where a measure is enacted by the voters rather than the legislature, the ballot materials are recognized as important guides for determining legislative intent. *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal.3d 208, 245-46, 149 Cal.Rptr. 239, 257-58, 583 P.2d 1281, 1300 (1978) (voter materials helpful in determining the probable meaning of uncertain language), overruled on other grounds sub nom. *Los Angeles County Transportation Comm'n v. Richmond*, 31 Cal.3d 197, 182 Cal.Rptr. 324, 643 P.2d 941 (1982).

FN18. "Government must protect English ... by functioning in English...." Argument in Favor of Proposition 63, California Ballot Pamphlet 46 (Nov. 4, 1986).

FN19. We also note that if the Municipal Court rule forbade communication in Spanish with the non-English-speaking public, serious questions of denial of access to the courts would be presented, and possibly other constitutional questions as well.

[11] Third, contrary to appellants' arguments, the adoption of a constitutional provision or a state statute does not ipso facto create a business necessity. See *Dothard*, 433 U.S. at 331 n. 14, 97 S.Ct. at 2728 n. 14. A state enactment cannot constitute the business justification for the adoption of a discriminatory rule unless the state measure itself meets the business necessity test; otherwise employers could justify discriminatory regulations by relying on state laws that encourage or require discriminatory conduct. *Id.* For federal law purposes, it is immaterial whether inadequate justifications directly underlie the actions of a government agency or are incorporated in the constitution of a state. In either case, if the proffered justifications fail to meet the business necessity test they are legally insufficient.

For the above reasons, section 6 cannot serve as a

justification for the municipal court's rule.

4. Summary

[12] English-only rules generally have an adverse impact on protected groups and ordinarily constitute discriminatory conditions of employment. Here, none of the justifications appellants offer for their English-only rule meets the rigorous business necessity standard. See *Robinson*, 444 F.2d at 798. Thus there appears to be *1045 no basis for making an exception to the general rule. Accordingly, the district court correctly determined that Gutierrez established a likelihood of success on the merits on her adverse impact claim.

B. Irreparable Injury and Balance of Hardships

Although the district court presumed irreparable harm in reliance on invalid legal authority, its decision to issue the preliminary injunction was not erroneous. Gutierrez has established a likelihood of success on the merits as to her adverse impact claim. See *supra* at 1039-1045. To qualify for a preliminary injunction on that claim she must show only that she faces the possibility of irreparable injury from enforcement of the rule. See *Dollar Rent A Car*, 774 F.2d at 1374.

[13] Gutierrez has clearly established a possibility of irreparable injury. " 'When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.' " *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir.1984) (quoting 11 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2948, at 440 (1973)); see also *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976) (plurality opinion). Similarly, when the right the plaintiff is allegedly deprived of constitutes an important aspect of a person's identity--as does the right involved here--no additional injury need be shown. Money damages are inadequate compensation for the threatened loss in either case.

[14] Moreover, permitting the English-only rule to be enforced pending trial might well have other deleterious effects. Prohibiting the exercise of one right protected by Title VII may discourage employees from exercising other rights protected by that statute. See *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 938-39 (9th Cir.1987);

Garcia v. Lawn, 805 F.2d 1400, 1405 (9th Cir.1986). Further, a rule that has the effect of creating or heightening racial or national origin tension in the workplace raises the specter of ongoing discrimination. Gutierrez has offered evidence that the imposition of the English-only rule has contributed to a workplace atmosphere that derogates Hispanics, encourages discriminatory behavior by non-Hispanic supervisory and non-supervisory employees, and heightens racial animosity between Hispanics and non-Hispanics. Compare Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 2405-06, 91 L.Ed.2d 49 (1986) (pervasive sexual harassment may create an intimidating, hostile, or offensive working environment actionable under Title VII). For these reasons also, the injury to Gutierrez cannot be fully recompensed by an award of money damages.

C. Conclusion

[15] Entry of a preliminary injunction halting the enforcement of a discriminatory employment practice is within the purpose of the Civil Rights Act of 1964, so long as the customary prerequisites for an injunction are met. Gutierrez established a likelihood of success on the merits as well as the possibility of irreparable injury. Therefore, the district court properly issued a preliminary injunction. [FN20]

FN20. We note, incidentally, that the effect of the injunction will be to maintain the status quo. There is no indication in the record that the municipal court will be unable to function normally and efficiently without the English-only rule, nor does the record show that an injunction will seriously disrupt or inconvenience municipal court operations. Cf. Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1203-04 (9th Cir.1980).

[16] Finally, we note that the district court's injunction is more favorable to the employer than the business necessity test permits: the injunction allows restrictions to be imposed based on public relations concerns. [FN21] Public relations concerns do *1046 not constitute a business necessity. See Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 388-89 (5th Cir.), cert. denied, 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267 (1971); Decision 81-25, 27 Fair Empl.Prac.Cas. (BNA) 1820, 1822 (EEOC 1981).

If such concerns were sufficient a major goal of Title VII would be thwarted because employers would be free to consider public prejudices when setting employment policies and determining employment practices. Such a result would be wholly inconsistent with Title VII, which was intended to overcome the effect of prejudice on employment opportunities. See Diaz, 442 F.2d at 389. Having already discussed the proper definition of the business necessity test, see supra at 1041, we simply mention the "public relations concerns" issue for the court's guidance in its further proceedings. [FN22]

FN21. The injunction provides that:

[D]efendants, ... are ... enjoined and prohibited pendente lite, from requiring plaintiff and other employees of the Municipal Court of the Southeast Judicial District of Los Angeles County to communicate only in the English language during working hours; provided that, defendants may restrict employee communication in other than the English language under any circumstances dictated by valid business and public relations concerns articulated to the work force in writing. (Emphasis added in final clause.)

FN22. We also note that we seriously doubt the propriety of using the term "business concerns" as a substitute for "business necessity." We have previously concluded that "business necessity" means more than "business purpose." Atonio II, 827 F.2d at 442. Similarly it would appear to mean more than "business concerns".

II. IMMUNITY AND THE DAMAGE CLAIMS

A. Absolute Legislative Immunity

[17] Following issuance of the preliminary injunction, Gutierrez proceeded with discovery and deposed appellants. The municipal court judges refused to answer certain questions until the district court determined whether the defenses of absolute and qualified immunity entitled them to summary judgment. Appellants first assert that they are absolutely immune from suit because they acted in a legislative capacity in enacting the English-only rule. [FN23] We review the district court's determination regarding immunity de novo. Cf. Capoeman v. Reed, 754 F.2d 1512, 1513 (9th Cir.1985).

FN23. Appellants argued below, but do not assert here, that Gutierrez sued them in their official

capacity as state officers, and thus was attempting to sue the State of California. The Eleventh Amendment prohibits suits for damages against the states in federal court. *Kentucky v. Graham*, 473 U.S. 159, 169, 105 S.Ct. 3099, 3107, 87 L.Ed.2d 114 (1985). A suit against state officers in their official capacity is simply another way of suing the state. *Id.*; see also *Cory v. White*, 457 U.S. 85, 90, 102 S.Ct. 2325, 2328, 72 L.Ed.2d 694 (1982). Assuming *arguendo* that municipal court judges are state officers, to the extent that Gutierrez seeks damages from appellants in their official capacity, her claim would be barred. The district court originally certified the eleventh amendment issue to this court for review but at appellants' request, amended its certification order to omit that contention and add several others. Appellants sought the amended order on the ground that the record no longer supported an eleventh amendment defense. The district court, in altering its certification order, apparently agreed, concluding either that Gutierrez had sued the defendants individually, in their personal capacities as her employers, rather than in their official capacities, or that municipal court judges are not state officers.

[18][19] Members of legislative bodies, whether state, local, or regional, have absolute immunity from suit based on their acts undertaken as part of the legislative function. See *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731-33, 100 S.Ct. 1967, 1974-75, 64 L.Ed.2d 641 (1980); *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405, 99 S.Ct. 1171, 1179, 59 L.Ed.2d 401 (1979); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349-50 (9th Cir.1982). Absolute immunity protects the legislative process by shielding lawmakers from civil liability based on their legislative role which necessarily involves the balancing of social needs and rights of different groups. See *Kuzinich*, 689 F.2d at 1350-51. Individuals who are not legislators but whose acts are sufficiently legislative in nature are also absolutely immune from liability for those acts. See *Supreme Court of Virginia*, 446 U.S. at 731-33, 100 S.Ct. at 1974-75. A legislative act involves " 'the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct.' " *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 580 (9th Cir.1984) (quoting *Yakus v. United States*, 321 U.S. 414, 424, 64 S.Ct. 660, 667, 88 L.Ed. 834 (1944)), cert. *1047 denied, 471 U.S. 1054, 105 S.Ct. 2115, 85 L.Ed.2d 480 (1985).

[20][21] The promulgation of a rule governing the conduct of clerical employees is best characterized as an administrative function, rather than a legislative or judicial one. See *Goodwin v. Circuit Court of St. Louis County, Missouri*, 729 F.2d 541, 549 (8th Cir.1984), cert. denied, 469 U.S. 1216, 105 S.Ct. 1194, 84 L.Ed.2d 339 (1985); cf. *Supreme Court of Virginia*, 446 U.S. at 731-33, 100 S.Ct. at 1974-75; *Crooks v. Maynard*, 820 F.2d 329, 334 (9th Cir.1987) (order and contempt order issued to correct administrative problem was a judicial act); *Cinevision*, 745 F.2d at 580. Personnel rules govern what are essentially internal affairs of a particular employer and are in that respect markedly dissimilar from state bar disciplinary rules or land-use ordinances, for example, which are of general applicability, at least within an affected profession, industry or type of business. Cf. *Supreme Court of Virginia*, 446 U.S. at 721-24, 100 S.Ct. at 1969-71; *Lake Country Estates*, 440 U.S. at 394, 99 S.Ct. at 1173; *Kuzinich*, 689 F.2d at 1350. A work rule is not transformed into legislation merely because the employer is a public entity. Because, in promulgating the challenged personnel rule, appellants acted in their capacity as an employer, and not in a legislative capacity, they are not entitled to assert the defense of legislative, or absolute, immunity. [FN24]

FN24. Appellants specifically disclaim any reliance on absolute judicial immunity although they suggest that the defense might have been available, citing *Forrester v. White*, 792 F.2d 647 (7th Cir.1986). The Supreme Court has just reversed *Forrester* and held that when supervising employees a judge "act[s] in an administrative capacity" and is not protected by absolute judicial immunity. *Forrester v. White*, --- U.S. ---, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988).

B. Qualified Immunity and the Pleading of Unconstitutional Motive

1. Introduction

[22][23][24][25] Appellants next assert that they are entitled to qualified immunity from suits brought under sections 1981, 1983, and 1985(3). Claims pleaded pursuant to those sections have varying requirements, but in some instances it is necessary to allege intentional discrimination. For example, a section 1981 claim always requires purposeful

discrimination and therefore cannot be based solely on a disparate impact theory. See *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 386-88, 102 S.Ct. 3141, 3147-49, 73 L.Ed.2d 835 (1982). On the other hand, a claim brought pursuant to section 1983 may or may not require intent; the requirements for section 1983 claims are the same as those for establishing the underlying constitutional or statutory violations. See *Baker v. McCollan*, 443 U.S. 137, 140 & n. 3, 99 S.Ct. 2689, 2692 & n. 3, 61 L.Ed.2d 433 (1979). Here, Gutierrez alleges a section 1983 claim based primarily upon a violation of the equal protection clause. Because purposeful discrimination is an essential element of an equal protection clause violation, Gutierrez's section 1983 claim requires her to prove intentional discrimination. See *Personnel Administrator v. Feeney*, 442 U.S. 256, 276, 99 S.Ct. 2282, 2294, 60 L.Ed.2d 870 (1979). [FN25] Finally, a claim brought under section 1985(3) requires a direct or indirect purpose to "depriv[e] ... any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws," and a class or race-based animus. *Griffin v. Breckenridge*, 403 U.S. 88, 102-03, 91 S.Ct. 1790, 1798-99, 29 L.Ed.2d 338 (1971); see *Bretz v. Kelman*, 773 F.2d 1026, 1028 (9th Cir.1985) (en banc). Because the district court was not asked to rule on any motion to dismiss, we do not now consider whether Gutierrez has met the requisite pleading requirements for her *1048 various causes of action; however, for reasons we explain infra at 1052-1053, it may be necessary for the district court to do so on remand.

FN25. Other section 1983 claims have different requirements. See, e.g., *Little v. City of North Miami*, 805 F.2d 962, 967 (11th Cir.1986) (per curiam) (discussing requirements for section 1983 claim alleging unlawful retaliation in connection with exercise of first amendment rights.). On this appeal, Gutierrez does not rely on her Title VII claim as the triggering provision for her section 1983 action. Thus we need not consider here whether that statutory provision, which itself does not provide for damages, may indirectly serve as the basis for such relief.

2. Clearly Established in General

[26][27] In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the Supreme Court held that government officials

performing discretionary functions are entitled to qualified immunity unless, in taking the challenged action, they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 102 S.Ct. at 2738; see also *Anderson v. Creighton*, 483 U.S. ----, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir.1986), cert. denied, --- U.S. ----, 107 S.Ct. 3263, 97 L.Ed.2d 762 (1987); *Guerra v. Sutton*, 783 F.2d 1371, 1374 (9th Cir.1986). For purposes of *Harlow*, government officials are charged with knowledge of constitutional and statutory developments, including all available decisional law. *Ward*, 791 F.2d at 1332; see also *Capoeman*, 754 F.2d at 1513-14.

There is little authority on the question how a court should determine whether a constitutional or statutory right is clearly established. *Capoeman*, 754 F.2d at 1514; see also *Anderson*, 107 S.Ct. at 3039. Ordinarily, courts begin by attempting to determine whether the statutory or constitutional provision creating the right is unambiguous. Where the existence of the right is clear from the face of the provision, courts usually need go no further. However, where ambiguities exist, we "look to whatever decisional law is available to ascertain whether the law is clearly established." *Capoeman*, 754 F.2d at 1514; see also *Ward*, 791 F.2d at 1332. In doing so, we may also consider the likelihood that we would reach the same conclusion as other courts that have previously considered the issue. *Capoeman*, 754 F.2d at 1515; see also *Ward*, 791 F.2d at 1332. Finally, we should note that the term "clearly established right" may be somewhat misleading in that in some cases the relevant inquiry may more properly be described as: whether it is clearly established that the particular act by the public official constitutes a violation of the right involved, rather than whether the right itself is clearly established. Cf. *Anderson*, 107 S.Ct. at 3038-39 (while right to be free from unlawful warrantless searches of one's home is clearly established, court of appeals should have focused on the particular facts of the search under challenge to see whether it was clearly established that the officer's conduct was unlawful). The latter type of inquiry is not, however, appropriate in cases in which intentional or purposeful discrimination is an element of the offense. See section II.B.4.infra, at 1049-1051.

3. Pre-existing Law and the English-Only Rule

When the municipal court adopted its English-only rule, there was no binding decisional authority on point in this circuit. In fact, as we previously noted, *supra* at 1039, there was a dearth of judicial authority concerning English-only rules. The only outstanding federal appellate court decision was *Garcia v. Gloor*, 618 F.2d 264 (5th Cir.1980), cert. denied, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981). In that case, the Fifth Circuit had upheld an English-only rule saying that it only prevented some employees from exercising "a preference to converse in Spanish" and did not constitute national origin discrimination. *Id.* at 271.

On the other hand, shortly after the Fifth Circuit decided *Garcia*, the Equal Employment Opportunity Commission, the agency charged with administering employment discrimination law, adopted a contrary position. In December of 1980, the EEOC promulgated guidelines providing that a total prohibition on speaking languages other than English will be presumed invalid, and that a limited prohibition will be found permissible only when it is justified by a clear business necessity. 45 Fed.Reg. 85632, 85636 (1980) (codified at 29 C.F.R. § 1606.7 (1986)). Subsequently, the guidelines were construed in two significant EEOC decisions which shed considerable light on their proper interpretation. *1049 See Decision 81-25, 27 Fair Empl.Prac.Cas. (BNA) at 1821-22 (customer preference does not constitute business necessity); Decision 83-7, 31 Fair Empl.Prac.Cas. (BNA) at 1862 (English-only rule limited to communication during emergencies and while conducting inherently dangerous procedures constituted business necessity). While the EEOC guidelines are not binding on the courts, they "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Savings Bank*, 106 S.Ct. at 2405 (quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42, 97 S.Ct. 401, 410-11, 50 L.Ed.2d 343 (1976), quoting in turn *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944)).

We need not decide in this case, whether, in the absence of decisional law, EEOC guidelines and decisions can constitute clearly established law. Here, judicial precedent existed and it appears to

have been inconsistent, at least in part, with the guidelines. If contrary judicial precedent had been issued subsequent to the guidelines, there is no question that we would hold that the guidelines do not "clearly establish" the law. Although the answer is not as certain when the guidelines are issued after a judicial decision, where that decision has been rendered by a federal circuit court and the subsequently issued guidelines remain largely untested, we think it appropriate to reach the same conclusion. Thus, we hold that in the case before us the EEOC guidelines did not serve to clearly establish the law regarding the validity of English-only rules.

4. Purposeful Discrimination

[28] Our conclusion that the invalidity of English-only rules was not clearly established does not end our inquiry, for, as we have noted, Gutierrez has alleged that appellants imposed the rule for the purpose and with the intent of discriminating against Hispanics, in violation of Title VII and the equal protection clause of the Fourteenth Amendment. She now argues that because appellants purposefully discriminated against Hispanics, they violated clearly established law. In support of this argument, she points out that both the Fourteenth Amendment and Title VII unequivocally forbid intentional racial or national origin discrimination. Thus, she concludes, appellants clearly knew they could not engage in purposeful acts of discrimination, and since they acted with a discriminatory motive, they are not entitled to claim qualified immunity.

Gutierrez's argument raises an interesting and important question which requires us to consider the history and purpose of the qualified immunity rule. The current rule is designed to protect government officials from "broad-reaching discovery" and "trial" in cases involving insubstantial claims. *Harlow*, 457 U.S. at 817, 102 S.Ct. at 2737. Prior to *Harlow*, an official was entitled to qualified immunity unless he "knew or reasonably should have known that the action he took ... would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." *Id.* at 815, 102 S.Ct. at 2737 (quoting *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1001, 43 L.Ed.2d 214 (1975)). The rule was largely subjective in nature and permitted plaintiffs

(Cite as: 838 F.2d 1031, *1049)

to subject government officials to exhaustive legal inquiries on the basis of unsupported suspicions. The Harlow Court, in seeking to protect government officials from vexatious litigation based on bare allegations of malice, decreed that thereafter the availability of the qualified immunity defense would depend on objective considerations, rather than on the subjective intent of the government actor. The Court then set forth its "clearly established" test.

While the Harlow rule provided clear answers to a number of questions, it initially resulted in considerable uncertainty regarding some types of claims, and particularly those in which unlawful motivation or intent was an essential element of the alleged violation. The issue that arose post- Harlow was whether, notwithstanding that decision, courts could consider the actor's discriminatory intent or motive in cases in *1050 which the existence of a violation was dependent on proof of such intent. The courts were faced with an awkward choice. On the one hand, it would appear that judicial consideration of the actor's motive would restore in at least one important category of cases the subjective test that Harlow sought to eliminate. On the other hand, if intent or motive could not be considered, courts would be unable to reach a significant number of acts that are unlawful solely because of the actor's motivation. For example, if a public employer terminates a black employee because he is black, that act clearly violates federal constitutional and statutory law. If, however, the employer terminates the black employee because of incompetence, then the discharge obviously does not violate the law at all. The act itself--the act of discharge--is neutral; it is the motive or intent that makes the act both actionable and violative of clearly established law. See *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425, 1433 n. 17 (D.C.Cir.1987); *Goodwin*, 729 F.2d at 545-46; see also *Lowe v. City of Monrovia*, 775 F.2d 998, 1010-11 (9th Cir.1985).

The United States Court of Appeals for the District of Columbia soon recognized the problem that would be created by too literal a reading of Harlow and quickly resolved the dilemma in a manner that was thereafter followed, either explicitly or implicitly, by all other circuits that have considered the question. The District of Columbia Circuit concluded that where unlawful intent or motive is an essential element of the challenged conduct, the act

cannot be analyzed apart from the actor's intent and the court must consider that intent in determining whether the defense of qualified immunity is available. *Martin*, 812 F.2d at 1431; *Hobson v. Wilson*, 737 F.2d 1, 26-29 (D.C.Cir.1984), cert. denied, 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985). [FN26] In *Hobson*, Judges Edwards, Scalia (now Justice Scalia), and Starr held that while each "individual act ... shown to have [been] committed was lawful," the defendants were not entitled to qualified immunity because of their motive: the court found that the individual acts were undertaken "in a specific effort 'to disrupt and interfere with the plaintiffs' political activities.'" *Hobson*, 737 F.2d at 26-27. The District of Columbia Circuit unequivocally reaffirmed its *Hobson* analysis earlier this year in *Martin* and explained its original reasoning in greater detail. It said that an interpretation of Harlow that excluded all inquiry into motivation would "insulate officials from liability in all cases in which the substantive prescription makes the official's state of mind an essential component of the alleged constitutional violation." *Martin*, 812 F.2d at 1433 (emphasis added). The court added that such a result was not intended by Harlow. It then concluded that "when the governing precedent identifies the defendant's intent (unrelated to knowledge of the law) as an essential element of plaintiff's constitutional claim, the plaintiff must be afforded an opportunity to overcome an asserted immunity with an offer of proof of the defendant's alleged unconstitutional purpose." *Id.* (citation omitted). [FN27]

FN26. Since Harlow, the Supreme Court has not considered a qualified immunity case in which intent or motive was an element of the offense. Compare *Anderson v. Creighton*, --- U.S. ---, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), in which the issue was whether under the particular facts and circumstances "a reasonable officer could have believed Anderson's warrantless search to be lawful," an inquiry the Court described as "objective (albeit fact-specific)." *Id.* 107 S.Ct. at 3040.

FN27. Judge Starr dissented from the majority opinion, but only on the issue of how much evidence of unlawful motive a plaintiff was required to plead before discovery could be had under the test established in *Hobson*. Significantly, Judge Starr concurred fully in the portion of the decision we discuss here. We note that, originally, the District of Columbia Circuit granted rehearing

en banc and vacated part IV of the Martin opinion, the part Judge Starr objected to. *Martin v. D.C. Metro. Police Dep't*, 817 F.2d 144 (D.C.Cir.1987). The court has since reconsidered its decision to grant an en banc hearing, denied the petition for rehearing en banc, and reinstated part IV of the opinion. *Martin v. D.C. Metro. Police Dep't*, 824 F.2d 1240 (D.C.Cir.1987).

Our circuit has also previously held that a government official is not entitled to *1051 qualified immunity from a Section 1981 or 1983 action that is based on a claim of intentional discrimination. See *Lowe*, 775 F.2d at 1011. As we said there, it is well-established that an individual has a "right not to be refused employment ... because of her race or sex. A reasonable person would have been aware that the practices ... were unlawful if ... they were intended to deprive Blacks or women of employment opportunities." *Id.* Similarly, the Eighth Circuit has held that qualified immunity is not a defense in a case in which invidious discrimination on the basis of sex has been established. *Goodwin*, 729 F.2d at 546. The Eighth Circuit explained that intentional discrimination is not subject to a Harlow -type qualified immunity defense because "[t]he right to be free of invidious discrimination on the basis of sex certainly is clearly established, and no one who does not know about it can be called 'reasonable' in contemplation of law." *Id.* In so holding the court quoted our language from *Flores v. Pierce*, 617 F.2d 1386, 1391-92 (9th Cir.), cert. denied, 449 U.S. 875, 101 S.Ct. 218, 66 L.Ed.2d 96 (1980):

No official can ... impose discriminatory burdens on a person or group by reason of a racial or ethnic animus against them. The constitutional right to be free from such invidious discrimination is so well established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it.

Goodwin, 729 F.2d at 546 (quoting *Flores*, 617 F.2d at 1391-92). [FN28] Intentional invidious discrimination was an essential element of the claims in *Lowe* and *Goodwin*. Whether the qualified immunity defense was available in these cases turned on whether the act was taken for the purpose and with the intent of discrimination. Both cases held that if discriminatory animus was present, then the act alleged to have resulted in a deprivation of rights violated clearly established law. The same is true in the case before us.

FN28. The Eighth Circuit found our *Flores* language still applicable in the post-Harlow era, and we agree. Cf. *Lowe*, 775 F.2d at 1011.

[29] We hold, along with the District of Columbia Circuit, that where the lawfulness of a challenged act is dependent upon the actor's motive or intent, the purpose for which the act was undertaken must be analyzed and not just the act itself. We also hold that in deciding whether a defendant is entitled to qualified immunity in cases in which unlawful motive is a critical element, the court must consider the actor's intent in carrying out the act that is alleged to have resulted in the violation of the plaintiff's rights. Specifically, we reaffirm our *Lowe* decision and agree with the Eighth Circuit that qualified immunity is not a defense in cases involving intentional racial or other similar discrimination, including national origin. [FN29]

FN29. If the plaintiff fails to establish that the discrimination was intentional, the claim fails. If the plaintiff does establish such intent, there can be no qualified immunity. Thus, it seems simpler to say that qualified immunity is not a defense in such cases, rather than that the defense prevails where proof of intentional discrimination is not established.

5. Pleading Requirements and Limited Discovery

The District of Columbia Circuit recognized that the rule it adopted in *Hobson* could provide the means for an end run around the Harlow objective test. The court acknowledged that "[I]n some instances, plaintiffs might allege facts demonstrating that defendants have acted lawfully, append a claim that they did so with an unconstitutional motive, and as a consequence usher defendants into discovery, and perhaps trial, with no hope of success on the merits. The result would be precisely the burden Harlow sought to prevent." *Hobson*, 737 F.2d at 29. In an effort to pretermitt the use of such tactics, the court held that in cases involving contentions that defendants acted with an unlawful motive, plaintiffs must present nonconclusory allegations containing evidence of unlawful intent in their complaint or the case would be subject to dismissal prior to the taking of any discovery. *Id.*; see also *Elliott v. Perez*, 751 F.2d 1472, 1479-81 (5th *1052 Cir.1985). The allegations, the court said, must be sufficiently precise to place "defendants on notice of the nature of the claim and enable them to prepare a response

and, where appropriate, a summary judgment motion." Hobson, 737 F.2d at 29; and compare Elliott, 751 F.2d at 1482 ("Once a complaint ... adequately raises the likely issue of immunity ... the district court should on its own require of the plaintiff a detailed complaint alleging with particularity all material facts on which he contends he will establish his right to recovery, which will include detailed facts supporting the contention that the plea of immunity cannot be sustained."). While, unlike the Eighth Circuit, we do not place the burden on the district court to police the pleadings, we adopt the District of Columbia Circuit's rule that, in order to survive a motion to dismiss, plaintiffs must state in their complaint nonconclusory allegations setting forth evidence of unlawful intent.

[30][31] Upon being served with a complaint which lacks sufficient nonconclusory allegations of evidence of unlawful intent, a public official who would ordinarily be entitled to raise a qualified immunity defense, and who wishes to avoid discovery, may either move for dismissal for failure to state a claim, or file an answer and move for judgment on the pleadings. See *Mitchell v. Forsyth*, 472 U.S. 511, 526-27, 105 S.Ct. 2806, 2815-16, 86 L.Ed.2d 411 (1985); Fed.R.Civ.P. 12(c) and (h)(2). Here, appellants answered the complaint but did not file either of those motions. Instead, at their depositions, they asserted a "legislative and administrative" privilege and refused to answer questions concerning their motives in enacting the English-only rule. When Gutierrez moved to compel answers, appellants asserted the defenses of absolute and qualified immunity and filed their own motion, for summary judgment. The gist of appellants' argument on appeal is that because Gutierrez's claim of unlawful motive is based on bare allegations of malice, the defense of qualified immunity must be upheld. That argument, properly stated, would be as follows:

Gutierrez is alleging intentional discrimination. In order to plead such a claim against a public official, she must allege specific facts. She has failed to do so.

Thus, although appellants' motion was titled a motion for summary judgment, as appellants now appear to recognize, the motion in actuality challenges the sufficiency of the complaint and functions properly as a motion to dismiss for failure to state a claim or for judgment on the pleadings.

Although the district court might have, sua sponte, treated appellants' summary judgment motion as a motion to dismiss and applied the Hobson standards, it was not required to, and did not, do so. [FN30] In short, the district court never ruled on the sufficiency of Gutierrez's complaint; rather, without explanation, it simply stated that the appellants were not entitled to rely on a qualified immunity defense. The court's failure to rule on the sufficiency of Gutierrez's complaint is certainly understandable, since appellants failed to make a motion to dismiss and failed to call the court's attention to any inadequacy in the complaint. Moreover, the law regarding the pleading of unconstitutional motive and qualified immunity was far from clear and the procedural posture of the case was, to say the least, confused. Now, on appeal, appellants suggest that Gutierrez should be permitted to amend her complaint and that the district court should then determine whether the amended pleading can withstand a motion to dismiss. Although appellant's suggestion is belated, it has considerable merit. Because of the uncertainty that existed as to the law and because the district judge was not afforded an opportunity to consider the complex legal issues in an appropriate context, we think a remand may provide the best vehicle for allowing the parties to have their pre-trial disputes resolved in an orderly and *1053 efficient manner. [FN31] Other courts have followed that course in similar circumstances. See, e.g., Elliott, 751 F.2d at 1479-80.

FN30. We assume without deciding that with proper notice the court could have reclassified the motion in that manner. It would then, however, have been required to disregard all supporting factual material not contained in the pleadings.

FN31. We note that in keeping with the purpose of this remand--the district judge should, as appellants suggest, allow Gutierrez to amend her complaint before considering any motion to dismiss.

We note that, subsequent to Hobson, the District of Columbia Circuit suggested that where a defendant asserts on a summary judgment motion that the plaintiff has failed to plead the facts with sufficient specificity, rather than making that claim in connection with a motion to dismiss, a somewhat different rule applies. In *Martin*, the court said that in summary judgment cases the plaintiff should be permitted to conduct a limited amount of discovery, if the discovery is narrowly confined to

"particularized interrogation of the defendants for the circumscribed purpose of ascertaining whether there is any substance to" the plaintiff's assertions of unconstitutional motive. 812 F.2d at 1438. Thus, where the defendant relies on factual material, the plaintiff is afforded some opportunity to discover the critical facts before being compelled to defend his complaint.

While the District of Columbia Circuit's limited discovery rule for summary judgment cases makes considerable sense, and while the appeal before us is from a summary judgment motion, we need not now determine whether to follow that portion of *Martin*. Here, Gutierrez was entitled to the order compelling defendants to answer the questions as to motive because of her Title VII claims for permanent injunctive relief. Gutierrez's right to pursue those claims was not challenged in the district court or before us, and defendants do not assert any immunity as to them. Defendants assert both absolute and qualified immunity as to the non-Title VII claims only. Since Gutierrez has the right to pursue her Title VII claims, and immunity is not an issue, appellants cannot refuse to answer deposition questions relevant to those claims, including questions relating to motive, or insist that their responses to those questions be postponed until after the court rules on their motions relating to the other claims. Thus, whether or not we follow the discovery rule laid down in *Martin*, Gutierrez is entitled to obtain the answers to her pending questions without further delay.

6. Conclusion

At the time appellants adopted their English-only rule, it was not clearly established that such rules were unlawful. Accordingly, to the extent that any claim for monetary damages is based on a disparate impact theory, appellants' qualified immunity defense would serve as a bar. However, Gutierrez's damage claims, including her section 1983 claim, are based primarily, if not exclusively, on allegations of purposeful discrimination. Discriminatory intent is an essential element of a 1983 action where the underlying claim is a violation of the equal protection clause. Qualified immunity is not a defense in such cases. Nevertheless, the concerns that led to *Harlow* have also led to the adoption of rules requiring plaintiffs alleging purposeful discrimination by public officials

to set forth in their complaints non-conclusory allegations containing evidence of unlawful intent. Gutierrez's complaint has not been tested under that standard. Accordingly, we remand for further proceedings with respect to the pleadings issues. Finally, for the reasons we have explained, appellants must now answer the questions regarding their motives in accordance with the order of the magistrate.

III. JURISDICTION UNDER TITLE VII

Appellants also contend that the district court lacked jurisdiction over Gutierrez's Title VII claim for three reasons. These challenges can be readily resolved.

A. The Right to Sue Letter

[32][33] Appellants assert that the district court lacked jurisdiction over Gutierrez's Title VII claim because she filed this action in March, 1985 but did not receive *1054 her right-to-sue letter from the EEOC until September, 1985. They contend that her early filing interfered with conciliation attempts. There is no evidence in the record to support this contention, and appellants admit that the lack of a right-to-sue letter at the time of filing a lawsuit may be cured by the later issuance of the letter. See *Jones v. Bechtel*, 788 F.2d 571, 573 (9th Cir.1986); *Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346, 1351 (9th Cir.1984). Established precedent is controlling. Any jurisdictional problem created by the initial lack of a right-to-sue letter was cured. *Wrighten*, 726 F.2d at 1351.

B. The EEOC Charge

[34] Appellants next contend that they are not proper defendants because they were not named individually in the EEOC charge which Gutierrez filed against the Municipal Court. "EEOC charges should be construed liberally." *Wrighten*, 726 F.2d at 1352. In *Wrighten*, we said that a Title VII action may be brought against persons not named in the EEOC charge "as long as they were involved in the [challenged] acts." *Id.* Subsequently, in *Carter v. Smith Food King*, 765 F.2d 916, 924 n. 10 (9th Cir.1985), we stated that plaintiffs could bring actions against defendants not named in the prior administrative proceeding "under certain circumstances." From the examples we gave in

Carter, it is clear that several types of connections between the party named in the charge and a new party named in the legal action are sufficient: for example, a connection between a corporate or governmental employer and a supervisor, a union and one of its officials, a union and a related organization, and an employer and an independent contractor that trains and supervises its employees. Appellants do not dispute that such a connection exists here, specifically the connection between governmental employer and supervisor. The municipal court judges have supervisory control over certain working conditions of the municipal court's employees. Accordingly, whether we apply the all-encompassing WRIGHTEN standard or look to the type of connection that Carter suggests may be required, the failure to list appellants in the EEOC charge does not preclude Gutierrez from naming them as defendants in the current litigation.

C. Appellants As Employers

[35] Appellants finally argue that Los Angeles County is Gutierrez's employer and that Gutierrez may not sue individuals who do not employ her. [FN32] More to the point, it is the Clerk of the Municipal Court, Joseph Sharar, who supervises her, and the Clerk is appointed by appellants.

Cal.Govt.Code § 71181. Further, the municipal court judges are authorized by statute to promulgate personnel rules for court employees. Cal.Govt.Code § 72002.1. The record establishes that the Clerk is responsible for enforcement of those rules. The judges thus possess authority to control working conditions in the Clerk's office. Cal.Govt.Code § 72002.1. If not the direct employers, appellants exercise supervisory authority over the employees. As such, they are proper parties. See Carter, 765 F.2d at 918 n. 1.

FN32. We note that at least for some purposes, appellants are county officials. See Villanazul v. City of Los Angeles, 37 Cal.2d 718, 724, 235 P.2d 16 (1951); 68 Op.Cal.Att'y Gen. 127, 133 (1985). Recently, a California appeals court held that a municipal court judge is a county rather than a state employee. Hamilton v. Workers' Compensation Appeals Bd., 196 Cal.App.3d 542, 242 Cal.Rptr. 67 (1987).

AFFIRMED IN PART; REVERSED AND REMANDED IN PART FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION.

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998 F.2d 1480

62 USLW 2055, 62 Fair Empl.Prac.Cas. (BNA) 525, 62 Empl. Prac. Dec. P 42,456

(Cite as: 998 F.2d 1480)

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Page 1

**Priscilla GARCIA; Maricela Buitrago; United
Food and Commercial Workers
International Union, AFL-CIO, Plaintiffs-
Appellees,**

v.

**SPUN STEAK COMPANY, a California
corporation, Defendant-Appellant.**

No. 91-16733.

**United States Court of Appeals,
Ninth Circuit.**

Argued and Submitted Nov. 3, 1992.

Decided July 16, 1993.

Spanish-speaking employees brought action against employer, alleging that English-only policy violated Title VII. The United States District Court for the Northern District of California, Robert H. Schnacke, Senior District Judge, granted summary judgment for employees, and employer appealed. The Court of Appeals, O'Scannlain, Circuit Judge, held that: (1) disparate impact claim may be based upon challenge to practice or policy that has significant adverse impact on "terms, conditions, or privileges" of employment of protected group under Title VII; (2) employees who spoke both Spanish and English failed to show that employer's requirement that bilingual workers speak only English while on job had significant adverse effects on terms, conditions, or privileges of their employment; and (3) genuine issue of material fact existed as to whether employee who spoke no English was adversely affected by English-only rule.

Reversed and remanded.

Boochever, Circuit Judge, filed dissenting opinion.

[1] CIVIL RIGHTS Ⓒ=366.1

78k366.1

Union had standing to seek injunctive relief on claim that employer's requirement that bilingual workers speak only English while working on job violated Title VII; Spanish-speaking employees would have standing to sue in their own right, employees' interest in conditions of workplace was germane to

union's purpose, and claim asserted and relief requested did not require participation of individual members. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[2] CIVIL RIGHTS Ⓒ=153

78k153

Plaintiff alleging discrimination under Title VII may proceed under two theories of liability: "disparate treatment" or "disparate impact"; while disparate treatment theory requires proof of discriminatory intent, intent is irrelevant to disparate impact theory. Civil Rights Act of 1964, § 703(a)(2), 42 U.S.C.A. § 2000e-2(a)(2).

See publication Words and Phrases for other judicial constructions and definitions.

[3] CIVIL RIGHTS Ⓒ=141

78k141

Burdensome term or condition of employment or denial of privilege does not limit, segregate or classify employees in way that would "deprive any individual of employment opportunities" or "otherwise adversely affect his status as an employee" within meaning of Title VII and, thus, such claims must be brought directly under section of Title VII prohibiting practices or policies with significant adverse impact on "terms, conditions, or privileges" of employment. Civil Rights Act of 1964, § 703(a)(1, 2), 42 U.S.C.A. § 2000e-2(a)(1, 2).

See publication Words and Phrases for other judicial constructions and definitions.

[4] CIVIL RIGHTS Ⓒ=153

78k153

Disparate impact claim may be based upon challenge to practice or policy that has significant adverse impact on "terms, conditions, or privileges" of employment of protected group under Title VII; there is no reason to restrict application of disparate impact theory to denial of employment opportunities under separate section of Title VII. Civil Rights Act of 1964, § 703(a)(1, 2), 42 U.S.C.A. § 2000e-2(a)(1, 2).

[5] CIVIL RIGHTS Ⓒ=153

78k153

Regardless of whether company's decisions about whom to hire or to promote are infected with

discrimination, policies or practices that impose significant harsher burdens on protected group than on employee population in general may operate as barriers to equality in workplace and, if unsupported by business justification, may be considered "discriminatory" for purposes of Title VII. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

See publication Words and Phrases for other judicial constructions and definitions.

[6] CIVIL RIGHTS ☞153

78k153

To make out prima facie of discriminatory impact under Title VII, plaintiff must identify specific, seemingly neutral practice or policy that has significantly adverse impact on persons of protected class. Civil Rights Act of 1964, § 703(a)(1, 2), 42 U.S.C.A. § 2000e-2(a)(1, 2).

[7] CIVIL RIGHTS ☞378

78k378

In disparate treatment context, Title VII plaintiff can make out prima facie case merely by presenting evidence sufficient to give rise to inference of discrimination, whereas, in disparate impact case, plaintiff must do more than merely raise inference of discrimination before burden shifts; plaintiff must actually prove discriminatory impact at issue. Civil Rights Act of 1964, § 703(a)(1, 2), 42 U.S.C.A. § 2000e-2(a)(1, 2).

[7] CIVIL RIGHTS ☞383

78k383

In disparate treatment context, Title VII plaintiff can make out prima facie case merely by presenting evidence sufficient to give rise to inference of discrimination, whereas, in disparate impact case, plaintiff must do more than merely raise inference of discrimination before burden shifts; plaintiff must actually prove discriminatory impact at issue. Civil Rights Act of 1964, § 703(a)(1, 2), 42 U.S.C.A. § 2000e-2(a)(1, 2).

[8] CIVIL RIGHTS ☞377.1

78k377.1

Fact that alleged effects of disparate impact on conditions, terms or privileges of employment may be subjective does not relieve Title VII plaintiff of burden of proving disparate impact; plaintiff must prove existence of adverse effects of policy, that impact of policy is on terms, conditions, or

privileges or employment of protected class, that adverse effects are significant, and that employee population in general is not affected by policy to same degree. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

[9] CIVIL RIGHTS ☞383

78k383

Employees who spoke both Spanish and English failed to show that employer's requirement that bilingual workers speak only English while on job had significant adverse effects on terms, conditions, or privileges of their employment, so as to create prima facie case under Title VII; Title VII did not protect employees' ability to express cultural heritage at workplace, employees could engage in privilege of speaking on job, and there was no evidence that atmosphere at workplace was infused with hostility toward Hispanic workers. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

[10] COURTS ☞89

106k89

Case vacated as moot by Supreme Court had no precedential authority.

[11] CIVIL RIGHTS ☞141

78k141

Title VII does not protect ability of workers to express their cultural heritage at workplace. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

[12] CIVIL RIGHTS ☞153

78k153

Title VII is not meant to protect against rules that merely inconvenienced some employees, even if inconvenience falls regularly on protected class but, rather, Title VII protects against only those policies that have significant impact. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

[13] FEDERAL CIVIL PROCEDURE ☞2497.1

170Ak2497.1

Genuine issue of material fact as to whether employee who spoke no English was adversely affected by English-only rule imposed by employer precluded summary judgment in Title VII suit; employee stated that she was not bothered by rule because she preferred not to make small talk on job, and there was evidence that she was not required to

comply with English-only policy when she chose to speak. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

[14] FEDERAL CIVIL PROCEDURE ⚡2491.5
170Ak2491.5

Whether employee spoke such little English as to be effectively denied privilege of speaking on job by imposition of English-only rule was question of fact for which summary judgment was improper in Title VII suit. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

[15] CIVIL RIGHTS ⚡145
78k145

In evaluating claim that employer's English-only rule has exacerbated existing tensions or contributed to overall environment of discrimination, or that rule is enforced in such draconian manner that enforcement itself amounts to harassment, court in Title VII suit must look to totality of circumstances in particular factual context in which claim arises. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

[16] CIVIL RIGHTS ⚡383
78k383

Equal Employment Opportunity Commission (EEOC) guideline providing that employee meets prima facie case in disparate impact cause of action merely by proving existence of English-only policy was rejected; nothing in plain language of Title VII supported guideline, and guideline contravened Supreme Court policy that plaintiff in disparate impact case must prove alleged discriminatory effect before burden shifts to employer by presuming that English-only policy had disparate impact in absence of proof. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

*1482 James A. Carter, Hendrickson, Higbie & Carter, San Francisco, CA, for defendant-appellant.

Edward M. Chen, American Civil Liberties Union Foundation of Northern California, San Francisco, CA, for plaintiffs-appellees.

Jennifer S. Goldstein, E.E.O.C., Washington, DC, for amicus.

Appeal from the United States District Court for the Northern District of California.

Before: BOOCHEVER, NOONAN and O'SCANNLAIN, Circuit Judges.

*1483 O'SCANNLAIN, Circuit Judge:

We are called upon to decide whether an employer violates Title VII of the Civil Rights Act of 1964 in requiring its bilingual workers to speak only English while working on the job.

I

Spun Steak Company ("Spun Steak") is a California corporation that produces poultry and meat products in South San Francisco for wholesale distribution. Spun Steak employs thirty-three workers, twenty-four of whom are Spanish-speaking. Virtually all of the Spanish-speaking employees are Hispanic. While two employees speak no English, the others have varying degrees of proficiency in English. Spun Steak has never required job applicants to speak or to understand English as a condition of employment.

Approximately two-thirds of Spun Steak's employees are production line workers or otherwise involved in the production process. Appellees Garcia and Buitrago are production line workers; they stand before a conveyor belt, remove poultry or other meat products from the belt and place the product into cases or trays for resale. Their work is done individually. Both Garcia and Buitrago are fully bilingual, speaking both English and Spanish.

Appellee Local 115, United Food and Commercial Workers International Union, AFL-CIO ("Local 115"), is the collective bargaining agent representing the employees at Spun Steak.

Prior to September 1990, these Spun Steak employees spoke Spanish freely to their co-workers during work hours. After receiving complaints that some workers were using their bilingual capabilities to harass and to insult other workers in a language they could not understand, Spun Steak began to investigate the possibility of requiring its employees to speak only English in the workplace. Specifically, Spun Steak received complaints that Garcia and Buitrago made derogatory, racist comments in Spanish about two co-workers, one of whom is African-American and the other Chinese-American.

The company's president, Kenneth Bertelson, concluded that an English-only rule would promote racial harmony in the workplace. In addition, he concluded that the English-only rule would enhance worker safety because some employees who did not understand Spanish claimed that the use of Spanish distracted them while they were operating machinery, and would enhance product quality because the U.S.D.A. inspector in the plant spoke only English and thus could not understand if a product-related concern was raised in Spanish. Accordingly, the following rule was adopted:

[I]t is hereafter the policy of this Company that only English will be spoken in connection with work. During lunch, breaks, and employees' own time, they are obviously free to speak Spanish if they wish. However, we urge all of you not to use your fluency in Spanish in a fashion which may lead other employees to suffer humiliation.

In addition to the English-only policy, Spun Steak adopted a rule forbidding offensive racial, sexual, or personal remarks of any kind.

It is unclear from the record whether Spun Steak strictly enforced the English-only rule. According to the plaintiffs-appellees, some workers continued to speak Spanish without incident. Spun Steak issued written exceptions to the policy allowing its clean-up crew to speak Spanish, allowing its foreman to speak Spanish, and authorizing certain workers to speak Spanish to the foreman at the foreman's discretion. One of the two employees who speak only Spanish is a member of the clean-up crew and thus is unaffected by the policy.

In November 1990, Garcia and Buitrago received warning letters for speaking Spanish during working hours. For approximately two months thereafter, they were not permitted to work next to each other. Local 115 protested the English-only policy and requested that it be rescinded but to no avail.

On May 6, 1991, Garcia, Buitrago, and Local 115 filed charges of discrimination against Spun Steak with the U.S. Equal Employment Opportunity Commission ("EEOC"). The EEOC conducted an investigation and determined that "there is reasonable *1484 cause to believe [Spun Steak] violated Title VII of the Civil Rights Act of 1964, as amended, with respect to its adoption of an English-only rule and with respect to retaliation when [Garcia, Buitrago, and Local 115] complained."

Garcia, Buitrago, and Local 115, on behalf of all Spanish-speaking employees of Spun Steak, (collectively, "the Spanish-speaking employees") filed suit, alleging that the English-only policy violated Title VII. On September 6, 1991, the parties filed cross-motions for summary judgment. The district court denied Spun Steak's motion and granted the Spanish-speaking employees' motion for summary judgment, concluding that the English-only policy disparately impacted Hispanic workers without sufficient business justification, and thus violated Title VII. Spun Steak filed this timely appeal and the EEOC filed a brief amicus curiae and participated in oral argument.

II

[1] As a preliminary matter, we must consider whether Local 115 has standing to sue on behalf of the Spanish-speaking employees at Spun Steak. If Local 115 does not have standing, we will consider the application of the policy only to Garcia and Buitrago, both of whom speak English fluently.

"[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977).

Here, it is clear that the Spanish-speaking employees would have standing to sue in their own right because they could claim injury from the application of the policy to them. Further, it is clear that the employees' interest in the conditions of the workplace is germane to Local 115's purpose as the collective bargaining agent of the employees. Finally, the claim asserted and the relief requested do not require the participation of individual members. Local 115 claims that the policy has a per se discriminatory impact on all Spanish-speaking employees. Further, the union is seeking only injunctive relief on behalf of its members, not damages.

In short, Local 115 has standing.

III

[2] Sections 703(a)(1) and (2) of Title VII provide:

(a) It shall be an unlawful employment practice for an employer--

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

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

42 U.S.C. § 2000e-2(a). It is well-settled that Title VII is concerned not only with intentional discrimination, but also with employment practices and policies that lead to disparities in the treatment of classes of workers. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31, 91 S.Ct. 849, 853-54, 28 L.Ed.2d 158 (1970). Thus, a plaintiff alleging discrimination under Title VII may proceed under two theories of liability: disparate treatment or disparate impact. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87, 108 S.Ct. 2777, 2784-85, 101 L.Ed.2d 827 (1987). While the disparate treatment theory requires proof of discriminatory intent, intent is irrelevant to a disparate impact theory. *Id.* at 988, 108 S.Ct. at 2785. "[I]mpact analysis is designed to implement Congressional concern with 'the consequences of employment practices, not simply the motivation.'" *Rose v. Wells Fargo & *1485 Co.*, 902 F.2d 1417, 1424 (9th Cir.1990) (citations omitted).

A

The Spanish-speaking employees do not contend that Spun Steak intentionally discriminated against them in enacting the English-only policy. Rather, they contend that the policy had a discriminatory impact on them because it imposes a burdensome term or condition of employment exclusively upon Hispanic workers and denies them a privilege of employment that non-Spanish-speaking workers enjoy. Because their claim focuses on disparities in the terms, conditions, and privileges of employment, and not on barriers to hiring or promotion, it is

outside the mainstream of disparate impact cases decided thus far. As a threshold matter, therefore, we must determine whether the disparate impact theory can be made applicable at all.

The disparate impact cause of action developed out of the language in section 703(a)(2) prohibiting discrimination based on deprivation of employment opportunities, such as the opportunity to be hired or promoted. See, e.g., *Connecticut v. Teal*, 457 U.S. 440, 448-50, 102 S.Ct. 2525, 2531-32, 73 L.Ed.2d 130 (1981). Our court's disparate impact cases fall squarely within the language of section 703(a)(2). The cases in which we have concluded that the plaintiff has proved discrimination based on a disparate impact theory have all involved plaintiffs who claimed that they were denied employment opportunities as the result of artificial, arbitrary, and unnecessary barriers that excluded members of a protected group from being hired or promoted, see, e.g., *Bouman v. Block*, 940 F.2d 1211, 1224-26 (9th Cir.), cert. denied, 502 U.S. 1005, 112 S.Ct. 640, 116 L.Ed.2d 658 (1991), not plaintiffs contending that they were subjected to harsher working conditions than the general employee population.

[3] This case, by contrast, does not fall within the language of section 703(a)(2). While policies that serve as barriers to hiring or promotion clearly deprive applicants of employment opportunities, we cannot conclude that a burdensome term or condition of employment or the denial of a privilege would "limit, segregate, or classify" employees in a way that would "deprive any individual of employment opportunities" or "otherwise adversely affect his status as an employee" in violation of section 703(a)(2). See *Nashville Gas Co. v. Satty*, 434 U.S. 136, 144, 98 S.Ct. 347, 352, 54 L.Ed.2d 356 (1977) (deprivation of benefits does not fall under § 703(a)(2)). Such claims, therefore, must be brought directly under section 703(a)(1). We have never expressly considered, however, whether disparate impact theory applies to claims under section 703(a)(1), and the Supreme Court has explicitly reserved the issue. *Id.*

[4][5] Nevertheless, we are called upon to decide the issue in this case notwithstanding the parties' failure to brief it. Our decision is simple: we see no reason to restrict the application of the disparate impact theory to the denial of employment

opportunities under section 703(a)(2). The Supreme Court has instructed that the language of section 703(a)(1) is to be interpreted broadly. "[T]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate treatment," *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1985) (internal quotations and citations omitted), even when the differences in treatment are not the result of intentional discrimination. See also *Lynch v. Freeman*, 817 F.2d 380, 387 (6th Cir.1987) ("The language of section 703(a)(2) is ... broad enough to include working conditions that have an adverse impact on a protected group of employees."). Regardless whether a company's decisions about whom to hire or to promote are infected with discrimination, policies or practices that impose significantly harsher burdens on a protected group than on the employee population in general may operate as barriers to equality in the workplace and, if unsupported by a business justification, may be considered "discriminatory." *Id.*; cf. *Meritor Sav. Bank*, 477 U.S. at 57, 106 S.Ct. at 2399 (sexual harassment can be arbitrary barrier to equality in the marketplace). We are satisfied that a disparate impact claim may be based upon a challenge to a practice or policy that has a significant *1486 adverse impact on the "terms, conditions, or privileges" of the employment of a protected group under section 703(a)(1).

B

[6] To make out a prima facie case of discriminatory impact, a plaintiff must identify a specific, seemingly neutral practice or policy that has a significantly adverse impact on persons of a protected class. *Teal*, 457 U.S. at 446, 102 S.Ct. at 2530. If the prima facie case is established, the burden shifts to the employer to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C.A. § 2000e-2(k)(1)(A) (Supp.1992). In this case, the district court granted summary judgment in favor of the Spanish-speaking employees, concluding that, as a matter of law, the employees had made out the prima facie case and the justifications offered by the employer were inadequate.

[7][8] We first consider whether the Spanish-speaking employees have made out the prima facie case. "[T]he requirements of a prima facie disparate impact case ... are in some respects more exacting than those of a disparate treatment case." *Spaulding v. University of Washington*, 740 F.2d 686, 705 (9th Cir.) (citation omitted), cert. denied, 469 U.S. 1036, 105 S.Ct. 511, 83 L.Ed.2d 401 (1984). In the disparate treatment context, a plaintiff can make out a prima facie case merely by presenting evidence sufficient to give rise to an inference of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-06, 93 S.Ct. 1817, 1824-26, 36 L.Ed.2d 668 (1973). In a disparate impact case, by contrast, plaintiffs must do more than merely raise an inference of discrimination before the burden shifts; they "must actually prove the discriminatory impact at issue." *Rose*, 902 F.2d at 1421. In the typical disparate impact case, in which the plaintiff argues that a selection criterion excludes protected applicants from jobs or promotions, the plaintiff proves discriminatory impact by showing statistical disparities between the number of protected class members in the qualified applicant group and those in the relevant segment of the workforce. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650, 109 S.Ct. 2115, 2121, 104 L.Ed.2d 733 (1988). While such statistics are often difficult to compile, whether the protected group has been disadvantaged turns on quantifiable data. When the alleged disparate impact is on the conditions, terms, or privileges of employment, however, determining whether the protected group has been adversely affected may depend on subjective factors not easily quantified. The fact that the alleged effects are subjective, however, does not relieve the plaintiff of the burden of proving disparate impact. The plaintiff may not merely assert that the policy has harmed members of the group to which he or she belongs. Instead, the plaintiff must prove the existence of adverse effects of the policy, must prove that the impact of the policy is on terms, conditions, or privileges of employment of the protected class, must prove that the adverse effects are significant, and must prove that the employee population in general is not affected by the policy to the same degree.

It is beyond dispute that, in this case, if the English-only policy causes any adverse effects, those effects

will be suffered disproportionately by those of Hispanic origin. The vast majority of those workers at Spun Steak who speak a language other than English--and virtually all those employees for whom English is not a first language--are Hispanic. It is of no consequence that not all Hispanic employees of Spun Steak speak Spanish; nor is it relevant that some non-Hispanic workers may speak Spanish. If the adverse effects are proved, it is enough under Title VII that Hispanics are disproportionately impacted.

[9][10] The crux of the dispute between Spun Steak and the Spanish-speaking employees, however, is not over whether Hispanic workers will disproportionately bear any adverse effects of the policy; rather, the dispute centers on whether the policy causes any adverse effects at all, and if it does, whether the effects are significant. The Spanish-speaking employees argue that the policy adversely affects them in the following ways: (1) it denies them the ability to express *1487 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. We discuss each of these contentions in turn. [FN1]

FN1. The Spanish-speaking employees rely on the reasoning in *Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir.1988), vacated as moot, 490 U.S. 1016, 109 S.Ct. 1736, 104 L.Ed.2d 174 (1989), which held that English-only policies adversely impact Spanish-speaking employees. The case has no precedential authority, however, because it was vacated as moot by the Supreme Court. We are in no way bound by its reasoning.

a

[11] The employees argue that denying them the ability to speak Spanish on the job denies them the right to cultural expression. It cannot be gainsaid that an individual's primary language can be an important link to his ethnic culture and identity. Title VII, however, does not protect the ability of workers to express their cultural heritage at the workplace. Title VII is concerned only with disparities in the treatment of workers; it does not confer substantive privileges. See, e.g., *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir.1980), cert. denied, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d

842 (1981). It is axiomatic that an employee must often sacrifice individual self-expression during working hours. Just as a private employer is not required to allow other types of self-expression, there is nothing in Title VII which requires an employer to allow employees to express their cultural identity.

b

Next, the Spanish-speaking employees argue that the English-only policy has a disparate impact on them because it deprives them of a privilege given by the employer to native-English speakers: the ability to converse on the job in the language with which they feel most comfortable. It is undisputed that Spun Steak allows its employees to converse on the job. The ability to converse--especially to make small talk--is a privilege of employment, and may in fact be a significant privilege of employment in an assembly-line job. It is inaccurate, however, to describe the privilege as broadly as the Spanish-speaking employees urge us to do.

The employees have attempted to define the privilege as the ability to speak in the language of their choice. A privilege, however, is by definition given at the employer's discretion; an employer has the right to define its contours. Thus, an employer may allow employees to converse on the job, but only during certain times of the day or during the performance of certain tasks. The employer may proscribe certain topics as inappropriate during working hours or may even forbid the use of certain words, such as profanity.

Here, as is its prerogative, the employer has defined the privilege narrowly. When the privilege is defined at its narrowest (as merely the ability to speak on the job), we cannot conclude that those employees fluent in both English and Spanish are adversely impacted by the policy. Because they are able to speak English, bilingual employees can engage in conversation on the job. It is axiomatic that "the language a person who is multi-lingual elects to speak at a particular time is ... a matter of choice." *Garcia*, 618 F.2d at 270. The bilingual employee can readily comply with the English-only rule and still enjoy the privilege of speaking on the job. "There is no disparate impact" with respect to a privilege of employment "if the rule is one that the affected employee can readily observe and

nonobservance is a matter of individual preference." Id.

This analysis is consistent with our decision in *Jurado v. Eleven-Fifty Corporation*, 813 F.2d 1406, 1412 (9th Cir.1987). In *Jurado*, a bilingual disc jockey was fired for disobeying a rule forbidding him from using an occasional Spanish word or phrase on the air. We concluded that *Jurado's* disparate impact claim failed "because *Jurado* was fluently bilingual and could easily comply with the order" and thus could not have been adversely affected. Id.

[12] The Spanish-speaking employees argue that fully bilingual employees are hampered in the enjoyment of the privilege because *1488 for them, switching from one language to another is not fully volitional. Whether a bilingual speaker can control which language is used in a given circumstance is a factual issue that cannot be resolved at the summary judgment stage. However, we fail to see the relevance of the assertion, even assuming that it can be proved. Title VII is not meant to protect against rules that merely inconvenience some employees, even if the inconvenience falls regularly on a protected class. Rather, Title VII protects against only those policies that have a significant impact. The fact that an employee may have to catch himself or herself from occasionally slipping into Spanish does not impose a burden significant enough to amount to the denial of equal opportunity. This is not a case in which the employees have alleged that the company is enforcing the policy in such a way as to impose penalties for minor slips of the tongue. The fact that a bilingual employee may, on occasion, unconsciously substitute a Spanish word in the place of an English one does not override our conclusion that the bilingual employee can easily comply with the rule. In short, we conclude that a bilingual employee is not denied a privilege of employment by the English-only policy.

[13][14] By contrast, non-English speakers cannot enjoy the privilege of conversing on the job if conversation is limited to a language they cannot speak. As applied "[t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home," an English-only rule might well have an adverse impact. *Garcia*, 618 F.2d at 270. Indeed, counsel for Spun Steak conceded at oral argument that the

policy would have an adverse impact on an employee unable to speak English. There is only one employee at Spun Steak affected by the policy who is unable to speak any English. Even with regard to her, however, summary judgment was improper because a genuine issue of material fact exists as to whether she has been adversely affected by the policy. She stated in her deposition that she was not bothered by the rule because she preferred not to make small talk on the job, but rather preferred to work in peace. Furthermore, there is some evidence suggesting that she is not required to comply with the policy when she chooses to speak. For example, she is allowed to speak Spanish to her supervisor. Remand is necessary to determine whether she has suffered adverse effects from the policy. It is unclear from the record whether there are any other employees who have such limited proficiency in English that they are effectively denied the privilege of speaking on the job. Whether an employee speaks such little English as to be effectively denied the privilege is a question of fact for which summary judgment is improper.

c

Finally, the Spanish-speaking employees argue that the policy creates an atmosphere of inferiority, isolation, and intimidation. Under this theory, the employees do not assert that the policy directly affects a term, condition, or privilege of employment. Instead, the argument must be that the policy causes the work environment to become infused with ethnic tensions. The tense environment, the argument goes, itself amounts to a condition of employment.

i

The Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. at 66, 106 S.Ct. at 2405, held that an abusive work environment may, in some circumstances, amount to a condition of employment giving rise to a violation of Title VII. The Court quoted with approval the decision in *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir.1971), cert. denied, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972):

[T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily

charged with ethnic or racial discrimination.... One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.

Although Vinson is a sexual harassment case in which the individual incidents involved behavior that was arguably intentionally discriminatory, its rationale applies equally to *1489 cases in which seemingly neutral policies of a company infuse the atmosphere of the workplace with discrimination. The Vinson Court emphasized, however, that discriminatory practices must be pervasive before an employee has a Title VII claim under a hostile environment theory.

Here, the employees urge us 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. This we cannot do. Whether a working environment is infused with discrimination is a factual question, one for which a per se rule is particularly inappropriate. The dynamics of an individual workplace are enormously complex; we cannot conclude, as a matter of law, that the introduction of an English-only policy, in every workplace, will always have the same effect.

The Spanish-speaking employees in this case have presented no evidence other than conclusory statements that the policy has contributed to an atmosphere of "isolation, inferiority or intimidation." The bilingual employees are able to comply with the rule, and there is no evidence to show that the atmosphere at Spun Steak in general is infused with hostility toward Hispanic workers. Indeed, there is substantial evidence in the record demonstrating that 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. In light of the specific factual context of this case, we conclude that the bilingual employees have not raised a genuine issue of material fact that the effect is so pronounced as to amount to a hostile environment. See generally *Anderson v. Liberty Lobby*, 477 U.S. 242, 250-51, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

ii

[15] We do not foreclose the prospect that in some

circumstances English-only rules can exacerbate existing tensions, or, when combined with other discriminatory behavior, contribute to an overall environment of discrimination. Likewise, we can envision a case in which such rules are enforced in such a draconian manner that the enforcement itself amounts to harassment. In evaluating such a claim, however, a court must look to the totality of the circumstances in the particular factual context in which the claim arises.

[16] In holding that the enactment of an English-only while working policy does not inexorably lead to an abusive environment for those whose primary language is not English, we reach a conclusion opposite to the EEOC's long standing position. The EEOC Guidelines provide that an employee meets the prima facie case in a disparate impact cause of action merely by proving the existence of the English-only policy. See 29 C.F.R. § 1606.7(a) & (b) (1991). Under the EEOC's scheme, an employer must always provide a business justification for such a rule. *Id.* The EEOC enacted this scheme in part because of its conclusion that English-only rules may "create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment." 29 C.F.R. § 1606.7(a).

We do not reject the English-only rule Guideline lightly. We recognize that "as an administrative interpretation of the Act by the enforcing agency, these Guidelines ... constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank*, 477 U.S. 57 at 65, 106 S.Ct. 2399 at 2404 (internal quotations and citations omitted). But we are not bound by the Guidelines. See *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 94, 94 S.Ct. 334, 339, 38 L.Ed.2d 287 (1973). We will not defer to "an administrative construction of a statute where there are 'compelling indications that it is wrong.'" *Id.*

We have been impressed by Judge Rubin's pre-Guidelines analysis for the Fifth Circuit in *Garcia*, which we follow today. *Garcia*, 618 F.2d 264. Nothing in the plain language of section 703(a)(1) supports EEOC's English-only rule Guideline. "Title VII could not have been enacted into law without substantial support from legislators in both

Houses who traditionally resisted federal regulation of private business." *United Steelworkers of America, AFL-CIO v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979). "Those legislators demanded as a price for their support that," *id.*,

*1490 management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices.

Statement of William M. McCulloch, et al., H.R.Rep. No. 914, 88 Cong., 2d Sess (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2516 (quoted in part in *Steelworkers*, 443 U.S. at 206, 99 S.Ct. at 2728). It is clear that Congress intended a balance to be struck in preventing discrimination and preserving the independence of the employer. In striking that balance, the Supreme Court has held that a plaintiff in a disparate impact case must prove the alleged discriminatory effect before the burden shifts to the employer. The EEOC Guideline at issue here contravenes that policy by presuming that an English-only policy has a disparate impact in the absence of proof. We are not aware of, nor has counsel shown us, anything in the legislative history to Title VII that indicates that English-only policies are to be presumed discriminatory. Indeed, nowhere in the legislative history is there a discussion of English-only policies at all.

2

Because the bilingual employees have failed to make out a prima facie case, we need not consider the business justifications offered for the policy as applied to them. On remand, if Local 115 is able to make out a prima facie case with regard to employees with limited proficiency in English, the district court could then consider any business justification offered by Spun Steak.

IV

In sum, we conclude that the bilingual employees have not made out a prima facie case and that Spun Steak has not violated Title VII in adopting an English-only rule as to them. Thus, we reverse the grant of summary judgment in favor of Garcia, Buitrago, and Local 115 to the extent it represents the bilingual employees, and remand with

instructions to grant summary judgment in favor of Spun Steak on their claims. A genuine issue of material fact exists as to whether there are one or more employees represented by Local 115 with limited proficiency in English who were adversely impacted by the policy. As to such employee or employees, we reverse the grant of summary judgment in favor of Local 115, and remand for further proceedings.

REVERSED and REMANDED.

BOOCHEVER, Circuit Judge, dissenting in part:

I agree with most of the majority's carefully crafted opinion. I dissent, however, from the majority's rejection of the EEOC guidelines. The guidelines provide that an employee establishes a prima facie case in a disparate impact claim by proving the existence of an English-only policy, thereby shifting the burden to the employer to show a business necessity for the rule. See 29 C.F.R. § 1606.7(b) (1991) ("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."). I would defer to the Commission's expertise in construing the Act, by virtue of which it concluded that English-only rules may "create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment." *Id.* § 1606.7(a).

As the majority indicates, proof of such an effect of English-only rules requires analysis of subjective factors. It is hard to envision how the burden of proving such an effect would be met other than by conclusory self-serving statements of the Spanish-speaking employees or possibly by expert testimony of psychologists. The difficulty of meeting such a burden may well have been one of the reasons for the promulgation of the guideline. On the other hand, it should not be difficult for an employer to give specific reasons for the policy, such as the safety reasons advanced in this case.

It is true that EEOC regulations are entitled to somewhat less weight than those promulgated by an agency with Congressionally delegated rulemaking authority. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141, 97 S.Ct. 401, 410, 50 L.Ed.2d 343 (1976). Nevertheless, the EEOC guideline is

(Cite as: 998 F.2d 1480, *1490)

entitled to "great deference" in the absence of "compelling indications that it is wrong." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95, 94 S.Ct. 334, 339-340, 38 L.Ed.2d 287 (1973). While one may reasonably differ with the EEOC's position as a matter of policy, I can find no such "compelling indications" in this case. The lack of directly supporting language in § 703(a)(1) or the legislative history of Title VII, relied on by the majority, does not in my opinion make the guideline "inconsistent with an obvious congressional intent not to reach the employment practice in question." *Id.* at 94, 94

S.Ct. at 339.

I conclude that if appropriate deference is given to the administrative interpretation of the Act, we should follow the guideline and uphold the district court's decision that a prima facie case was established. I believe, however, that triable issues were presented whether Spun Steak established a business justification for the rule, and I would remand for trial of that issue.

END OF DOCUMENT

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, Plaintiff,**

v.

**SYNCHRO-START PRODUCTS, INC.,
Defendant.**

No. 98 C 7047.

United States District Court,
N.D. Illinois,
Eastern Division.

Jan. 20, 1999.

Equal Employment Opportunity Commission (EEOC) brought action against employer, alleging that employer's English-only policy violated Title VII. Employer moved to dismiss. The District Court, Shadur, Senior District Judge, held that EEOC guideline providing that employer's English-only rule violates Title VII unless employer can establish a business necessity for the rule, comports with requirements for a viable Title VII claim.

Motion denied.

[1] CIVIL RIGHTS 145

78k153

In a disparate impact case under Title VII, employee must prove that the challenged practice is discriminatory because it has a disparate impact unjustified by the employer's legitimate business needs. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[2] CIVIL RIGHTS 378

78k378

Unlike a Title VII disparate treatment claim, where the burden of production may shift but the burden of persuasion always remains on the employee, in the disparate impact situation the employee's demonstration of such an impact shifts the burden of persuasion as to the existence of legitimate business needs to the employer. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-2(k).

[3] CIVIL RIGHTS 142

78k142

Equal Employment Opportunity Commission (EEOC) guideline providing that employer's English-only rule violates Title VII unless employer

can establish a business necessity for the rule, comports with requirements for a viable Title VII claim; English-only rules may create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-2(k); 29 C.F.R. § 1606.7.

[3] CIVIL RIGHTS 145

78k145

Equal Employment Opportunity Commission (EEOC) guideline providing that employer's English-only rule violates Title VII unless employer can establish a business necessity for the rule, comports with requirements for a viable Title VII claim; English-only rules may create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-2(k); 29 C.F.R. § 1606.7.

*911 Mary Manzo of EEOC, Chicago, IL, for Plaintiff.

Timothy Riordan of Defrees & Fiske, Chicago, IL, for Defendant.

MEMORANDUM OPINION AND ORDER

SHADUR, Senior District Judge.

Equal Employment Opportunity Commission ("EEOC") brought this action under Title VII of the Civil Rights Act of 1964 as amended ("Title VII," 42 U.S.C. §§ 2000e to 2000e-17) and Title I of the Civil Rights Act of 1991 (42 U.S.C. § 1981a) [FN1] against Synchro-Start Products, Inc. ("Synchro-Start") on behalf of Brian Sudol ("Sudol") and a class of employees, claiming intentional unlawful employment practices on the basis of the employees' national origin. [FN2] EEOC's main assertion is that Synchro-Start deprived Sudol and other employees of equal employment *912 opportunities on the basis of their national origin by requiring them to speak only English during working hours. EEOC further claims that Synchro-Start violated Title VII by failing, before it implemented that English-only rule, to explain to its employees what consequences would or could flow from violating the rule.

FN1. Because the latter statute deals only with damages for a plaintiff who succeeds in an employment discrimination action, this opinion (like the parties' submissions) focuses only on the substantive Title VII issues.

FN2. After Synchro-Start had attacked the original Complaint by filing a Fed.R.Civ.P. ("Rule") 12(b)(6) motion for its dismissal, EEOC responded on January 13, 1999 by filing both a responsive memorandum and a First Amended Complaint ("FAC")--the latter filing being a matter of right under Rule 15(a) because no answer or motion for summary judgment had been filed.

Instead of treating Synchro-Start's motion to dismiss as having been mooted by the FAC (see n. 2), this Court considers it more efficient to address the aspects of that new pleading that would remain vulnerable to Rule 12(b)(6) dismissal if Synchro-Start's contentions were sound--a procedure that eliminates any need for the latter to relaunch the same missiles. In that light, the motion is denied for the reasons set forth in this memorandum opinion and order.

Facts According to the FAC [FN3]

FN3. Although this opinion of course makes no factual findings, it omits such qualifying labels as "alleged" because of the need to credit the FAC's allegations on the current motion.

Synchro-Start employs approximately 200 employees, many of whom are of Polish or Hispanic national origin. Since at least September 15, 1997 Synchro-Start has required its employees to speak only English during working hours. That rule is applied to employees with varying degrees of English proficiency (some speak no English or very little English). Synchro-Start did not explain the consequences of violating the English-only rule to its employees before implementing the rule.

Rule 12(b)(6) Standards

For the present, all of the FAC's well-pleaded allegations must be credited, with all reasonable inferences drawn in EEOC's favor (*Sherwin Manor Nursing Ctr., Inc. v. McAuliffe*, 37 F.3d 1216, 1219 (7th Cir.1994)). Dismissal is proper only if it is clear from the FAC that no set of facts consistent with its allegations would entitle EEOC to relief (*Hishon v. King & Spalding*, 467 U.S. 69, 73, 104

S.Ct. 2229, 81 L.Ed.2d 59 (1984), citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

Title VII Claim

[1][2] Under traditional Title VII analysis "[i]n a disparate impact case, the plaintiff must prove that the challenged practice is discriminatory because it has a disparate impact unjustified by the defendant's legitimate business needs" (*Melendez v. Illinois Bell Tel. Co.*, 79 F.3d 661, 668 (7th Cir.1996)). That summary telescoping of the plaintiff's burden of proof with a reference to "unjustified" business needs should not be misunderstood: Unlike a Title VII disparate treatment claim, where the burden of production may shift but the burden of persuasion always remains on the plaintiff (*McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)), in the disparate impact situation the employee's demonstration of such an impact shifts the burden of persuasion as to the existence of legitimate business needs to the employer (42 U.S.C. § 2000e-2(k), hereafter simply "Section 2000e-2(k)").

Because any English-only rule unarguably impacts people of some national origins (those from non-English speaking countries) much more heavily than others, it is easy to imagine a set of facts consistent with the FAC's allegations that would entitle EEOC to relief (*Hishon*, 467 U.S. at 73, 104 S.Ct. 2229). [FN4] That alone should enable EEOC to withstand Synchro-Start's motion to dismiss, but given the existence of authority upholding certain English-only rules in other Circuits, the question certainly calls for more extended discussion.

FN4. In the Rule 12(b)(6) context, the absence of any "legitimate business need[]" on Synchro-Start's part (such a need would be a potential defense to Title VII liability under Section 2000e-2(k)) must also be assumed.

Although each of the three Courts of Appeals that has examined the issue has upheld the validity of an employer's English-only rule, no such court has knocked the plaintiff out of the running at the very outset by finding that English-only rules could never violate Title VII. Each decision examining such a rule in a disparate impact framework [FN5] *913

has limited its holding to situations where the employee has the ability to speak English (*Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1488 (9th Cir.1993); *Gonzalez v. Salvation Army*, 985 F.2d 578 (11th Cir.1993) (unpublished opinion affirming findings of law and fact in 1991 U.S. Dist. LEXIS 21692, at *7 (M.D.Fla. May 28)); *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir.1980)). [FN6] By contrast, FAC ¶ 7(b) alleges that Synchro-Start's English-only rule is applied to employees "who speak no English or whose ability to speak English is limited."

FN5. *Long v. First Union Corp.*, 86 F.3d 1151 (4th Cir.1996) (per curiam) (unpublished opinion) dealt with an English-only rule in a disparate treatment context, considering only whether the rule was discriminatorily enforced, not whether the very existence of the rule created discrimination based on national origin. Defendants' summary judgment victory was upheld on appeal because there were insufficient facts to prove disparate treatment.

FN6. Because two of the three Courts of Appeals decisions share a *Garcia* name plaintiff (though of course the plaintiffs were not the same person), this opinion will utilize only the names of their respective defendants (*Spun Steak* and *Gloor*) for shorthand reference purposes.

On that score *Spun Steak*, 998 F.2d at 1488 has said, quoting *Gloor*, 618 F.2d at 270:

As applied "[t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home," an English-only rule might well have an adverse impact.

With respect to that subset of employees, then, EEOC plainly states a viable claim. But this Court, writing on a clean slate in this Circuit, goes beyond that easy case to find it possible to impose liability across a broader spectrum--perhaps even as to those bilingual employees who can "readily comply with the English-only rule and still enjoy the privilege of speaking on the job" (*Spun Steak*, 998 F.2d at 1487).

Congress has charged EEOC with the interpretation, administration and enforcement of Title VII. In the exercise of that authority, EEOC has promulgated a Guideline specifically addressing English-only rules: Under 29 C.F.R. § 1606.7

("Reg. § 1606.7") an English-only rule such as Synchro-Start's violates Title VII unless the employer can establish a business necessity for the rule. [FN7] That reverses the effect of the absence of evidence (or the theoretically possible, but rare, equipoise of evidence) on the subject of business necessity, a shifting of burdens that occurs under the Guideline whether or not the employees are proficient in English.

FN7. Reg. § 1606.7 breaks English-only rules into two types: (1) rules applied at all times, which are presumed to violate Title VII and are closely scrutinized, and (2) rules applied only at certain times, which are allowed where the employer demonstrates a business necessity for the rule. Here FAC ¶ 7 states that employees are required "to speak only English during working hours," an obligation that could arguably fit the "at all times" category. But because EEOC itself has placed Synchro-Start's rule within the less stringently scrutinized category (EEOC Mem. 1, 4), this opinion will deal with it in that same manner.

Albemarle Paper Co. v. Moody, 422 U.S. 405, 431, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) (internal quotation marks from *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) omitted) teaches that EEOC guidelines "constitute the administrative interpretation of [Title VII] by the enforcing agency and consequently are entitled to great deference." *Gilardi v. Schroeder*, 833 F.2d 1226, 1232 (7th Cir.1987) echoes that view:

This Court is also bound to give substantial weight to the EEOC's interpretation of the statute that it administers.

Nevertheless *Spun Steak*, 998 F.2d at 1489-90 rejected EEOC's English-only Guideline [FN8] because that Guideline presumes in the absence of other proof that an English-only policy has a disparate impact, thus evoking a shift to the employer to demonstrate some business necessity for that policy.

FN8. Because *Gonzalez*, 985 F.2d 578 makes no mention of the EEOC Guideline, it is unclear whether it was accepted or rejected, but the district court's use of the legitimate business purpose rationale for upholding the rule and the lack of attention paid by that court to whether the rule had a disparate impact at least suggests that the Guideline was accepted. *Gloor*, 618 F.2d at 268 n. 1 (an opinion issued before the Guideline was

adopted) expressly noted that the decision was rendered in the absence of any guidance from EEOC regulations, so that the court "approach[ed] the problem on the basis of the statute itself and the case law."

It should be made clear just what is and what is not at issue in this case. If the question were whether EEOC could adopt a *914 regulation that placed the burden of persuasion on an employer in every instance as to the existence of a business necessity for every one of its shop rules, the answer would have to be "no." After all, the Chevron-type of bow to the administrative agency's expertise--the Albemarle-Gilardi deference to the agency's statutory interpretation--does not extend to conferring true legislative power on the agency: If the statute is clear, it is Congress' will (and not any contrary views of the agency as to what policy is wise) that necessarily controls. And here Section 2000e-2(k) provides that in a disparate impact case the employer's obligation to demonstrate a business necessity is triggered only after the employee has borne his or her burden of demonstrating a disparate impact from a statutorily prohibited employment practice.

[3] In this instance EEOC has taken a far more modest step: It has said that an English-only rule creates an inference that the foreign national is disadvantaged in his or her employment because of his or her national origin. What that creates in evidentiary terms is a tie-breaker. If the only evidence placed before the factfinder were the existence of such a rule, with no explanation being proffered either way as to the reason for the rule or as to the manner in which it actually impacts, that level of evidentiary silence would call for a verdict in the employee's favor rather than the employer's on the element of disparate impact. And in those terms the question really becomes one of interpretation rather than of any effort to override legislative intent--a proper sphere for extending deference to the agency's knowledge and experience.

It should be emphasized that Spun Steak, the only Court of Appeals decision that has actually rejected the EEOC Guideline, dealt with an appeal from a summary judgment that had been granted in favor of employees, despite the employer's proffer of evidence as to a stated business reason for the English-only rule ("complaints that some workers

were using their bilingual capacities to harass and to insult other workers in a language they could not understand" (998 F.2d at 1483)). Although that demonstration of a factual issue would normally spell doom for any summary judgment disposition, the District Court had found as a matter of law that the case involved a discriminatory disparate impact on Spanish-speaking employees, with no showing of a business justification. By contrast, the Court of Appeals majority found an absence of evidence of any disparate impact--at least as to bilingual employees (id. at 1489)--and went on to reject the EEOC Guideline in these terms (id.):

In holding that the enactment of an English-only while working policy does not inexorably lead to an abusive environment for those whose primary language is not English, we reach a conclusion opposite to the EEOC's long standing position. The EEOC Guidelines provide that an employee meets the prima facie case in a disparate impact cause of action merely by proving the existence of the English-only policy. See 29 C.F.R. § 1606.7(a) & (b)(1991). Under the EEOC's scheme, an employer must always provide a business justification for such a rule. Id.

That of course substitutes a pejorative characterization for a simple recognition of the effect of EEOC's presumption, which is only to move the inquiry to the second step prescribed by the statute--the employer's need to identify a business justification (which, although the just-quoted language describes it as "the EEOC's scheme," is really Congress' express mandate). And in those terms this Court is persuaded by Reg. § 1606.7's explanation of the presumption that such English-only rules may "create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment." As Judge Boochever put it persuasively in his dissent from Spun Steak, 998 F.2d at 1490:

It is hard to envision how the burden of proving such an effect would be met other than by conclusory self-serving statements of the Spanish-speaking employees or possibly by expert testimony of psychologists. The difficulty of meeting such a burden may well have been one of the reasons for the promulgation of the guideline. On the other hand, it should not be difficult for an employer to give specific reasons for the *915 policy, such as the safety reasons advanced in this

case.

Little wonder, then, that the denial of en banc reconsideration of *Spun Steak* at 13 F.3d 296 (9th Cir.1993) evoked a powerful dissent from Judge Reinhardt. That opinion (*id.*) should be read in full to appreciate its total impact. [FN9] But for purposes of the analysis here, special attention is due to its demonstration that the analysis by the panel majority (like the proverbial Emperor) is revealed to have no clothes when that analysis of the EEOC's Guideline and its *prima facie* approach are subjected to careful scrutiny (*id.* at 299-300). For the reasons stated earlier, this Court credits the EEOC Guideline and, having done so, upholds the FAC's Title VII claim.

FN9. A disparate impact?

Conclusion

Both EEOC's FAC and its challenged Guideline comport with the requirements for a viable Title VII claim. Synchro-Start's motion to dismiss is therefore denied, and it is ordered to answer the FAC on or before January 29, 1999. [FN10]

FN10. Not much courage is needed for a law review editor to disagree—even to the extent of the sharpest criticism—with any court, including the

most exalted in the jurisprudential hierarchy. Indeed, such disagreements have been the stock in trade of student-edited law reviews from the very beginning. When the law review editor becomes a judicial law clerk, however, the change in roles (and in responsibilities) obviously carries with it the need for far greater caution—for the recommendation to a District Judge that he or she should reject out-of-circuit precedent from a respected Court of Appeals should not be undertaken lightly. It is typical of the fine work of this Court's first-rate law clerk Kathryn Price that she has had both the courage and the perceptiveness to recommend that this Court disavow what the Ninth Circuit held and said in *Spun Steak*, a disavowal that also calls for staking out a legal position that has not been espoused by any appellate court. As this opinion shows, this Court has found that recommendation to be entirely sound and well-taken. It should of course be understood (as this Court invariably makes clear in paying tribute to its always outstanding law clerks) that this Court has not only arrived at its own independent conclusion on the subject but has painstakingly reworked each sentence and read each case cited in this opinion, so that this end product is totally this Court's own. If then any errors have found their way into the final version of this opinion, the sole responsibility is this Court's and not that of its law clerk.

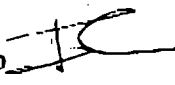
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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

February 19, 1999

To: Clara Shin
Office of the Chief of Staff
The White House

From: Ida Castro 
Chairwoman

REVISED
COPY

Re: EEOC Action Forecast

INTRODUCTION

The pursuit of an active civil rights agenda is necessary to promote increased efficiency, higher productivity, good morale, and ultimately, good government. Achieving the President's goal of "Building One America" requires the full participation of all members of society. Because the EEOC is the Federal agency charged with giving life to this nation's promise of equal employment opportunity, its performance should focus on the agency's promise to fulfill its primary mission, using all available tools at its disposal to identify, stop, and deter discrimination. The EEOC is prepared to undertake the task of establishing a targeted set of priorities and delivering achievements over the next ten months that would move the agency closer to achieving the goals and principles of good governance outlined by the President and Vice President.

► **FEDERAL SECTOR INITIATIVE**

ISSUE: A complex, duplicative, and unwieldy process for addressing complaints within the Federal sector has resulted in an unacceptable delay in having these complaints adjudicated. Private sector employees can expect to have their charges processed on average in 310 days, versus their Federal sector counterparts who do get through the final agency decision on average in no less than 659 days.

STRATEGY: One of the Commission's priorities is to implement the proposed regulations to revamp the federal sector EEO complaint process. Consequently, the implementation of these new regulations will significantly improve the process. Revision of the regulations, with the following federal sector initiatives, provides the potential for federal sector EEO as a significant civil rights initiative and provides the Administration with a platform to hold themselves up as a model employer.

Action: With accelerated approval by OMB and after the period for public comment has ended, an announcement of the implementation of the revision could occur within 60 days of the final stages. The earliest announcement date is expected the end of FY 1999.

Impact: Quicker and more effective investigation and adjudication of complaints will be accomplished by prohibiting interlocutory appeals. Under the new

procedure, the inefficiencies resulting from the fragmented process will be eliminated. In addition, enforcement will be strengthened by the Commission's use of its sanctions authority. Sanctions may be employed when one of the parties is recalcitrant in implementing an EEOC order.

Action: The National Partnership for Reinventing Government and EEOC are jointly sponsoring a task force which will survey Federal agencies to benchmark the level of EEO enforcement activities. The goal is identification of best practices. Achieving a streamlining of federal sector EEO process. Benchmarking is now expected to be completed by FY 2000.

Action: The complex federal sector EEO complaint process will undergo a "plain language" review to make the process more understandable. The current process description will be online at the Commission's website May 1999.

► **DISABILITY**

ISSUE/ITEM: EEOC's Chairwoman serves as the chair of the Civil Rights Committee for the President's Task Force on Employment of Adults with Disabilities. The Committee has several short term goals including:

Action: Initiating outreach pilot projects to remove discriminatory barriers to targeted underserved communities, such as disabled welfare-to-work recipients or people with disabilities in public housing.

Action: EEOC will work with the Social Security Administration to revise application forms for SSA's disability insurance to ensure that receipt of benefits does not preclude an individual from being able to pursue a claim under the ADA or the Rehabilitation Act. This promotes greater civil rights protections for people with disabilities.

► **WAGE DISCRIMINATION/GLASS CEILING ISSUES**

ISSUE: There are nearly 60 million working women in the U.S. and they constitute nearly half of all workers. Today, women earn only 75% of men's weekly earnings. For women of color, the gap widens - black women earn 63% and Hispanic women take home 53% of white men's earnings. By expanding access to the global bounty, everyone in America wins. In the President's State of the Union Address, he highlighted this key issue that affects families in all segments of American society.

STRATEGY: Wage discrimination often remains undetected due to unavailability of pay data and the increasing complexity of pay structures and job classifications. The Commission has worked closely with the White House Democratic Policy Council and the advocacy community to explore possible solutions. The Administration's proposal envisions a multilateral collaboration among the principal civil rights enforcement agencies. The EEOC is involved in on-going activities that can increase visibility and public awareness about the issue.

Action: On April 13, 1999, EEOC will convene a Commission meeting in Philadelphia to address the issue of pay discrimination. Following the Commissioners' meeting, there is a joint conference, sponsored by the Women's Bureau of the U.S. Department of Labor; the U.S. Equal Employment Opportunity Commission and 9 to 5: The National Association of Working Women, entitled "Pay Equity: Taking Control, Making it Happen". The day-long event will feature a distinguished panel of guest speakers and encourage broad participation by women from all segments of society to generate interest and mobilize public support for this issue.

Impact: The Commission is creating a public forum for residents and activists to bring forward their concerns in this area. The EEOC will also announce its enforcement strategy and FY 2000 Budget Request. The EEOC's General Counsel will develop a strategic litigation plan by examining the existing filings for cases which tells the story about on-going wage discrimination in the workplace.

NATIONAL ORIGIN/LANGUAGE RIGHTS

STRATEGY: The Commission will be focusing its attention on national origin discrimination in the form of "language" issues such as speak-English-only rules and discriminatory employment practices based on accent. These practices affect a wide range of people suffering from discriminatory treatment by virtue of the way they speak.

Action: The EEOC also plans to hold a public Commission Meeting in the fall, outside the Washington, D.C. area, at a relevant location (perhaps Florida, California or New York) where the Commission will hear from guest panelists about national origin discrimination issues, including language discrimination. The EEOC will coordinate this meeting with any federal, state and local entities and stakeholders as may be appropriate to promote meaningful dialogue and provide informational services.

Action: EEOC proposes that the White House take the lead in formulating a federal civil rights task force that will focus on the development of strategic enforcement and promotion of language rights. The Commission has already begun a collaborative effort with the Office of Special Counsel for Immigration Related Unfair Employment Practices, U.S. Department of Justice, to begin joint efforts for cross-training and outreach to communities which speak languages other than English and a Memorandum of Understanding to this effect will be prepared and made public by September 1999.

Action: EEOC will announce its First Phase toward a multilingual website during the Fall. The website will supplement our efforts to expand our reach beyond traditional language barriers to governmental access. Content included in the EEOC's Internet web site, such as fact sheets, charge processing information, issue-based questions-and-answer documents, and information for small businesses will be made available in at least one other language to maximize the use of the site by people seeking information about their civil rights at the workplace.

CONCLUSION

The Equal Employment Opportunity Commission has mapped out an achievable course of action over the next ten months, deliverable achievements that lends credibility to the Administration's civil rights agenda for the coming year. The priorities identified by the Commission enhances the EEOC's strategic mission and goals. The EEOC will maximize existing resources and forge collaborative relationships with their partners in the civil rights community and beyond. The Agency's activities goes hand in hand with the Administration's efforts to promote effective civil rights outreach and enforcement policies.



The EEOC and National Origin Discrimination Based on Language and Accent

Title VII of the Civil Rights Act of 1964, as amended (Title VII), prohibits employment discrimination based upon, among other things, an individual's national origin. The Commission defines national origin broadly to include one's birthplace, ancestry, physical, cultural, or linguistic characteristics of a national origin group. This definition is set out in EEOC's *Guidelines on Discrimination Because of National Origin (Guidelines)*, 29 C.F.R. Section 1606.1.

The Commission recognizes that an individual's primary language is often an essential national origin characteristic and that prohibiting an employee from speaking in his/her primary language while at work may disadvantage the employee on the basis of his/her national origin.

Speak-English-Only Rules

It is the Commission's position that rules requiring employees to speak only English in the workplace (speak-English-only rules) have an adverse impact on individuals whose primary language is not English (language-minority) or who are limited-English proficient (LEP). Such rules, when **applied at all times**, are presumed to violate Title VII and will be closely scrutinized.

Limited English-only rules that apply **only at certain times** may be lawful if the employer can show they are **justified by business necessity**. If a limited English-only rule is adopted due to business necessity, the employer should inform all employees of the rule and explain the circumstances under which speaking only in English is required. The employer should also make sure that employees are aware of the repercussions of violating an English-only rule. If an employer fails to provide notice of an English-only rule, including the consequences of breaking the rule, the employer's taking adverse action against an employee for violating the rule constitutes national origin discrimination.

- An English-only rule applied **only to a particular group(s)** but not others violates Title VII as unlawful disparate treatment. English-only rules, whether applied at all times or only at certain times, may create a hostile working environment, which could constitute unlawful harassment under Title VII.
- The Commission's policy on speak-English-only rules is set out in the *Guidelines*, 29 C.F.R. Section 1606.7 (See Attachment A).

Language/Accent Discrimination

- If a job applicant is not hired because of his/her accent or manner of speaking, the employer must show that the accent materially interfered with the person's ability to perform the job in order to defend against a charge of violating Title VII. Investigations will focus on the qualifications of the person and whether his/her accent or manner of speaking had a detrimental effect on job performance.
- The Commission's position on language and accent discrimination is set out in the *Guidelines*, 29 C.F.R. Section 1606.6 (See Attachment A), and in EEOC Compliance Manual Section 623.

Recent Caselaw Developments -- *Garcia v. Spun Steak*

Ninth Circuit Ruling

The Commission's Guidelines on National Origin Discrimination (Guidelines) were generally accepted as the authoritative interpretation of Title VII until July 1993 when the U.S. Court of Appeals for the Ninth Circuit decided *Garcia v. Spun Steak Company*. In a 2-1 ruling that reversed a district court decision, the Ninth Circuit upheld a California employer's speak-English-only rule and declined to defer to the Commission's Guidelines -- noting its disagreement with certain aspects of the Commission's position.

In particular, the court held that plaintiffs had to **prove** adverse impact, not merely assert it. The court found that Spun Steak's bilingual employees could not show that they suffered discriminatory adverse impact because they could comply with the speak-English-only rule.

Supreme Court Review

After the Ninth Circuit's decision, plaintiffs petitioned the U.S. Supreme Court to review the case. In preparation for the review, the Court invited both the EEOC and the U.S. Department of Justice (DOJ) to file an *amicus curiae* brief. The EEOC and Justice Department filed the brief on June 1, 1994, arguing that the Ninth Circuit erred in its *Spun Steak* ruling, and that the Commission's Guidelines should be followed to find the speak-English-only rule a violation.

The EEOC/DOJ brief quoted the *Spun Steak* dissent in which Judge Reinhardt of the Ninth Circuit observed that banishing a person's primary language from the workplace communicates not only "a rejection of the excluded language and the culture it embodies, but also a denial of that side of an individual's personality."

The EEOC/DOJ brief also concurred with Judge Reinhardt's contention that "[s]ome of the most objectionable discriminatory rules are the least obtrusive in terms of one's ability to comply: being required to sit in the back of a bus, for example." Furthermore, the brief noted that under the court of appeals' analysis, a black employee could not challenge a rule requiring black employees to use separate bathrooms and drinking fountains, and an Orthodox Jew could not challenge a rule forbidding the wearing of head coverings.

Upon completion of its review on June 20, 1994, the Supreme Court denied *certiorari* and announced it would not hear the appeal of the Ninth Circuit ruling in *Spun Steak*. Language-rights experts believe that the Supreme Court's denial of *certiorari* was based on its desire to allow other courts of appeal an opportunity to review the English-only issue before the Court considers it. In the 15 years since EEOC promulgated its Guidelines, the Ninth Circuit's decision remains the only appellate ruling on English-only requirements.

Current EEOC Enforcement

- The Ninth Circuit's decision in *Spun Steak* affects only field offices within that court's jurisdiction, which covers Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. In all other federal circuits, the Commission's position remains unaffected and is being enforced as stated in the Guidelines. Moreover, the Commission has not revised or modified its position on this issue, nor does it anticipate doing so.
- On March 14, 1995, the EEOC held a special meeting on national origin discrimination in which invited experts from affected national origin communities addressed the Commission. Topics discussed included the issues of language and accent discrimination, including speak-English-only rules, and their effects on the American workplace.

Following the panel's presentations, Chairman Casellas called on the Commission to increase its outreach and enforcement activities on behalf of traditionally underserved national origin communities, in accordance with section 111 of the Civil Rights Act of 1991 (also known as the *Serrano Amendment*).

- Historically, the EEOC did not break down its national origin charge data by language or accent violations. Affected language-minority communities repeatedly indicated to the EEOC that this type of discrimination is a growing problem in the workplace. Moreover, the agency has been and continues to be a party in numerous English-only lawsuits across the country.

Due to the Commission's increased focus on national origin language-related issues, new tracking codes were recently added to EEOC's national Charge Data System and Litigation Management Information System. These tracking codes will enable the agency to more closely monitor specific charges and litigation involving language and accent discrimination, including English-only violations.

- Generally, national origin-based charges filed between fiscal years (FY) 1990 and 1996 averaged approximately 7,044 charges per year -- accounting for an average of 11% of all charges filed with the agency over the past seven years.

EEOC Litigation

- EEOC has litigated several cases against private employers for violations of Title VII involving speak-English-only rules. These lawsuits were filed in federal district courts by EEOC regional offices in the following locations: Los Angeles, San Antonio, Miami, Phoenix, Houston, New York, and Baltimore. The following are summaries of some of the most recent lawsuits brought by the Commission in this area:
- *EEOC v. American Red Cross:*

Filed: November 2, 1994, by EEOC's Baltimore District Office, and settled on December 6, 1995.

Facts: Chinese employees at two American Red Cross laboratories in Maryland were prohibited from speaking English and Chinese interchangeably to each other during office hours and during telephone conversations to family members.

Outcome: The settlement obtained by the EEOC provided for the termination of the English-only rule and sensitivity training to American Red Cross employees on English-only issues at the two laboratories in Rockville, Md.
- *EEOC v. Long Life Home Care Service, inc.:*

Filed: December 16, 1996, by EEOC's New York District Office.

Facts: Two employees were fired shortly after their supervisor met with them to discuss "speaking Spanish on the job." The company does not dispute the existence of its policy prohibiting the speaking of a language other than English during working hours. The charging parties state that the policy prohibits employees from speaking Spanish during breaks, lunch in the cafeteria, and within one city block of the Long Life's office building.

Outcome: Litigation pending.
- *EEOC v. Wallach's Inc.:*

Filed: May 19, 1993, by EEOC's New York District Office, and settled on April 21, 1994.

Facts: EEOC alleged that charging party, Marilyn Dominquez, was treated to unequal terms and conditions of employment. An investigation found that the employee was subject to different treatment in the implementation of a "speak English-only" rule.

Outcome: The settlement obtained by EEOC provided for the termination of the English only rule, and Wallach's agreed to pay \$30,000 in damages to Ms. Dominquez.

ATTACHMENT A
Selected Sections of
Guidelines on Discrimination Because of National Origin
29 C.F.R. Part 1606

Section 1606.6 - Selection Procedures

(b) The Commission has found that the use of the following selection procedures may be discriminatory on the basis of national origin. Therefore, it will carefully investigate charges involving these selection procedures for both disparate treatment and adverse impact on the basis of national origin. However, the Commission does not consider these to be exceptions to the "bottom line" concept:

(1) Fluency-in-English requirements, such as denying employment opportunities because of an individual's foreign accent, or inability to communicate well in English

Section 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.

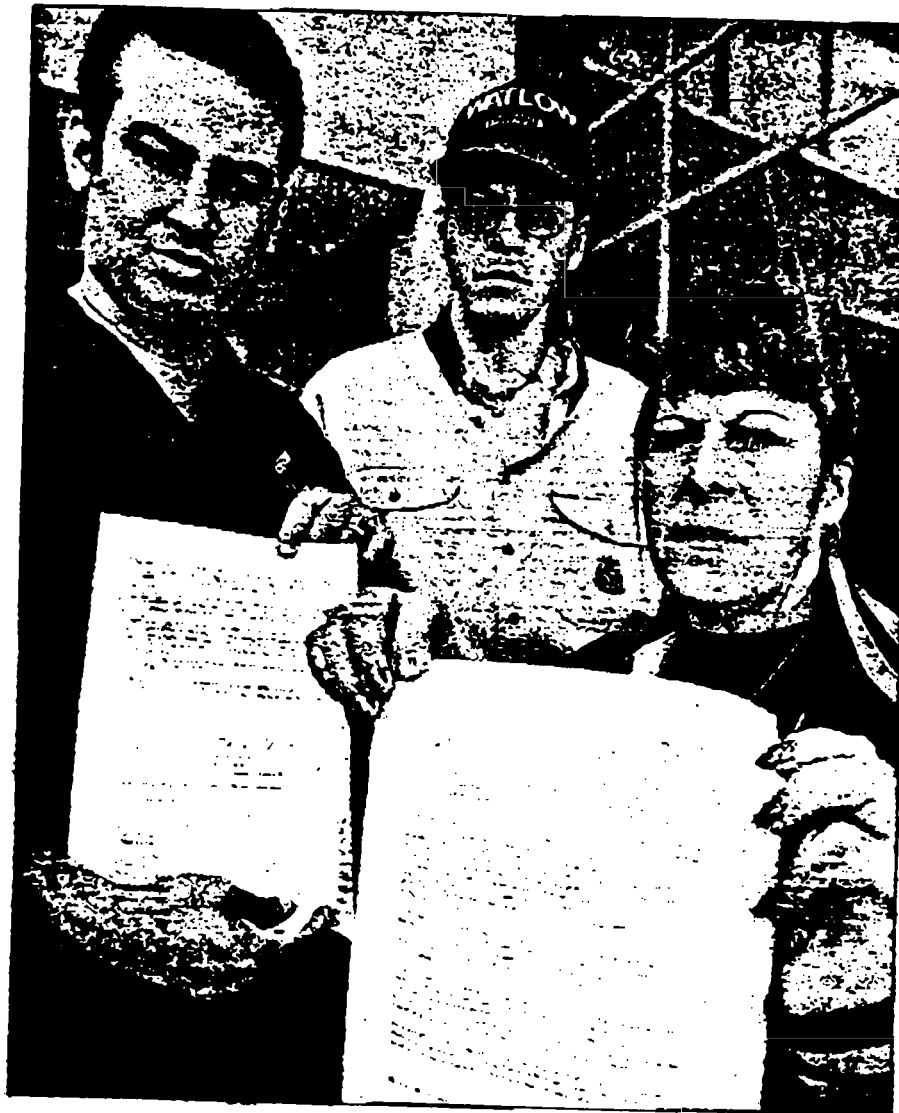
(c) *Notice of the Rule.* It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should 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.

Note: Footnotes have been omitted from the excerpted text of the Guidelines.

Prepared by EEOC's Office of Communications and Legislative Affairs (February 1997)

A language fight

The government files suit against a suburban company, saying its 'English-only' policy violates workers' civil rights.



Carlos Solero and Marcelina Navar hold letters advising them of Watlow Batavia Inc.'s rule mandating English during working hours. They and Oscar Medina (center) were fired. Photo by Antonio Perez/Expo

By Stephen Franklin
TRIBUNE STAFF WRITER

Taking an action increasingly sought by immigrant groups, the U.S. Equal Employment Opportunity Commission took a suburban Chicago manufacturer to court on Thursday, challenging its "English-only" on-the-job rule for workers.

In its federal lawsuit, the agency said that Watlow Batavia Inc., a subsidiary of Watlow Electric Manufacturing Co. of St. Louis, violated workers' civil rights by barring them from speaking Spanish at any time during working hours.

The company declared an "English-only" policy in August 1997, saying workers could converse only in English while at work at

EEOC cases

Equal Employment Opportunity Commission complaints against private employers for violations involving English-only rules:

1996*	77
1997	240
1998	145

* Earliest data available

Source: EEOC

Chicago Tribune

the small plant that builds aluminum radiators and other products. Within days of the announcement, Watlow fired four employees for speaking Spanish on the job, and eventually three others were disciplined, said Jose J. Behar, an EEOC attorney.

After workers complained, the agency attempted to resolve the dispute with the company but could not reach an agreement, said John P. Rowe, head of the EEOC's Chicago district office.

Edward Jepsen, an attorney in Chicago for the company, declined to comment on the case, and company officials in St. Louis could not be reached for a reaction. The suit seeks an

SEE SPANISH BACK PAGE

Spanish

CONTINUED FROM PAGE 1

injunction to prevent the company from enforcing the rule; affected employees also could receive up to \$300,000 in punitive damages plus back pay for those who were fired.

Stirred by a tide of complaints, led largely by Latino and Asian groups, the EEOC decided in 1996 to put a high priority on cases where workers charge they have been discriminated against because of English-only policies, Rowe said.

From 77 such complaints filed against employers in 1996, the agency stepped up its activity to 140 complaints in 1997 and 146 complaints last year. "Often, English-only rules are manifestations of prejudice toward ethnic minorities," said John C. Hendrickson, the EEOC's regional attorney in Chicago.

In the Warlow case, for example, Hendrickson said the EEOC could not see any reason why employees, who mostly work by themselves, should be barred from speaking Spanish. "This looks like, 'We don't want to hear a word out of your mouth if it is not English,'" he said.

EEOC officials said taking action is especially important in Chicago, which attracts immi-

■ **'Buenos días' meant bad days for workers. In Business.**

grants and boasts a workforce of people whose mother tongues are of lands circling the globe.

The problem, Hendrickson said, is that "they (employers) are attempting to homogenize the workplace automatically."

But asserting workers' rights to resist English-only rules is a battleground where the EEOC and immigrant and other groups face major challenges.

Businesses are not barred by federal law from demanding that workers speak only English.

But they are required under an EEOC regulation to show that such a rule is necessary to do business—as in coordinating medical care, for example—and is not too sweeping.

In most cases, employers prevail, said Christine Godsil Cooper, a labor law expert at Loyola University Law School.

"Employers usually say they need to be able to maintain order in the workplace," explained Martin Malin, a law professor at Chicago-Kent College of Law.

Still, the EEOC has won several cases against employers, as have workers against their bosses in the courts.

Four years ago, the federal agency was able to persuade the American Red Cross to stop an English-only rule at two laboratories in Rockville, Md. It had barred Chinese-speaking workers from using Chinese to chat on the job or when talking with relatives on the phone.

But backers of English-only rules won a major victory when the 9th Circuit Court of Appeals in July 1993 upheld a California firm's ban on other languages in the workplace. The court pointed out its disagreement with the EEOC's view.

The Supreme Court refused to hear an appeal on the case in 1994, leaving the issue up for more court battles.

In January, the EEOC won a victory, however, in federal court in Chicago. That's when Judge Milton I. Shadur ruled that Synchro-Start Products Inc., a small manufacturing company in Niles with about 200 workers, had wrongfully implemented an English-only rule in September 1997 for its workers.

Most of the workers, the judge noted, have Polish or Hispanic origins. Citing the EEOC regulation, the judge said that such a rule creates an "atmosphere of inferiority, isolation and intimidation."

To Juan Figueroa, an attorney and the president of the Puerto Rican Legal Defense and Education Fund in New York City, the drive for English-only rules "is nothing more than discrimination against Hispanics."

"It is driven by their fear of our numbers, and our power. They are not questioning whether people can speak French or Russian on the job," he said.

Because of the legal uncertainties, some groups are hesitant, however, about raising legal challenges to employers.

Patricia Mendoza, an attorney with the Mexican American Legal Defense and Education Fund in Chicago, said that is true for her group, which regularly receives complaints from workers, asking what can be done about English-only rules.

In some cases, they are able to negotiate a solution, she said, citing a Chicago hospital that recently agreed to rescind an English-only rule.

"They realized how stupid it was," she said.

Business

CHICAGO TRIBUNE

FRIDAY, MARCH 5, 1999

David Greising



'Buenos dias' brought bad days for some workers

It's the most natural thing in the world. Someone says, "Good morning." The response is embedded in the brain, "Good morning."

That's exactly what Marcelina Navar said. And that's allegedly why Marcelina Navar got fired.

Navar made one bad mistake: She used her native tongue, Spanish, to reply to a friend's hello. Just a few days earlier, her boss at Watlow Electric Manufacturing Co. in Batavia had declared that employees could speak only English during working hours. No exceptions.

A friend said, "Buenos dias." Navar responded, "Buenos dias." Her boss said, "Adios."

And now, the federal government is saying, "We'll see you in court."

The U.S. Equal Employment Opportunity Commission filed a civil rights lawsuit Thursday against Watlow. The agency charges Watlow with violating the rights of seven assembly line employees who were fired or disciplined, allegedly for speaking Spanish with friends at work.



Navar

There are work-places where an English-only rule may make sense. In operating rooms, where teamwork is vital with lives on the line. In nuclear reactors, where misunderstandings could cause meltdowns. In airport control towers.

The department where Navar worked at Watlow Electric, a privately held, \$250 million company, is not one of those places.

It's an assembly line, where about a dozen employees crimp metal pieces for industrial heating equipment. The pieces Navar made wound up in medical equipment sold by Abbott Laboratories. Hamburger grills at McDonald's are heated by Watlow, too.

In most cases, English-only rules are not applied to save lives or prevent accidents.

They're used by paranoid managers to control people. After all, the workers might want to form a union. They might crack jokes about an unfortunate hair style. There's no telling what they will say when managers can't understand the words.

When Watlow instituted its English-only rule on Aug. 1, 1997, it didn't stop with demanding an all-English production line. Navar said the company imposed an English-only rule for everyone in Navar's department, for every minute on the job. At lunch, on break, in those quiet morning moments when people simply say good day.

Watlow officials didn't return our phone calls.

When a company manager called a meeting to announce the change, the workers revolted, Navar said in an interview. They refused to sign a statement acknowledging the English-only rule and several other new pronouncements. "This is a bad rule," someone shouted from the back of the room.

The manager had a simple response. "Shut up," she shouted. Several times. In English, of course.

Navar said she stormed out of the meeting and was suspended for three days. The morning she returned to work, she says, she got fired for saying good morning. Nearly 18 months later, she landed a job at a printing company, paying only half the \$13 an hour she earned at Watlow.

Lawsuits challenging allegedly illegal English-only work rules have been rare. But that's changing fast.

With its lawsuit against Watlow, the EEOC is signaling an intent to stamp out cultural discrimination. "You can buy a government lawsuit if you don't comply," warns John P. Rowe, director of the EEOC's Chicago office.

Funny thing: Watlow last year created a new "People Vision" program designed to retain workers, develop leaders and make Watlow "the best place to work."

The vision statement should come with a warning. In Watlow's world, be careful how you say good day.

Contact David Greising at DGreising@Tribune.com.

11/2
MONDAY, NOVEMBER 30, 1998

THE WASHINGTON POST

Language Rules Translate Into Litigation

Employers' English-Only Policies Called Backlash Against Immigrants

By MICHAEL A. FLETCHER
Washington Post Staff Writer

NEW YORK—For most of the 11 years that Irma Rivera sold crystal for Baccarat Inc., one of Manhattan's most exclusive purveyors of fine glass, her ability to speak both Spanish and English was a clear benefit. A supervisor once praised her work, saying she was a sales leader in part because her bilingualism made her "extremely effective when dealing with South American and other Spanish-speaking customers."

But what was once one of Rivera's most valued assets eventually led to

her professional undoing. She was fired in 1995, in part, she said, because she spoke Spanish to a co-worker on the job in violation of store policy.

Earlier this year, a federal jury awarded Rivera \$500,000, marking what employment lawyers say is the first time that damages were awarded in a case challenging an employer's English-only policy.

Few activists who monitor this burgeoning civil rights issue think it will be the last.

As the ranks of the nation's immigrants swell, so have the number of employers requiring workers to speak English at all times on the job, a

prohibition that many civil rights activists call discriminatory. Over the past three years, the federal Equal Employment Opportunity Commission has received 363 complaints from people claiming that such policies are discriminatory, a figure that has doubled in the past two years alone. Civil rights attorneys also report a sharp increase in discrimination lawsuits challenging what they describe as a proliferation of English-only policies.

"I think this is part of a kind of backlash about immigrants," said Ed Chen, a lawyer with the American

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FRONT PAGE

Civil Liberties Union of Northern California. "There is a general level of discomfort when there are a lot of immigrants around. Language becomes something of a flash point for some of those insecurities."

Under federal law, employers are within their rights to demand that workers speak English, but only if that restriction is necessary for conducting business. EEOC rules say that employers cannot prohibit employees from speaking a foreign language in informal situations. But the legal soundness of those guidelines was challenged by a 1993 federal appeals court ruling upholding an English-only restriction at a California meat processing company. There, employees who spoke only English had complained that they were being harassed in Spanish by co-workers.

Federal officials say the laws governing English-only restrictions often are misunderstood or ignored by employers who become unnerved by employees speaking a language they don't understand. For years, for example, convalescent homes in California commonly prohibited employees from speaking foreign languages if they were within "earshot" of patients. Chen said that restriction was even enforced by state health inspectors, who erroneously thought those policies were required by federal patients' rights law.

That prohibition was overturned two years ago when a Gilroy, Calif., convalescent home settled a suit brought by a former employee who was fired for speaking Spanish to a co-worker. After the settlement, California health officials issued new guidelines making it clear that employees are not required to speak English unless they are talking to patients or actively engaged in performing some type of service for them.

Employers accused of illegally imposing English-only rules typically see them as common-sense restrictions aimed at keeping the workplace comfortable for those who speak only English.

"Some managers feel they need English-only rules to maintain control in the workplace," said Caroline Zambrowicz, a spokeswoman for the Society for Human Resource Management. "Sometimes people feel others are talking behind their back if they use a foreign language. It can create an uncomfortable atmosphere."

Such sentiment is not new. In the 1920s, fear of the nation's large influx of immigrants led several states to ban the teaching of foreign languages in public schools. But with immigrants now accounting for 11 percent of the nation's

labor force, language rights activists see imposition of English-only policies in the workplace as part of a larger anti-immigrant backlash. Many call the workplace restrictions a direct outgrowth of the movement that has resulted in English being declared the official language in 25 states, a designation that is often symbolic but in some cases has restricted non-English services provided by state governments.

"This English-only rhetoric has seeped into the fabric of the nation," said Juan A. Figueroa, president of the Puerto Rican Legal Defense and Education Fund, a Manhattan-based advocacy group that has brought several lawsuits in recent years challenging English-only policies. "It is especially troubling because language is so closely tied to one's national origin."

Many employers contend that they craft English-only policies to complement their business needs or protect the rights of English-speaking workers. But language rights activists complain that language restrictions are often imposed at the whim of supervisors who find themselves uncomfortable among workers who speak languages other than English.

Maria Quinones and Evelyn Silverman were fired from their jobs as home health care workers in May 1995, shortly after their supervisor at a Brooklyn-based home nursing firm warned them not to speak Spanish on the job.

The women, who are from the Dominican Republic, alleged that they were fired after the same supervisor heard them speaking Spanish on the sidewalk outside the firm's offices. The EEOC has filed a lawsuit against the company, which has denied the charge, saying the women were fired "for cause." The suit is pending in federal court.

Similarly, the EEOC settled a suit earlier this month, winning a \$133,000 payment for six employees from NHS National Health Services Inc. and EMS Correctional Care Inc., New York firms that provided health services at juvenile correction facilities. Among the charges made by the EEOC was that a supervisor with a mostly Latino work force imposed an "English-only" rule that extended to employees' personal activities at work.

"They were not allowed to speak Spanish during breaks, or at lunch, and they were not allowed to listen to Spanish radio stations," said Elizabeth Grossman, an EEOC trial attorney who handled the case.

In the Baccarat case, store lawyers said Rivera was fired by a new

company president as part of a shake-up intended to improve the store's sales performance. The new president had made several unannounced visits to the Madison Avenue store and found that the sales force was not friendly or attentive enough, company lawyers said.

In court, the company president acknowledged that Rivera was ordered to refrain from speaking Spanish. But he said the rule was imposed as "a matter of courtesy" to employees and customers who speak only English. The jury wasn't convinced, and Baccarat's request for a new trial was denied.

The requirement to speak English has at times affected even employees who have little contact with either the public or other workers.

Rogelio Campos, 61, a dump truck driver who moved to the United States from Cuba 14 years ago, was stopped by police in Yonkers, N.Y., last summer, allegedly because his dump truck was overweight. But after talking with the officer, Campos was given a ticket under an obscure section of federal transportation law that prohibits drivers from operating commercial vehicles if they don't have an adequate command of English. Campos is fighting the case in court with the help of the Puerto Rican Legal Defense and Education Fund.

"This is a guy who has never run a stop sign," said Fernando Mateo, a Dominican immigrant who owns San Mateo Construction Corp., which employs Campos. "The funny thing here is that he was able to take a test for his commercial license in Spanish, but he is required to speak English."

Mateo, 40, who owns several companies after starting out as a poor high school dropout, said learning English has been integral to his success. He has used the incident to prod Campos into taking classes to improve his limited English. Still, he thinks the police went too far by giving his driver a ticket.

"You are a nobody in this country if you can't speak English. I am a firm believer that if I live in France, my language should be French. If I live in Spain, my language should be Spanish. If I live in the United States, my language should be English," Mateo said. "But I don't feel that, constitutionally, anyone should be given a ticket because they can't speak the language."

2/2

Arizona Court Strikes Down Law Requiring English Use

By DON TERRY

LOS ANGELES, April 28 — The Arizona Supreme Court ruled today that a 1988 law requiring state and local government business to be conducted in English was unconstitutional.

Arizona was one of the 23 states from Arkansas to Wyoming that had passed measures in the late 1980's and early 1990's making English the official language of the state.

Most of measures were little more than symbolic, but Arizona's was by far the most restrictive, at least on paper. It prohibited an elected official, for example, from speaking to his Navajo constituents in their native tongue while on state or local business. And it required that welfare workers or state park rangers fluent in six languages use only English to give aid or directions.

But the measure, passed as an amendment to the state Constitution, had never been implemented because most elected officials refused to do so and because of Federal and state-court battles.

In today's ruling the Arizona Supreme Court said that the law "adversely affects non-English speaking persons and impinges on their ability to seek and obtain information and services from government."

The 43-page opinion went on to say that the law "chills First Amendment rights that government is not otherwise entitled to proscribe" and that it also violates the United States Constitution.

"It was racist," said Stephen Montoya, the lawyer who represented legislators and state employees seeking to overturn the law. "The only individuals in Arizona who don't speak English fluently or not all are people of color. I see this as a way to keep them out of the political process."

Arizona's English-only law is the first to be overturned in court since the 1920's. The measure has been in court almost from the moment the voters passed it in 1988, by less than one percentage point, during a campaign hot with accusations of racism and love-it-or-leave sentiments.

"I'm disappointed," said Bob Parks, one of the sponsors of the law, and a retired investigator for the Immigration and Naturalization Service. "If the state doesn't appeal this ruling, I will."

But Paul Binder, a professor of constitutional law at the Arizona State University College of Law, said it was about time that "we get rid of this thing."

"The thing was passed by a tiny majority of the people in the state," Professor Binder said. "If the campaign had gone on a little longer, it would have been defeated and we would have been spared all this."

James Weinstein, who also teaches

at Arizona State, said the law was bad policy and "animated in part by some xenophobia." But, Mr. Weinstein said, "I have some real questions whether this law is totally unconstitutional."

Eric Stone, a spokesman for U.S. English, a national group seeking to make English the official language of the nation, said, "We kind of expected what happened today, because Arizona's law was the strictest in the nation," adding that "this ruling is basically limited to Arizona."

Since Arizona's law was passed and almost immediately taken to court, Mr. Stone said his group had been trying to draft less restrictive laws to avoid legal challenges. For the most part they have succeeded,

Challenged from the outset, a language law 'chills First Amendment rights.'

except in Alabama, where state officials are being sued because they now provide driving tests only in English. Before the state adopted an English-only law in 1990, Alabama offered driving exams in 14 languages. Now people like Martha Sandoval, who is suing the state, cannot get a driver's license because she is not fluent in English, The Mobile Register in Alabama has reported.

Still, most of the laws across the country are more political than legal, said James Crawford, an expert on English-only laws and bilingual education.

"The main impact of these measures," Mr. Crawford said, "has been to create a hostile climate for supporting programs that provide a transition to help immigrants into the mainstream."

But Mr. Park, the law's sponsor, said it was not the government's obligation to provide services "in 300 different languages."

"I don't believe in English-only," he said. "I believe in English as the official language of government."

Pete Rios, a Democratic State Senator and a plaintiff in the English-only case, represents a Phoenix district with a high percentage of Spanish-speaking residents. Mr. Rios said there was no underground movement to replace English as the official language of government.

"We in Arizona, we as Hispanics and Latinos, have always accepted English as the official language," Mr. Rios said. "If this law was enforced, a lot of people would have been in a lot of trouble."

THE NEW YORK TIMES

WEDNESDAY, APRIL 29, 1998

SPEAKING OUT

1/2 English-only lawsuit blurs line
between good business, discrimination

By Diana Kunde

Staff Writer of The Dallas Morning News

When Edgar and Mardia Lira reported to work at Premier Operator Services in DeSoto one January day, their supervisor wanted to talk.

She asked the Liras to sign a policy requiring that they speak only English on company premises, except when addressing Spanish-speaking customers. The Liras, bilingual natives of Mexico who worked as telephone operators, took offense.

"If I try to talk to my wife, on my break time, and they think that's against the company? I felt it was something against my dignity," said Mr. Lira, 26.

What happened next is in dispute. Mr. Lira says an angry Eric Brown, Premier's president, told them to sign or leave the premises. They left.

Mr. Brown tells the story differently. The Liras weren't offenders, he conceded. But Mr. Brown he says he never fired anyone; the couple left of

their own accord. He says the English-only policy was intended to prevent Hispanic employees from making derogatory remarks about co-workers in Spanish.

Two years later, the controversy is in court — the latest in a spate of language-related job discrimination suits erupting across the country as workforces become more diverse. At issue are questions of when requiring English makes legal and business sense — and when an English-only requirement is discriminatory.

There's virtually no disagreement that it makes sense to mandate English for customer service workers who deal directly with English speakers or for safety reasons. Battle lines are typically drawn over requiring that English be spoken during informal conversations and on breaks.

"When you're dealing with an English-speaking public, working

in groups or teams in an operating room, a chemistry lab or an oil rig ... those are examples of pretty uncontroversial English-only," said Edward Chen, an attorney for the American Civil Liberties Union in San Francisco.

"The rules that come up all the time [in civil rights complaints] are rules that cover casual conversation," he said. "And those, I think, are hard to justify."

The federal Equal Employment Opportunity Commission, which has filed suit against Premier on behalf of the Liras and 10 other former employees, contends that the firm's broad policy was illegal, which Premier denies.

EEOC guidelines say English-only policies must be justified by business necessity.

"If the issue was somebody being discourteous or rude, the way that should be managed is to address it with the individuals involved, not to pass a blanket policy that affects a lot of innocent, hard-working people who aren't involved," said Robert Canino, senior trial attorney with the EEOC in Dallas.

Courts haven't always agreed on these cases. Many observers believe the issue will eventually go before the U.S. Supreme Court.

The ACLU in San Francisco, for example, lost a case before the federal 9th Circuit Court of Appeals, which also questioned the legal basis for the EEOC's guidelines on English-only.

Requiring bilingual employees of Spun Steak Co. to speak only English at work didn't impose an undue hardship, the court said in a 1993 decision. The company didn't

require English of cleanup employees who spoke only Spanish. Nor did its English-only policy apply to workers on break.

The 5th Circuit appeals court, which sets precedent in Texas, upheld an employer's English-only rule in a 1980 decision. That policy

didn't apply to breaks, and the court found a business necessity for the rule. Still, Michael Maslanka, a Dallas lawyer who represents employers, said he doubted whether a 1990s jury would find for the company, which fired a bilingual employee for responding in Spanish to a co-worker's question.

More recently, a federal jury in New York last February awarded \$500,000 in back pay and damages to a saleswoman for Baccarat Inc. who alleged that she was fired because a new boss didn't like her speaking in Spanish unless a customer initiated the conversation. Baccarat, a crystal maker, is appealing.

English-only disputes aren't numerous compared with other types of job discrimination complaints, but they're persistent. The EEOC reported 71 discrimination charges involving the policies in 1997, up from 32 in 1996. The New York-based Puerto Rican Legal Defense and Education Fund took part in five suits involving English-only rules during the last year, said Juan Figueroa, the group's president and general counsel.

The policies are an outgrowth of general uneasiness over immigration, said James Crawford, author of *Hold Your Tongue: Bilingualism and the Politics of English Only*.

"Language is something people can understand, so it becomes a symbol for all the unsettling changes going on," Mr. Crawford said. "Sometimes people lash out with these policies, trying to suppress the differences, which usually doesn't work out very well."

Americans have historically distrusted speakers of other languages at the same time that they've admired multilingualism, said Mr. Chen, the ACLU lawyer.

"It's a very American sort of

ENGLISH-ONLY POLICIES UNDER FIRE NATIONWIDE

The Dallas Morning News

Disputes over English-only policies at work are bubbling up across the country. Some recent examples:

■ **Amarillo** — Rosa Gonzales and Ester Hernandez left their jobs at Allied Insurance Agency, a small firm with Spanish-speaking customers. They said they were fired in July after refusing to sign a policy requiring only English except when talking to customers. Owner Pat Polk said the two women chatted in Spanish in the small office in front of co-workers who couldn't speak the language. They weren't fired, he said; they quit.

■ **Houston** — Ochs Industries, a Vandalia, Ohio-based company, dropped an English-only policy at its Houston computer parts factory in November after Hispanic advocacy groups protested and employees filed charges with the Equal Employment Opportunity Commission. Company officials said they implemented the policy after complaints from employees who said co-workers were harassing them in languages other than English.

■ **Meriden, Conn.** — The public housing authority rescinded an English-only policy in the fall after public protests and a legal challenge from the Puerto Rican Legal Defense and Education Fund. The housing authority's director, W. James Rice, said the policy was an attempt to avoid an atmosphere of distrust when co-workers speak another language. But a bilingual worker quoted in the *Hartford Courant* said the policy felt "like they tried to take my heart away."

■ **New York** — The Puerto Rican Legal Defense and Education Fund filed suit in November against the U.S. Postmaster General on behalf of Julios Ramos, a mail handler. A supervisor told Mr. Ramos he should "go back to Puerto Rico" if he wanted to speak Spanish, according to the complaint. A Postal Service spokeswoman said it requires English in certain situations and in fact considers the ability to speak Spanish an asset.

■ **New York** — The EEOC filed suit last year against Brooklyn-based Long Life Home Care Services Inc. on behalf of Maria Quinones and Evelyn Silverman. The two women said they balked after being told they couldn't speak Spanish even while walking to their cars. Company officials said the women were fired for cause. The suit is pending.

SOURCE: News reports

The Dallas Morning News

response to think that people speaking another language must be conspiring. The reaction is that 'they must be talking about me,' " Mr. Chen said.

That feeling resulted in a backlash against Italian and Polish-Catholic immigrants at the turn of the last century, he said.

Nonsense, said Jim Boulet Jr., executive director of English First, a Virginia-based lobbying group that is pushing to establish English as the official language of the United States. Mr. Boulet blames the rise in lawsuits on increased litigiousness by the EEOC and advocacy groups.

"Our policy is that an employer has the right to a one-language-in-the-workplace policy, no matter what that language might be," Mr. Boulet said. Safety and effective supervision are two reasons why an employer might choose to establish such a policy, he said.

But the most important, he said, is that "an employer is required not

to have a hostile working environment."

"If the EEOC prevails, then an employer is going to have to not tolerate abusive language in the workplace, even if he doesn't understand the language being used."

The recent spate of litigation is an attempt by the federal agency to reignite an issue that failed to catch on two decades ago, Mr. Boulet said.

"While they're responsible for discrimination on the basis of national origin, language is not national origin."

"It's kind of like going to the county fair and trying to win one of the big teddy bears. You keep pitching until you win," he said.

Try telling Mr. Figueroa of the Puerto Rican group that language isn't about national origin.

"Spanish is closely and inseparably linked to national identity," he said. "The politics of language are as much a defining issue for this country as it moves ahead as is affirmative action and

some of the issues traditionally associated with African-Americans."

The controversy is also about race, Mr. Figueroa said. "Let's look at the majority of Spanish speakers. ... They are Mexican-American, Puerto Ricans or Cubans, highly mixed with either African or Indian races — people of color."

But Alicia Serret, a multilingual supervisor at Premier, which provides operator services for long-distance carriers, said she views speaking English on the job as a matter of courtesy.

"I think it's a matter of being respectful. That's the main thing," said Ms. Serret, who believes that forcing herself to speak English helped her learn the language faster.

Mr. Brown's English-only policy was aimed at protecting a few younger operators who didn't speak Spanish, he said.

"The problem only happened when we couldn't hire enough Spanish operators. We had to hire English operators, and some of the Spanish operators resented that, obviously," he said.

Bilingual supervisors heard slurs, Mr. Brown said. Still, he said, no one had to sign the English-only policy in order to continue working.

"I didn't fire anybody over the language policy. We just said no discrimination, no slander. If you must do that, find another job," Mr. Brown said.

Edgar Lira, who worked at Premier while attending Christ for the Nations Institute in Dallas, remembers Mr. Brown losing his temper after being told that the Liras refused to sign.

"Mr. Brown was very upset, very mad. He said, 'If you don't want to sign the memo, you take your things, the door is wide open,'" Mr. Lira said.

Such a statement, the EEOC's Mr. Canino said, is tantamount to firing.

Another employee, Albert Estrada, also disagreed with the policy. He signed, but wrote a note below his signature in protest.

Mr. Estrada, then 17 and a student at the Dallas Independent School District's law magnet, went to the EEOC.

Although Mr. Estrada grew up in the United States, he said his parents speak Spanish.

"Speaking Spanish is my culture," Mr. Estrada said.

In its suit, the EEOC charges that Mr. Estrada and others were fired on Feb. 29, 1996, the same day Mr. Brown received notice from the

"If the [English-only] issue was somebody being discourteous or rude, the way that should be managed is to address it with the individuals involved, not to pass a blanket policy that affects a lot of innocent, hard-working people who aren't involved."

— Robert Canino, attorney,
Dallas EEOC

EEOC that his employees had filed charges.

"The law not only prohibits discrimination, it prohibits retaliation when someone comes forward to complain about something they think is unlawful," Mr. Canino said.

Mr. Brown contends that the action against Mr. Estrada had nothing to do with the charges but with his chronic tardiness. Mr. Brown also said Mr. Estrada wasn't really fired, just bumped to "on-call" status.

Furthermore, Mr. Brown said, the English-only policy at Premier Operator Services is no longer in force. It was dropped "after Mr. Estrada left and created all the ruckus," he said. Supervisors who once fielded calls themselves now do nothing but oversee the operators, Mr. Brown said.

"Once we went to that policy of someone doing active supervision, we do fine. It wasn't necessary anymore."

Mr. Brown nevertheless has declined an EEOC proposal to settle out of court because he says the facts are on his side.

"They weren't injured. They were paid for every hour they worked," he said. "They left of their own choosing."

Mr. Estrada is equally adamant.

"If I believe in something, I'll follow it all the way. Until the end, or until I do my best," said Mr. Estrada, a full-time student at El Centro Community College who also works as purchasing supervisor for an automobile parts outlet.

At the EEOC, Mr. Canino said he doesn't expect English-only disputes to die.

"I suspect this issue to continue to surface and that at some point it may go to the Supreme Court. For all we know, this could be the case," he said.

THE CHRISTIAN SCIENCE MONITOR

United States

Thursday January 15, 1998 Edition

On the Job, It's English Or Pink Slip

Shelley Coolidge, Staff writer of The Christian Science Monitor

LOS ANGELES -- The occasional "que pasa?" probably won't hurt you. But carrying on a full-blown conversation in any language other than English could someday cost you your job.

For reasons of safety and employee unity, businesses are increasingly adopting English-only rules for the workplace.

That means idle chatter in the wrong tongue on the factory floor, at the check-out counter, or even on the street a block away from the office is becoming grounds for dismissal at some US firms.

As a result, a growing number of workers - whose native languages include Spanish, Chinese, Vietnamese, and French Creole - are filing discrimination suits over the new rules.

**'We see reprimands for talking to a
fellow employee in the elevator.'
- An EEOC attorney**

The rise in such restrictions comes at a time when nearly two dozen states have declared English as the official language. Some say the trend reflects a larger ambivalence in society over the acceptance of immigrants in a nation built by immigrants - one that often considers diversity a strength.

Many businesses, in fact, seek out bilingual employees and welcome less-costly workers - from Mexican strawberry pickers to Russian software engineers. Yet, increasingly, that may only be on certain terms.

As the American workplace diversifies, the flap over what language is legal around the water cooler will likely only intensify.

"This is not only a legal question. It is also a question of how do you manage a diverse work force?" says Ed Chen, a lawyer at the American Civil Liberties Union in California.

English-only rules are not new. Yet lawyers and activists say companies are placing more demands on when and where workers must speak English, and they are enacting harsher penalties on employees who don't comply.

The US Equal Employment Opportunity Commission (EEOC), which only started tracking complaints about English-only rules in 1996, says they are rising. Maria Quinones and Evelyn

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Silverman, for example, say they were dismissed in May 1995 shortly after their supervisor at a New York City home-care agency met with them to discuss "speaking Spanish on the job."

The two women, who speak English and Spanish, allege that the company prohibits employees from speaking Spanish during breaks, lunch in the cafeteria, and within one city block of their office building. An attorney for their former employer, Long Life Home Care, contends that "there was no English-only rule in effect at the company and the [two workers] were fired for just cause." The EEOC filed a lawsuit a year ago in US District Court in New York against the company.

Companies - from retailers to financial institutions - say they adopt such policies because speaking a language that customers or coworkers don't understand is inefficient and can create distrust. "It's not so much that companies don't want workers speaking Spanish or German in the workplace," says Barry Lawrence of the Society for Human Resource Management in Alexandria, Va. "But sometimes it defeats the purpose of trying to build synergy."

In some workplaces, such as air-traffic-control towers and on assembly lines, clear communication can also be a critical safety issue. But civil libertarians argue that these rules stem from a growing anti-immigration sentiment and don't respect cultural and language diversity in the workplace.

"We see people being reprimanded not for violating safety laws, but because they are talking to a fellow employee in the elevator," says William Tamayo, an EEOC lawyer in San Francisco.

Mr. Tamayo argues that English-only rules reinforce the "erroneous perception" that when people speak in another language it is meant to demean someone who only speaks English.

IN many cases, lawyers say, companies don't have policies in writing. Rather a supervisor, without direct corporate approval, is prohibiting workers from speaking other languages.

Still, the legality of English-only policies and how far companies can go in implementing them remains unclear. The EEOC maintains that English-only rules discriminate against workers based on national origin, and it is therefore illegal to require all employees to speak English at all times. Under the guidelines, however, an employer may have a rule requiring employees to speak only in English at certain times where the employer can show the rule is "justified by business necessity."

The problem, say the ACLU's Mr. Chen and others, is that while courts reviewing English-only laws are supposed to refer to the EEOC guidelines in making a ruling, they are not required to accept them. In 1993, for example, the US Ninth Circuit Court of Appeals in San Francisco put aside the guidelines and upheld the English-only rules of a local meat-packing plant. The court said such rules are invalid only if an employee proves that they create an atmosphere of "inferiority, isolation, and intimidation."

Still, of the five companies the EEOC has sued in the past four years, all have ended their English-only policies, says Mr. Tamayo. In 1995, two American Red Cross laboratories in Rockville, Md., abandoned such a rule after the EEOC sued on behalf of Chinese employees who were prohibited from speaking English and Chinese interchangeably to each other during office hours and telephone conversations to family members.

"Language is a very emotional subject," says Marielena Hincapié, a lawyer at the Employment Law Center in San Francisco. "A lot of the arguments companies are making [for English-only policies] are not logical or legal, but are coming from inside."

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HEADLINE: Texan's victory in EEOC fight not so sweet Battle over English-only rule costs employer about \$ 60,000 in legal fees

BYLINE: Doug J. Swanson, Staff Writer of The Dallas Morning News

DATELINE: HOUSTON

HOUSTON - L.E. Kline, a 69-year-old silver-haired grandmother, said she vividly remembers the telephone call in which she was told to pay up - or else.

"For the first time," she recalled recently, "I truly understood how the little guy felt when the Mafia came in and said, 'You've got a nice place here. It'd be too bad if it burned down.' "

No mobster was on the line; it was a federal official. The threat was not one of arson, but of a lawsuit.

Mrs. Kline's misdeed, as alleged by the U.S. Equal Employment Opportunity Commission: firing an employee for speaking Spanish.

She denied the accusation and refused to pay back wages to the discharged worker. So the EEOC filed a civil suit.

In late August, after two separate court decisions in Mrs. Kline's favor, the EEOC announced that it was dropping its case against her.

Victory cost Mrs. Kline six years and nearly \$ 60,000. She doesn't feel much like a winner.

"They put us through hell," she said.

EEOC lawyers, despite the decision to withdraw, maintain their condemnation of Mrs. Kline's actions.

"This was clearly a violation of the law," said Jim Sacher, the agency's regional attorney in Houston.

Mrs. Kline, still angry at her treatment, sees herself as political fodder.

"They thought they'd gotten hold of this little day-care center that they were going to use to further their aspirations," she said. "I was a sacrificial lamb."

Federal web

Her experience shows what can happen when an ordinary person enters the elaborate web of federal regulations. But it represents more than just a small-business-against-big-government tale.

It involves a federal agency that has been forced to abandon some of its high-profile actions. And EEOC vs. A&B Nursery has a hot national issue as its backdrop: English-only rules in the workplace.

Interest groups on both sides watched the case closely. The Mexican American Legal Defense and Educational Fund, along with the American Civil Liberties Union, filed court papers in support of the EEOC.

Rules requiring English only, said a MALDEF position paper, "seek to degrade our ethnicity and . . . deny us our personalities."

U.S. English, a group that promotes laws designating English as the official language, used the case as the lead item in recent fund-raising letters. It accused the EEOC of "spending hundreds of thousands of your tax dollars" to perpetrate "this outrage."

For the EEOC, which takes less than 1 percent of all complaints it receives to court, the Houston suit was one of a handful of crucial litigations involving English-only rules.

But Mrs. Kline had no intention of jumping into a national policy debate. She said she simply honored requests by the parents of the children she kept.

"We had complaints from parents," she said. "Their children were coming home and saying they couldn't understand the teachers who were speaking Spanish in the room."

Mrs. Kline, who has owned and operated A&B Nursery for 30 years, posted a sign at the day-care center. It read, she recalled, "In children's presence, only English may be spoken. Failure to comply will result in termination immediately."

Employees were free, she said, to speak Spanish when children were not around.

In 1990, Mrs. Kline fired a cook named Vilma I. Umanzor, a native of El Salvador. Mrs. Kline said Mrs. Umanzor allowed too many children in the dining area at one time, a violation of the fire code.

Mrs. Umanzor, who could not be reached for comment, went to the EEOC after losing her job. She said she had been discharged for speaking Spanish in the kitchen, out of the earshot of children.

Agency investigators began looking into her complaint.

The Civil Rights Act of 1964 created the EEOC to enforce federal legislation that prohibits discrimination in employment.

Lots of complaints

Business is brisk. Last year 87,529 complaints alleging job bias were filed with the EEOC. The year before that, 91,189.

The agency has made some questionable moves over the years. In 1989, it sued a Florida trucking company for refusing to hire drivers who had been convicted of felonies.

The EEOC's rationale: The employer's policy was discriminatory because Hispanics had a higher rate of felony convictions than did whites. A Hispanic judge sided with the trucking firm.

The agency recently withdrew threats to sue Lillie Rubin Affiliates Inc., an upscale retailer of women's clothing that does not hire men for sales jobs. Lillie Rubin stores feature fitting rooms where female sales clerks routinely help female customers in and out of clothing.

And this year the EEOC quietly backed away from an attempt to make the Hooters of America restaurant chain hire men to wait tables, a job the company limits to enticingly clad women.

Hooters had mounted a \$ 1 million publicity campaign that included advertisements showing a burly man in a blond wig and a Hooters uniform. He held a plate of chicken wings and urged, "Come on, Washington. Get a grip!"

"But what about Mitsubishi?" said Ellen Vargyas, legal counsel to the EEOC, defending her agency's record.

The carmaker was accused by the agency of sex discrimination at its Normal, Ill., plant. This year the company, in an implicit admission of problems, hired former U.S. Labor Secretary Lynn Martin to investigate and draw up a list of reforms.

Mitsubishi is a multimillion-dollar international corporation, but A&B Nursery is a neat, modest establishment in a blue-collar neighborhood on Houston's south side.

It had no staff lawyers and no wherewithal to mount an ad campaign when an EEOC investigator called in 1990 to inquire about Mrs. Umanzor's firing.

"She the investigator said, Would you care to negotiate?" " Mrs. Kline recalled. "She said, You'll usually come out ahead if you just rehire the employee and pay the back wages." "

Mrs. Kline refused. "I could not do what they asked because I was not guilty."

In late 1991, based on information from Mrs. Umanzor and other ex-employees of A&B, the

EEOC issued its findings: Mrs. Kline had engaged in national-origin bias.

"There's a long and troubling history of this type of discrimination," said Ms. Vargyas, the agency's legal counsel.

The EEOC's definition of national origin includes such markers as birthplace, cultural background, physical attributes and linguistic characteristics. Protection extends even to one's manner of speaking. Employers may not engage in "accent discrimination," the EEOC has determined.

Workers can be required to speak English only when an employer can show it is justified by business necessity. A blanket English-only rule, agency guidelines say, may "create an atmosphere of inferiority, isolation and intimidation."

In A&B's case, the EEOC did not dispute Mrs. Kline's right to insist on English around children. But she violated the Civil Rights Act, the agency found, when she forbade employees to speak Spanish during their lunch breaks on nursery grounds. "That was never true," Mrs. Kline said. "This entire thing was based on fabrications."

The EEOC also determined that Mrs. Umanzor's dismissal constituted discrimination. "She was fired in retaliation for heroically opposing a policy she believed was unlawful," said Mr. Sacher, the regional attorney.

An offer to settle

In 1992, the EEOC offered to settle the case if Mrs. Kline would pay Mrs. Umanzor about \$ 20,000 in back wages. "I could not have been more insulted," Mrs. Kline said, "if they came out here and said, You're going to go out to the corner and be a hooker and give us the profits."

Its settlement offers refused, the EEOC filed suit in federal court.

Agency lawyers say the suit could have been avoided if Mrs. Kline had simply agreed to comply with regulations and pay back wages. "She turned this into some kind of ideological war," Mr. Sacher said.

They also object to any depiction of the EEOC as a big-government bully. "We're not dealing with mom and pop shops," said Ms. Vargyas.

Only businesses with more than 15 employees, she said, fall under EEOC regulations. When the suit was filed, Mrs. Kline employed 17.

The matter went to trial in May 1994. U.S. District Judge Melinda Harmon heard four days of testimony - the EEOC's side only.

Before Mrs. Kline's lawyer could present her evidence, the court rendered its decision.

The government, the judge ruled, had no case.

A&B had an English-only rule, but it was unenforced, the judge wrote. She added, "Kline's motives were clearly to encourage the learning of English by her primarily Spanish-speaking employees and not to discriminate against them."

Said EEOC attorney Sacher, "I don't know how the judge had that opinion based on the testimony she heard."

Judge Harmon also ordered the EEOC to pay Mrs. Kline's legal expenses of more than \$ 48,000.

The EEOC appealed. A three-judge panel of the 5th U.S. Circuit Court of Appeals heard the case in March. During oral arguments, a woman describing herself as a "spiritual adviser" to Mrs. Umanzor stood and announced that the ex-employee had experienced a change of heart and no longer wished to press her complaint.

"It was an absolute circus," said Mrs. Kline's lawyer, Mary Sinderson.

In June the appeals court upheld the lower court's ruling against the EEOC. But it said the agency did not have to pay legal fees, which by then approached \$ 60,000.

Paid in full

Mrs. Kline now stands vindicated but poorer for it; she has paid her lawyer in full. She delayed her retirement and deferred plans to sell the day-care center while litigation was pending. "Nobody will buy a school that's being sued by the EEOC," she said.

Her summation: "This whole thing has been a horrible waste."

The EEOC, in response to a reporter's questions, said in late August that the agency has abandoned its effort against Mrs. Kline.

"It was just decided it was not in the best interests of the commission's mission," said Claire Gonzales, director of communications.

EEOC attorney Sacher remains undeterred. "Frankly, if we find cases here in the Houston region in which the facts are similar, we'll file lawsuits on them," he said.

Mrs. Kline expressed no surprise at his remarks. "He has to say that, because look at how much of the government's money he has spent already," she said. "And that's our tax dollars he's being paid with, by the way."

The law does not allow Mrs. Kline to countersue the EEOC for damages. But she would if she could. "In a heartbeat," she said.

ENGLISH ONLY

105th Congress

There are three pieces of legislation which deal with English-only rules.

- **S. 323, the Language of Government Act, and H.R. 123, the Bill Emerson English Language Empowerment Act of 1997**, both would require all federal publications to be printed in English only. **H.R. 622, the Declaration of Official Language Act of 1997**, would make English the official language of the federal government.
- EEOC joined the Administration to oppose identical legislation considered in the 104th Congress (copy of Administration Statement attached.)
- The EEOC's guidelines, 29 C.F.R. Section 1606.7, provide that the Commission will presume that an "English-only" rule that is applied at all times violates Title VII, and that the Commission will closely scrutinize such policies. An "English-only" policy that is applied only at specified times may be justified by a showing of business necessity. The EEOC believes that any such proposed legislation is inconsistent with Title VII.
- There has been no movement in this Congress on English-only legislation. Although this issue was included on the Republican agenda, it has not been a priority.

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ENGLISH LANGUAGE EMPOWERMENT ACT OF 1996

COMMITTEE ACTION

H.R. 123, 'The Language of Government Act of 1995,' was introduced in the House of Representatives on January 4, 1995 by Representative Bill Emerson (R-MO). This bill was referred to the Committee on Economic and Educational Opportunities on the same day. On January 24, 1995 it was referred to the Subcommittee on Early Childhood Youth and Families. The Committee was also referred three other bills regarding English as the official or common language: H.R. 345, Language of Government Act of 1995, introduced on January 4, 1995 by Rep. Owen Pickett; H.R. 739, Declaration of Official Language Act of 1995, introduced on January 30, 1995 by Rep. Toby Roth; and H.R. 1005, the National Language Act of 1995, introduced on February 21, 1995 by Rep. Peter T. King.

All of these bills were discussed at two Subcommittee hearings regarding 'English as a Common Language.' The first occurred on October 18, 1995 and the following witnesses testified at the hearing; Senator Richard Shelby (R-AL); Representative Bill Emerson (R-MO); Representative Peter King (R-NY); Representative Toby Roth (R-WI); and Representative Jose Serrano (D-NY).

The second hearing was held on November 1, 1995 and the following witnesses testified: the Honorable Everett Alvarez of Conwall Inc.; Mr. Edward Chen of the American Civil Liberties Union; Ms. Linda Chavez of the Center for Equal Opportunity; Ms. Maria Lopez-Otin a Cuban immigrant and Federal liaison at the U.S. Nuclear Regulatory Commission; the Honorable Nimi McConigly, State Representative from Wyoming; Mr. Charles Gogolak, former professional football player and Hungarian immigrant; Dr. Geeta Dalal, an immigrant from India; Mr. Mauro Mujica of U.S. English.

The Early Childhood Youth and Families Subcommittee was discharged from further consideration of the bill. On, July 23, 1996, the Committee on Economic and Educational Opportunities ordered H.R. 123 favorably reported, as amended, by a vote of 19 to 17.

SUMMARY

H.R. 123, the 'English Empowerment Act of 1996,' amends Title 4 of the United States Code by adding a new chapter entitled 'Language of the Federal Government.' This legislation declares English as the official language of the Federal Government. H.R. 123 mandates that the government conduct its official business in English, with the following exceptions: the teaching of languages; international relations, trade or commerce; actions or documents that protect the public health and safety; actions or documents that are not enforceable in the United States; actions that protect the rights of victims of crimes or criminal defendants; actions in which the United States has initiated a civil law suit; documents that utilize terms of art or phrases from languages other than English; actions or documents that facilitate the activities of the Census. According to the legislation no one may be denied services because they communicate in English. This bill allows standing to sue for violations of this Act. H.R. 123 mandates that all naturalization services be conducted in English. There is a rule of construction that requires that this bill to be consistent with the Constitution of the United States and that allows federal employees to communicate orally in languages other than English.

EXPLANATION OF THE BILL AND COMMITTEE VIEWS

We are a nation of immigrants. Our history has been shaped by the contributions of immigrants of

different cultures, religions and languages from around the world. We are proud of our nation's ability to assimilate people from around the world into one cohesive society. The purpose of H.R. 123, 'The English Language Empowerment Act of 1996', is to build upon our nation's historic tradition as a melting pot of diverse cultures from around the world, and to bind us together through the use of English as a common language.

Over the past few decades, Congressional action and inaction has resulted in a balkanized national language policy, devoid of any clear, uniform principles. For example, whether documents are published in a foreign language depends in large part upon the particular Federal statute involved. Some Federal statutes require materials to be provided in an individual's native language or mode of communication. In other statutes, Federal law provides for services in the language and cultural context most appropriate to the individuals. While such provisions may initially sound reasonable, they have consequences. As Linda Chavez, former director of the United States Commission on Civil Rights, and current President of the Center for Equal Opportunity stated in testimony before the Subcommittee on Early Childhood, Youth, and Families:

[T]he public policy that has been in place over the last 25 years * * * has discouraged immigrants from learning English, and has made it quite possible for immigrants to function in all aspects of their civic life in their original language.

The Committee believes it is time for a change; it is time to take stock of the piecemeal policies that have evolved, and replace them with a more uniform policy across all of the Federal government.

Right now, the Bureau of the Census informs us that over 320 different languages are spoken in the United States. Given this fact, it is obvious that Federal taxpayers cannot possibly publish every Federal document of whatever kind in 320 different languages. Furthermore, one might also make the case that the current situation of selectively choosing to sanction a particular foreign language (i.e. publishing a document in Spanish and not the 319 others) the Federal Government is implicitly favoring certain languages and peoples over others. It is better to have one common language.

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

July 31, 1996
(House Rules)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

H.R. 123 - Language of Government Act
(Emerson (R) MO and 197 cosponsors)

If H.R. 123 were presented to the President, the Attorney General, the Secretaries of Treasury, Health and Human Services, Housing and Urban Development, Education and Labor, and the Chairman of the Equal Employment Opportunity Commission would recommend that the bill be vetoed. H.R. 123 would establish English as the official language of the United States and require the Federal Government to conduct most official business only in English. This highly objectionable bill is unnecessary, inefficient, and divisive. It would:

- Effectively exclude Americans who are not fully proficient in English from employment, voting, and equal participation in society.
- Jeopardize the rights of students with limited English proficiency to equal educational opportunity as well as the ability of schools to communicate effectively with parents with limited English proficiency about the education of their children.
- Be subject to serious constitutional challenge. The bill's provision that it not be construed to be inconsistent with the Constitution is so general as to provide no clear guidance and thereby, would create widespread uncertainty in the Government's day-to-day operation.
- Make it impossible for the Federal Government to conduct required business in writing with the millions of U.S. citizens in Puerto Rico and the States who do not read English.
- Effectively repeal the minority language provisions of the Voting Rights Act, limiting meaningful electoral participation by minority language populations. (The proposed Cunningham amendment would actually repeal these provisions.)
- Impair the ability of American Indian tribal governments to engage in self-governance.
- Significantly increase barriers to effective law enforcement in immigrant communities.
- Create an unnecessary private right of action, inviting frivolous litigation against the Government.
- Potentially eliminate programs that promote the welfare of children and older Americans where an immediate public health risk does not exist. The bill could also prohibit

publication in foreign languages of informational pamphlets on subjects like Head Start, Social Security, Older Americans, the Americans with Disabilities Act, child support collection, and child abuse prevention.

English is universally acknowledged as the common language of the United States, but language alone is not the basis for nationhood. Americans are united by the principles enumerated in the Constitution and the Bill of Rights: freedom of speech, representative democracy, respect for due process, and equality of protection under the law. H.R. 123 is contrary to each of these principles.

* * * * *



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

February 14, 1996

Mr. James Jukes
Assistant Director
for Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Jukes:

This is in response to the Office of Management and Budget's request for the Equal Employment Opportunity Commission's (EEOC) views on S. 356, the Language of Government Act of 1995.

As requested, EEOC has reviewed S. 356 to determine its implications for enforcement of Title VII of the Civil Rights Act of 1964, as amended (Title VII), and Commission operations. As a symbolic matter, the bill seems intended to broadly prohibit the use of languages other than English in a broad range of government activities. Such a prohibition would conflict with Title VII jurisprudence on national origin discrimination, and affect the Commission's own enforcement operations, in ways set forth below. On the other hand, much of the language of the bill is so ambiguous that its practical impact on Title VII interpretations and Commission operations may be negligible. That very ambiguity is troubling, however, because it will generate confusion and potential overreaction both in and outside of the government.

Discussion

Under Commission policy, speak-English-only rules are presumed to have an adverse impact based on national origin, and therefore violate Title VII unless they are shown to be job related and consistent with business necessity. The Commission presumes that prohibiting employees from speaking their primary language, or the language they speak most comfortably, can create a discriminatory working environment. 29 C.F.R. section 1606.7 (1995).¹

¹ Note that the Ninth Circuit has rejected the Commission's position that adverse impact from speak-English-only rules can be presumed. See Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993), cert.denied, 114 S.Ct. 2726 (1994). In the Ninth Circuit, a plaintiff must prove that a group has been adversely affected by a speak-English-only rule before the employer will be required to justify it.

Thus, under Title VII, any rule limiting employees' rights to speak their native language must be narrowly drawn and necessary to accomplish a legitimate business purpose. It will be almost impossible for an employer to justify, under Title VII, a rule that requires employees to speak English at all times, including on breaks and at lunch time. In contrast, an employer generally will be able to justify requiring employees to speak only English at times necessary to perform the business function -- when close coordination among coworkers is required (for example, in performing surgery or on construction sites where accidents are likely to occur) or when communicating with English-speaking customers.

As noted above, the tone of the Language in Government Act conflicts with the Commission's interpretation of Title VII in that the bill seems intended to discourage the use of languages other than English. However, its prohibitions are vaguely worded and it is unclear whether, by whom, or how it would be enforced.

First, we note that, as to communications between employees, the bill's impact appears to be limited to federal employees. It requires English as the official language only for federal government operations and apparently does not directly affect private sector or state and local employers.

Second, it is not clear whether or not the bill conflicts with Title VII. It specifies that it is not intended to "restrict the rights of any individual in the United States," and does not repeal existing laws except where such laws "directly contravene" the language of the Act. Section 2(b). It is not at all clear whether the Title VII "right" to speak languages other than English -- absent business necessity -- "directly contravene" this bill. If so, Title VII would presumably be superseded at least as to the "official business" for which the Act requires the use of English.

On the other hand, the bill specifies that it is "not intended to discourage or prevent the use of languages other than English in any nonofficial capacity." Section 2(b)(2). This statutory language may be intended to preserve the Title VII prohibition on speak-English-only rules that apply to all employee communications at all times on the job. Because the term "nonofficial" is not defined, however, it is unclear what activities are authorized by the bill to be conducted in languages other than English. It is unclear, for example, whether the bill would treat private conversations among employees about matters on which they are working as "nonofficial," or whether, alternatively, any interaction among

employees during "official" working hours would be defined as "official business" that must be conducted in English. Similarly, the bill provides that the Government is obliged to "encourage greater opportunities for individuals to learn the English language." Section 3(a). This might be construed to mean that an English-only rule whose stated purpose is to promote learning English is consistent with "business necessity" within the meaning of Title VII ² and/or that the Commission is not permitted to challenge such a rule.³

Third, it is unclear exactly what governmental actions the bill prohibits. S. 356 specifies only that the federal government shall conduct its "official business" in English and that people cannot be denied service because they communicate only in English. "Official business" is defined as "those governmental actions, documents, or policies which are enforceable with the full weight and authority of the Government," Section 3(a). (emphasis added). The bill then sets forth a number of exceptions that are not "official business," including teaching foreign languages, actions to protect the public health, or actions that protect victims of crime or criminal defendants. Id.

The EEOC currently publishes numerous documents, including informational brochures and EEO posters, in multiple languages. The Commission also uses languages other than English when communicating with non-English speaking charging parties, including in intake interviews and in issuing right-to-sue letters. Because such actions ensure protection of the rights of non-English speakers, they are necessary for the full enforcement of Title VII's prohibitions on national origin discrimination.

The intent of this bill may be to prohibit the government from publishing or conveying any information in any language other than English, except as to the enumerated exceptions. However, it is not evident that governmental issuances that

² Note, however, that in a recent challenge to an English-only rule, the Commission introduced evidence that prohibiting employees from using their native language actually inhibits the English learning process. See EEOC v. Wynell, Inc., No. H-92-3938 (S.D.Tex.) (decided March 29, 1995).

³ In EEOC v. Wynell, Inc., the Commission challenged a day care center's rule that employees must speak English-only at all times. It argued, among other things, that prohibiting non-English speaking employees from speaking Spanish denied them an equal opportunity to express themselves and to learn new skills, damaged their self esteem, and created an environment of intimidation.

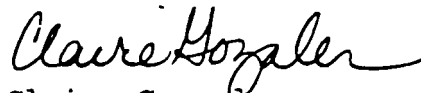
Mr. James Jukes
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explain existing laws or government operations constitute "enforceable" governmental action or documents.

Finally, the enforcement mechanism created by the bill for any violation of its terms is incoherent. The bill specifies that government services cannot be denied solely because the person speaks only English. Since the EEOC conducts its business in English and makes all advice or guidance available in English, as well as in other languages, it is difficult to see how any person could allege that Commission actions violated the bill or caused injury. It is unclear how any individual could have standing to challenge government action that is communicated both in English and in other languages. Moreover, such dual communication does not violate the right to receive information in English, and would not appear to impose "injury" on English speakers in any event. See Section 3(a) (granting standing to "any person alleging injury arising from a violation" of the Act).

As noted above, the EEOC is extremely troubled by this bill. With respect to this agency's operations, the bill has the potential to leave some of the most vulnerable employees uninformed about their rights and thus unprotected. Moreover, it seems likely to prompt an argument that the Commission cannot challenge English-only rules. While the Commission believes that such an argument would ultimately fail, it is virtually certain that a great deal of time and taxpayer dollars will be spent attempting to resolve those disputes.

Sincerely,



Claire Gonzales
Director of Communications
and Legislative Affairs

cc: Gilbert F. Casellas
Chairman

ENGLISH ONLY/ENGLISH PROFICIENCY LEGISLATION
106TH CONGRESS

H.R. 50	Declaration of Official Language Act of 1999
H.R. 123	Bill Emerson English Language Empowerment Act of 1999
H.R. 929	2000 Census Language Barrier Removal Act of 1999
H.R. 1005	National Language Act of 1999
H.R. 1155	A bill to amend the Immigration and Nationality Act to require the Attorney General to provide for special consideration concerning the English language requirement with respect to the naturalization of individuals over 65 years of age.
HConRes. 4	English Plus Resolution
HJRes. 21	A resolution to amend the Constitution to establish English as the official language of the United States

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Link to Word(s) or Phrase in Context:

CQ BILLWATCH

HR50

Sponsor:

Stump (R-AZ)

Introduced:

Jan. 6, 1999

Official Title:

A bill to amend title 4, U.S. Code, to declare English as the official language of the government of the United States.

CQ BillWatch Brief:

HR50 would proclaim English as the official language of the United States.

Under the bill, English would be the official language of the government and the "preferred language of communication" among U.S. citizens.

The measure would require the Immigration and Naturalization Service (INS) to enforce rules on proficiency in the English language for all applicants for U.S. citizenship, and INS would have to conduct all naturalization ceremonies entirely in English.

HR50 also would repeal the Bilingual Education Act and amend the Voting Rights Act of 1965 to repeal bilingual voting requirements.

The new "English-only" requirement would not apply to religious activities, training in foreign languages for international communication or "the use of non-English terms of art in government documents."

CQ BillWatch Insight:

HR50 was referred to the House Education and the Workforce and Judiciary committees.

Similar legislation was introduced in the 105th Congress.

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CQ BILLWATCH

HR123

Sponsor:

Barr (R-GA)

Introduced:

Jan. 6, 1999

Official Title:

A bill to amend title 4, U.S. Code, to declare English as the official language of the government of the United States.

Brief Title:

Bill Emerson English Language Empowerment Act of 1999

CQ BillWatch Brief:

HR123 would declare English as the official language of the federal government.

The bill would make everything from income tax forms to naturalization ceremonies available only in English.

It would not apply to sign language, braille, foreign-language classes or diplomatic correspondence. Government employees also could talk to the public in a foreign language.

Under the measure, any money saved by eliminating bilingual publications and documents would be used to fund English classes for immigrants.

The bill also would urge federal employees to "preserve and enhance the role of English" and mandate that "no person shall be denied services, assistance, or facilities directly or indirectly provided by the federal government solely because the person communicates in English."

CQ BillWatch Insight:

HR123 was referred to the Education and the Workforce and Judiciary committees.

Similar legislation was introduced during the 105th Congress.

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CQ BILLWATCH

HR929

Sponsor:

Miller, D. (R-FL)

Introduced:

March 2, 1999

Official Title:

A bill to amend title 13, U.S. Code, to require that the questionnaire used in taking the 2000 decennial census be made available in certain languages besides English.

CQ BillWatch Brief:

Approved by the House Government Reform Committee, HR929 would require the Census Bureau to make the 2000 census questionnaire available in 33 different languages.

A household would be able to receive the short form of the census questionnaire in any of the following languages upon request: Armenian, Bengali, Cambodian, Chinese, Creole, Czech, Dutch, Farsi, French, German, Greek, Hindi, Hungarian, Italian, Japanese, Korean, Lao, Latvian, Lithuanian, Norwegian, Polish, Portuguese, Romanian, Russian, Samoan, Serbo-Croatian, Spanish, Tagalog, Thai, Ukrainian, Vietnamese, Yiddish, and English braille.

HR929 is part of a series of measures designed to improve the accuracy of the 2000 census count.

CQ BillWatch Insight:

The House Government Reform Committee approved HR929 by a vote of 23-21 on March 17, 1999.

The panel's Census Subcommittee approved it by a vote of 6-4 on March 12.

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Link to Word(s) or Phrase in Context:

CRS BILL DIGEST

HR1005

Sponsor:

King (R-NY)

Introduced:

March 4, 1999

Official Title:

A bill to amend title 4, U.S. Code, to declare English as the official language of the government of the United States.

Short Title as Introduced:

National Language Act of 1999

Subject Keywords

CRS Digest, Original Bill:

National Language Act of 1999 - Makes English the official language of the U.S. Government. Requires the Government to conduct its official business in English, including publications, income tax forms, and informational materials.

Provides that this Act shall not apply to the use of a language other than English for religious purposes, for training in foreign languages for international communication, to programs in schools designed to encourage students to learn foreign languages, or by persons over age 62. Permits the Government to provide interpreters for persons over age 62. Repeals the Bilingual Education Act. Terminates the Office of Bilingual Education and Minority Languages Affairs in the Department of Education. Sets forth provisions regarding the recapture of unexpended funds and transitional provisions.

Repeals provisions of the Voting Rights Act of 1965 regarding bilingual election requirements and regarding congressional findings of voting discrimination against language minorities, prohibition of English-only elections, and other remedial measures. Amends the Immigration and Nationality Act to require that all public ceremonies in which the oath of allegiance is administered pursuant to such Act be conducted solely in English. Specifies that this Act shall not preempt the law of any State.

Subject Keywords:

Communications

Aged

Allegiance

Bilingual education

Bilingual election requirements

Budgets

Citizenship

Civil rights

Discrimination

Education

Elections

Elementary and secondary education

English language

Executive departments

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Link to Word(s) or Phrase in Context:

CRS BILL DIGEST

HR1155

Sponsor:

Frank (D-MA)

Introduced:

March 17, 1999

Official Title:

A bill to amend the Immigration and Nationality Act to require the attorney general to provide for special consideration concerning the English language requirement with respect to the naturalization of individuals over 65 years of age.

Subject Keywords

CRS Digest, Original Bill:

Amends the Immigration and Nationality Act to require the Attorney General to provide certain older persons with special consideration concerning the English language naturalization requirement.

Subject Keywords:

Immigration

Aged

Citizenship

Citizenship education

Communications

Education

Educational tests

English language

Naturalization

Politics and government

Residence requirements

Source: Congressional Research Service

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CQ BILLWATCH

HConRes4

Sponsor:

Serrano (D-NY)

Introduced:

Jan. 6, 1999

Official Title:

A concurrent resolution entitled the "English Plus Resolution."

CQ BillWatch Brief:

HCONRES4 would encourage residents of the United States to become fully proficient in English and learn or maintain skills in a language other than English.

It also would resolve to provide government services in languages other than English to facilitate access to essential functions of government, promote public health and safety, protect rights and promote equal educational opportunity.

"This bill recognizes that English is the language of the United States but declares the importance of multilingualism to vital American interests and individual rights, and opposes 'English-only' measures and other restrictionist language measures," sponsor Jose E. Serrano, D-N.Y., said in a written statement.

CQ BillWatch Insight:

HCONRES4 was referred to the House Education and the Workforce Committee.

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CQ BILLWATCH

HJRes21

Sponsor:

Doolittle (R-CA)

Introduced:

Jan. 19, 1999

Official Title:

A joint resolution proposing an amendment to the Constitution of the United States establishing English as the official language of the United States.

CQ BillWatch Brief:

By Christine Justice, CQ Staff Writer

HJRES21 would amend the Constitution to establish English as the official language of the United States.

It calls for all elections, resolutions, records and judicial proceedings to be conducted in English.

Sponsor John Doolittle, D-Calif., said the United States is headed toward becoming a multilingual country, similar to Canada.

Opponents say the measure is discriminatory.

Similar legislation was introduced in the 105th Congress.

CQ BillWatch Insight:

HJRES21 was referred to the House Judiciary Committee.

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