THE MISPLACED APPLICATION OF ENGLISH-ONLY RULES IN THE WORKPLACE

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I. INTRODUCTION

Increasingly, employers establish English-only rules in the workplace.[1] This action on the part of employers follows a relatively large influx of Asian and Latin American immigrants[2] into the United States, the addition of English-only amendments to state constitutions, and a mounting intolerance of legal and illegal immigration to the United States.[3] Generally, managers institute the rules in two forms: blanket prohibitions on the use of languages other than English or limited bans which require employees to speak exclusively English during certain periods of the day or while having work-related conversations. Current Equal Employment Opportunity Commission (EEOC) guidelines hold that blanket prohibitions violate Title VII of the Civil Rights Act

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1. Tony E. Gallegos, a commissioner of the Equal Employment Opportunity Commission (EEOC), reports that complaints about English-only rules are emerging across the country: "I hear the growing rumble of these kinds of problems [English-only rules]. . . . I hear it in Los Angeles. I hear it in Denver. I hear it in Albuquerque, in Phoenix, in San Antonio, in Miami, in New York." Seth Mydans, *Pressure for English-Only Job Rules Stirring a Sharp Debate Across U.S.*, N.Y. TIMES, Aug. 8, 1990, at A12.

2. From 1961 to 1970, 135,200 immigrants came from China and Japan, 443,300 from Mexico, and 1,239,000 from Europe. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 11 (1992). In sharp contrast, from 1981 to 1989, 379,300 immigrants came from China and Japan, 974,200 from Mexico, and only 593,200 from Europe. In 1990, 52,700 legal immigrants came from China and Japan, 679,100 from Mexico, and 112,400 from Europe. *Id.*

3. A recent poll reveals the U.S. public's change of view on this subject. Sixty percent of all Americans polled viewed current levels of immigration as "bad" for the country, whereas 59% viewed immigration in the past as "good". In addition, 59% of those polled feel that many immigrants wind up on welfare. Tom Morganthau, *America: Still a Melting Pot?* NEWSWEEK, Aug. 9, 1993, at 16.

of 1964, since the rules constitute discrimination[4] on the basis of national origin.[5]

However, employees subjected to limited English-only rules currently enjoy less legal protection than those subjected to flat bans, especially after a recent appellate court decision. In *García v. Spun Steak*,[6] the Ninth Circuit Court of Appeals held in a 2-1 decision that an employer does not violate Title VII by imposing a rule that prohibits a bilingual worker from speaking a language other than English during working hours. This decision highlights a growing social intolerance by employers and an inability to manage effectively a workplace which is more diverse ethnically and linguistically than it has been since the turn of the century. Moreover, it makes clear that if multilingual individuals do not organize and assert their right to express themselves freely and without fear of retribution, then their rights as citizens will be diminished.

The increasing use of English-only rules in the workplace is a step backwards from a vision of a productive employment setting where cultural attributes, such as language, are tolerated and accepted. The greater use of English-only rules serves primarily to alienate and divide the workforce further. Employers and others must be especially careful not to ignore the growing racial and ethnic tensions that are bound to arise given the dramatic changes that are occurring in the workforce. To do otherwise threatens to add fuel to a fire of intolerance and bigotry that is re-emerging in the United States, as evidenced by the passage of English-only amendments and political harangues against the existence of undocumented immigrants in this country.

The workplace of the 1990s and beyond will become increasingly heterogeneous in terms of ethnicity, race, and language.[7]

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4. 42 U.S.C. § 2000e-2(a) (1988) states the following:

(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.

5. *See* 29 C.F.R. § 1606.7(a), (b) (1987).

6. 998 F.2d 1480 (9th Cir. 1993).

7. Estimates of the Latino population range between 18 million and 30 million. THOMAS WEYR, HISPANIC U.S.A. 3 (1988). By the year 2000, Latinos will be the largest ethnic minority group in the United States. *Id.* at 1. From 1980 to 1987, the number of Latino workers increased dramatically accounting for almost one-fifth of the growth in the U.S. labor force. Peter Cattan, *The Growing Presence of Hispanics in the U.S. Work Force*, MONTHLY LAB. REV., Aug. 1988, at 9. Indeed, the increase

How effectively employers manage ethnic and racial differences will become that much more important. In California, for instance, the non-Latino white population of 57.2% is yielding its majority position.[8] It is expected that by the year 2003, whites will make up less than 50% of California's population.[9] The primary purpose of this Article is to describe the *Spun Steak* case, to analyze it and suggest that it should have been decided differently, and to recommend a more effective interpretation of Title VII.

A. *García v. Spun Steak*

The *Spun Steak* court held that two assembly line, bilingual workers, Priscilla García and Maricela Buitrago, and their union, the United Food and Commercial Workers International Union, AFL-CIO, had not made out a prima facie case and that Spun Steak had not violated Title VII in adopting an English-only rule as to these bilingual workers.[10]

The court found that of the thirty-three workers employed by Spun Steak, twenty-four spoke Spanish and virtually all of them were Hispanic.[11] The employees, García and Buitrago (both bilingual in English and Spanish), labored as production line workers where they stood before a conveyor belt, removed poultry or other meat products from the belt, and placed the product in cases or trays for sale. Nearly 22 of Spun Steak's employees worked as production line workers or were otherwise involved in the production process. Two individuals spoke no English, and allegedly were exempt from the English-only rule which the company later instituted, and furthermore, Spun Steak had never required its employees to speak English.[12]

Following complaints by an African-American and a Chinese-American that García and Buitrago had made racist and derogatory remarks to them in Spanish, Spun Steak's president decided to institute an English-only rule in an effort to promote racial harmony.[13] According to the majority's decision, the president also felt 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

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is expected to continue so that by the year 2000, Latinos will comprise 10% of the nation's labor force. *Id.* at 10.

8. Carol Ness, *The Un-whitening of California*, SAN FRANCISCO EXAMINER, Apr. 14, 1991, at A1.

9. *Id.*

10. 998 F.2d at 1490.

11. *Id.* at 1483.

12. *Id.*

13. *Id.*

operating machinery, and [the rule] 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."[14]

The company, consequently, adopted the following rule:

> [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.[15]

Spun Steak also adopted a rule forbidding offensive racial, sexual, or personal remarks of any kind.[16]

The court states that "[i]t is unclear from the record whether Spun Steak strictly enforced the English-only rule."[17] In fact, there was some evidence that a few workers continued to speak Spanish during working hours and that the company issued written exceptions to the rule.[18]

In November 1990, the company issued García and Buitrago warning letters for speaking Spanish during working hours and required that the two not work next to each other for two months.[19] The union protested the rule, but the company continued to uphold the policy. The litigation in question quickly followed.

On May 6, 1991, the employees filed charges of discrimination against Spun Steak with the EEOC. The EEOC investigated the workplace situation and determined that the adoption of the English-only rule violated Title VII.[20] Subsequently, in the suit filed alleging that the company violated Title VII by instituting the English-only rule, the district court granted summary judgment in favor of the employees, holding that "the English-only policy disparately impacted Hispanic workers without sufficient business justification, and thus violated Title VII."[21] Spun Steak appealed.

At the appellate level, the employees argued that: (1) the English-only rule denied them the ability to express their cultural heritage on the job; (2) it denied them a privilege of employment that is enjoyed by monolingual speakers of English; and (3) it

14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 1483-84.
21. *Id.* at 1484.

created an atmosphere of inferiority, isolation, and intimidation.[22] The court promptly rejected the first contention by stating that "Title VII . . . does not protect the ability of workers to express their cultural heritage at the workplace."[23]

However, the court was not as quick to dismiss the second argument. The employees maintained that the rule had a disparate impact on them because it did not allow them the same privilege as monolingual speakers who could speak in the language in which they felt most comfortable. Although the court admitted that "[t]he 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 was not willing to describe the privilege so broadly so as to include "small talk" in Spanish.[24]

Judge Diarmuid F. O'Scannlain, writing for the majority, declared—without citing precedent—that an employer has the legal right to proscribe when an employee may speak and what they say.[25] The court then concluded that bilingual speakers were not adversely impacted by the policy, because they could choose to speak English and continue to converse on the job.[26] The *Spun Steak* court further stated: "It is axiomatic that 'the language a person who is multi-lingual elects to speak at a particular time is . . . a matter of choice.'"[27]

Judge O'Scannlain did, however, find that an English-only rule could have an adverse effect on non-English speaking individuals. Thus, the court held that with regard to one employee who only spoke Spanish, summary judgment should not have been granted, because 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.[28] On remand, it would be necessary for the court to determine whether that employee had suffered adverse effects from the rule.[29]

The court also examined closely the employees' third claim, which argued that the imposition of the English-only rule created an atmosphere of inferiority, isolation, and intimidation. The employees contended that any English-only rule *per se* infected the workplace to such an extent that it became intolerable to

22. *Id.* at 1486-87.
23. *Id.* at 1487.
24. *Id.*
25. *Id.*
26. *Id. See also* discussion *infra* notes 49-56.
27. 998 F.2d at 1487 (citing García v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980, *cert. denied*, 449 U.S. 1113 (1980)).
28. *Id.* at 1488.
29. *Id.*

multilingual speakers and thus, this hostile milieu amounted to a condition of employment.[30]

Judge O'Scannlain spurned the employees' argument maintaining:

> 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.[31]

After discerning the facts of the case, the court found that there was no evidence that the work atmosphere was infused with hostility towards Hispanics, primarily because they could easily comply with the rule.[32] On the contrary, the court found substantial evidence that by speaking Spanish the employees were intimidating non-Spanish speaking employees and creating a hostile environment.[33]

The court went on to state that it did not foreclose the possibility that an English-only rule could exacerbate existing tensions or that when combined with other discriminatory behavior could contribute to an overall environment of discrimination.[34] Consequently, the court proposed that when "evaluating such a claim . . . a court must look to the totality of the circumstances in the particular factual context in which the claim arises."[35] Because of this finding, the court did not have to examine any business justifications for the English-only rule. The court's approach, in effect, rejected the EEOC guidelines which provide that an employee has shown its prima facie case in a disparate impact cause of action by proving the existence of the English-only rule.[36]

Accordingly, the court reversed the lower court decision to the extent that it represented the bilingual employees and remanded with instructions to grant summary judgment in favor of Spun Steak on their claims.[37] Nevertheless, the court contended that a genuine issue of material fact remained as to whether there were one or more employees with limited English proficiency who were adversely impacted by the policy; as to those employees, the court granted summary judgment in favor of the union and remanded for further proceedings.[38]

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30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *See* 29 C.F.R. § 1606.7 (a), (b) (1987).
37. 998 F.2d at 1480.
38. *Id.*

Judge Robert Boochever, who dissented, agreed with the result, but disagreed with the rejection of the EEOC guidelines. He would have deferred to the EEOC's expertise in construing Title VII. This judge maintained that examining the purpose of the rule within a business justification analysis would have been a better application of the law.[39]

B. *Analysis of García v. Spun Steak*

The decision in *Spun Steak* makes two critical mistakes. First, it fails to consider language a proxy for national origin, as defined under Title VII. Second, the court rejects the EEOC Guidelines.

1. *Language as Proxy for National Origin*

Title VII proscribes discrimination on the basis of "national origin" but does not define the term. Legal scholars interpreting the debates preceding the passage of Title VII suggest that Congress wished to define the term to mean persons of common national heritage or background.[40] As Representative Roosevelt (D-N.Y.) noted during the debates: "May I just make very clear that 'national origin' means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France or any other country."[41] In an effort to carry out this congressional intent the EEOC employs the following definition of national origin discrimination:

> The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.[42]

The language that a person speaks is obviously a "linguistic characteristic" which others may use as a basis for national origin discrimination. Numerous commentators have acknowledged that an individual's language is an important proxy for defining national origin.[43] Already courts have held that foreign accents[44]

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39. *Id.*

40. CHARLES SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION 461 (2nd ed. 1988).

41. 110 Cong. Rec. 2549 (1964).

42. 29 C.F.R. § 1606.1 (1988).

43. *See* Juan F. Perea, *English-Only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 U. MICH. J.L. REF. 265, 276-79 (Winter 1990) (arguing that primary language is a fundamental aspect of ethnicity); Note, *"No Se Habla Español": English-Only Rules in the Workplace*, 44 U. MIAMI L. REV. 1209 n.1 (1990) (quoting Pierre Van Den Berghe stating:

and minimum height requirements[45] may serve as determinants of national origin. An individual's language[46] is at least as appropriate a proxy for national origin as her accent[47] and height. Moreover, the EEOC promulgates in its Guidelines on National Origin Discrimination that the "primary language of an individual is often an essential national origin characteristic."[48] Limiting a person's ability to speak the language of her/his choice, especially when it is so closely tied to an individual's identity, is simply not comparable to an employer's right to regulate an employee's hair length.

The "choice" or "mutable characteristic" argument was first presented in *García v. Gloor,*[49] and later applied in *Jurado v. Eleven-Fifty Corporation.*[50] The court in *Gloor* heard expert testimony that "the Spanish language is the most important aspect of ethnic identification for Mexican-Americans."[51] However the *Gloor* court found that language is a mutable characteristic, and thus not protected. As the court admitted, religion is a prohibited employment factor under Title VII,[52] but then the *Gloor*

> The first language learned in infancy is intimately associated with a whole register of emotions first experienced with close kinsmen and, therefore, these affective of kinship become associated with language and rub off on to other members of the speech community. . . . Language learning is the universal human experience of early childhood through which full human sociality is achieved, and through which one becomes integrated in a kinship network. PIERRE VAN DEN BERGHE, THE ETHNIC PHENOMENON 34 (1981);

Note, *English-Only Rules and "Innocent" Employers: Clarifying National Origin Discrimination and Disparate Impact Theory Under Title VII*, 74 MINN. L. REV. 387, 420-24 (1989) (arguing that courts should recognize a theory equating language with national origin); Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1363 n.132 (1991) (quoting Ralph Fasold who wrote, "[I]n addition to 'transmitting information . . . the speaker is using language to make statements about who she is, what her group loyalties are, how she perceives her relationship to her hearer, and what sort of speech event she considers herself to be engaged in.'").

44. Carino v. University of Oklahoma Bd. of Regents, 750 F.2d 815 (10th Cir. 1984)(holding that a foreign accent that does not interfere with a person's ability to perform job duties is not a legitimate basis for differential treatment under Title VII).

45. *See* Davis v. County of Los Angeles, 566 F.2d 1334, 1341-42 (9th Cir. 1977)(holding that minimum height requirements for firefighters had a disparate impact on Mexican Americans and were not proven to be job related).

46. In 1980, 23,060,000 people, or 11% of the total U.S population, spoke a language other than English at home. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1980 CENSUS OF THE POPULATION (Table 256) (1984). Of these 11%, 11 million speak Spanish and more than 1.4 million speak Asian languages including Chinese, Japanese, Korean, and Vietnamese. *Id.*

47. *See* Tracy Wilkinson, *An Accent Could be an Invitation to Bias*, L.A. TIMES, Apr. 23, 1990, at B1.

48. 29 C.F.R. § 1606.7 (1987). *See* discussion *infra* notes 67-69, 71-73.

49. 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1980).

50. 813 F.2d 1406 (9th Cir. 1987).

51. *Gloor*, 618 F.2d at 267.

52. *Id.* at 269.

court strained to justify its legal analysis, since Congress had explicitly listed religion as a mutable characteristic, *and thus* protected.

In *Jurado*, the plaintiff sued a radio station for terminating his employment after he failed to comply with an English-only rule, which censured him from speaking Spanish on the air. His claim was based mainly on a disparate treatment argument. However, the court contended that the only basis for such a assertion was to show that the English-only rule somehow disproportionately disadvantaged Hispanics.[53] In the end, the court agreed with the lower court's finding that a bilingual disc-jockey could easily comply with the rule.[54]

The mutable-immutable legal doctrine is difficult to apply rationally because there is no logical argument for protecting some mutable characteristics while not protecting others. Moreover, the mutable-immutable characteristics rationale requires the same analysis as used in cases arising under the equal protection clause of the Fourteenth Amendment, which has been used to shield an individual from discriminatory state action.[55] Nevertheless, the Supreme Court holds employers to a much higher standard of conduct under Title VII than that to which governments are held under the Fourteenth Amendment.[56] Thus, the courts should not employ the Fifth Circuit's approach given the Supreme Court's heightened standard.

Moreover, dismissing language as a proxy for national origin ignores the fact that employees naturally use their native language when speaking to another native speaker, and that their national origin is inextricably tied to their native language. Also, the court fails to acknowledge that a monolingual English speaker will never be impacted by the rule, since that speaker *cannot* violate the rule; the rule impacts *only* and disparately multilingual employees.

2. *Rejection of the EEOC Guidelines*

As amended by the Equal Employment Act of 1972, Title VII now encompasses virtually all state and local government employees, as well as previously exempt employees of educa-

53. *Jurado*, 813 F.2d at 1412.

54. *Id.*

55. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (Written by Justice Stone, footnote 4 is the source for the protection of discrete and insular minorities from invidious or arbitrary governmental treatment under the equal protection clause of the fourteenth amendment.).

56. Washington v. Davis, 426 U.S. 229, 247 (1975)(holding that employment discrimination is subject to a "more probing judicial review" under Title VII than under the Fourteenth Amendment).

tional institutions. The amended Act authorizes the EEOC to process complaints and, if necessary, file suits against defendants in federal court. Private suits may be filed as well to enforce fair employment standards stipulated in Title VII.[57] To trigger the statute's protection, the employee bears the burden of establishing a prima facie case of discrimination by showing that (1) an employer,[58] (2) discriminated against a protected class,[59] (3) within a prohibited category recognized under Title VII,[60] and

57. There are other available remedial measures to secure a fair work environment. *See* Note, *Language Discrimination Under Title VII: The Silent Right of National Origin Discrimination*, 15 J. MARSHALL L. REV. 667, 669 n.9 (1982) (stating that 42 U.S.C. § 1981 requires that "all persons" be treated the same as "white citizens"). Consequently, an individual can sue under Title VII or § 1981 and choose between the remedies that each affords. Establishment of a § 1981 claim is not dependent on Title VII, although the injunctive and monetary relief is quite similar. Most notably, § 1981 may preserve a racial discrimination claim which might be lost under Title VII racial discrimination cases. For instance, § 1981 applies to aliens, Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974); to national origin groups, such as Mexican-Americans, Vasquez v. McAllen Bag & Supply Co., 660 F.2d 686 (5th Cir. 1981); as well as Puerto Ricans and other Hispanics, Miranda v. Clothing Workers, Local 208, 8 Empl. Prac. Dec. (CCH) ¶ 9601 (D.C.N.J. 1974). However, exhaustion of remedies under Title VII is a prerequisite to maintenance of a claim under § 1981 for employment discrimination. *See* Annotation, *Exhaustion of Remedies Under Title VII (Equal Employment Opportunity) of Civil Rights Act of 1964 (42 U.S.C. §§ 2000e et seq.) As Prerequisite to Maintenance of Action Under 42 U.S.C. § 1981 for Employment Discrimination*, 23 A.L.R. FED. 895 (1975).

42 U.S.C. § 1983 can be used without prior exhaustion of Title VII remedies when the discriminatory activity can be classified as "state action." Public agencies and private organizations are subject to this statute only if state control is shown. Because the Fourteenth Amendment bars all arbitrary classifications and actions, § 1983 is broader than Title VII. *See generally* Parrat v. Taylor, 451 U.S. 527 (1981).

42 U.S.C. § 1985(c) grants 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. The statute reaches private conspiracies. Griffin v. Breckenridge, 403 U.S. 88 (1971).

In addition, most states have enacted state employment anti-discrimination laws. Often the aggrieved must first seek relief from the appropriate state agencies before filing a Title VII complaint with the EEOC. For example, in California, a charge of employment discrimination under California's Fair Employment and Housing Act (FEHA) must be filed with the Department of Fair Employment and Housing within one year of the date on which the unlawful practice occurred. Cal. Gov't Code § 12960 (West 1992). Under the FEHA, California uses the United States Supreme Court's analysis in determining whether an employee has been subjected to disparate treatment or impact. Mixon v. Fair Employment & Hous. Comm'n, 237 Cal. Rptr. 884, 890-91 (Ct. App. 1987).

58. Under Title VII, an action may be brought against an employer, an employment agency, or a labor organization. 42 U.S.C § 2000e (1988).

59. The protected classes are race, color, gender, religion, and national origin. 42 U.S.C. § 2000e-2 (1988).

60. The prohibited categories under Title VII may be the following: hire, discharge, compensation, terms, conditions, or privileges of employment (§ 2000e-2(a)(1)); limitation, segregation, or classification of employees or applicants (§ 2000e-2(a) (2)); failure to refer (§ 2000e-2(b)); exclusion or expulsion from membership in a labor organization (§ 2000e-2(c)(1)); limitation, segregation, or classification of membership or applicants for membership in a labor organization (§ 2000e-2(c)(2)); causing an employer to discriminate (§ 2000e-2(c)(3)); retaliation

(4) that there is a connection between the protected class and the prohibited category.[61]

The employee may establish his case using two forms of discrimination analysis: disparate treatment and disparate impact. Under a disparate treatment test, the plaintiff must first make a prima facie case by adducing evidence that the employer engaged in intentional discrimination.[62] The burden then shifts to the defendant to articulate a nondiscriminatory reason for its employment decision.[63] If a plaintiff establishes a prima facie case of racial discrimination, the employer must prove that it had a legitimate non-discriminatory reason for its action or that it was instituting an affirmative action plan.[64] In cases involving gender, religion, and national origin discrimination, the court permits two defenses to justify disparate treatment: a bona fide occupational qualification (BFOQ) or an affirmative action plan. A BFOQ is defined as any action that is "reasonably necessary to the normal operation of that particular business or enterprise."[65]

Partly in response to the *Gloor* decision and the increasing use of English-only rules in the workplace, the EEOC revised its national origin guidelines (Guidelines) to include a specific section on speak-English rules in 1980.[66] The Guidelines state that

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(§ 2000e-3(a)); or printing or publishing a discriminatory employment notice or advertisement (§ 2000e-3(b)).

61. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (stating: The plaintiff must begin by identifying the specific employment practice that is challenged . . . Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.).

62. *Jurado*, 813 F.2d at 1409. *See also* Fong v. American Airlines, Inc., 626 F.2d 759, 762 (9th Cir. 1980)(evidence proffered by plaintiff must be "adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act")(quoting International Bd. of Teamsters v. United States, 431 U.S. 324, 358 (1977)).

63. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-54 (1981).

64. United Steelworkers of America v. Weber, 433 U.S. 193 (1979) (affirmative action plans sometimes justify discrimination on the basis of race).

65. 42 U.S.C. § 2000e-2(e) (1988). For example, Dothard v. Rawlinson, 433 U.S. 321 (1977), involved a policy requiring that prison guards be of the same sex as the inmates they came in contact with in the prison. The employer felt that such a restriction on the basis of gender was justifiable as a BFOQ.

66. Although the EEOC is given authority to issue only procedural guidelines, it arguably has some power to interpret Title VII because § 713 (b) provides a "good faith defense" for employers who rely on the EEOC's interpretation. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 1020 (1968). Furthermore, the Supreme Court has stated that "[t]he EEOC Guidelines are not administrative 'regulations' promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute '[t]he administrative interpretation of the Act by the enforcing agency,' and consequently they are 'entitled to great deference.'" Albemarle Paper Co. v. Moody, 422 U.S. 405, 431

an employer may have a rule requiring that employees speak only in English at certain times when the employer can show that the rule is justified by business necessity.[67] In addition, Section 1606.7(c) advises employers that they should effectively notify their employees of any speak-English-only rule in recognition of the fact that it is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language.[68] Notice should include informing employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. The EEOC will consider the employer's application of the rule as presumptive evidence of discrimination on the basis of national origin where the employer fails effectively to notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule.[69]

Consequently, the Guidelines are sufficiently flexible to meet the concerns of the *Spun Steak* court with respect to the "dynamics of an individual workplace [which] are enormously complex."[70] On the other hand, the Guidelines ensure that language restrictions, without proper notice and business necessity, are viewed as national origin discrimination. It is clear from the facts in *Spun Steak* that harmony in the workplace was not promoted by instituting the English-only rule. The main issue in the case appears to be one of respect. In fact, the Spanish speaking employees were being rude to the non-Spanish speaking employees. However, the company's management could have achieved racial harmony in the workplace by enforcing only the rule forbidding the use of offensive racial, sexual, or personal remarks *in any language.*

C. *Two Recommendations for Making Title VII More Effective*

The first recommendation is that the EEOC Guidelines should be followed. The Guidelines correctly consider blanket prohibitions on the use of languages other than English a violation of Title VII.[71] When the rule is applied arbitrarily, the Guidelines require that the rule be justified by business necessity and that proper notice be given to employees concerning the

(1975) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971). *See also* MACK PLAYER, EMPLOYMENT DISCRIMINATION LAW 200 (stating that "[t]he third major function of the EEOC is interpretive").

67. 29 C.F.R. § 1606.7(b) (1987).
68. 29 C.F.R. § 1606.7(c) (1987).
69. *Id.*
70. 998 F.2d at 1480.
71. 29 C.F.R. § 1606.7(a) (1987).

existence of the rule and the penalties for not adhering to it.[72] If proper notice is not given, the EEOC will consider the employers' application of the rule as evidence of discrimination on the basis of national origin.[73]

The second recommendation is that the EEOC should dispense with its artificial distinction between blanket and limited English-only rules. Instead, the EEOC should uphold English-only rules in the workplace only when employers justify them for safety reasons and carefully tailor them accordingly. All other restrictions should be considered invalid and determined to be discriminatory on the basis of national origin.

The world of work covers a wide range of employment possibilities, some for which language is relatively unimportant and others for which it is critical. As one commentator states, there are many jobs that people do in silence.[74] Also there are some work places where the level of industrial noise reaches levels that make verbal communication impossible.[75] On the other hand, some jobs, such as airport traffic controller or 911 operator, require effective language communication. Few would argue that where language is critical to job performance, employees should not be permitted to use the language of their choice while carrying out their appointed tasks. Consequently, judges and administrative agencies must analyze the appropriateness of an English-only rule by examining its reasonable relationship to a real safety concern or other business *necessity* given the special nature of the workplace.

II. Beyond Title VII and Towards a Pluralistic Vision of the Workplace

Even with the additional protection that Title VII, if its guidelines were revised and applied as suggested herein, would afford employees facing an English-only rule, this statutory framework has serious drawbacks. First, it is important to keep in mind that the proliferation of English-only rules in the workplace affects those individuals who are least likely to exercise their rights under the law. Most English-only rules are not instituted in operating rooms, nuclear power plants, or law firms of this country, where employees are more highly educated and are not pusillanimous about exercising their legal rights.

Instead, the rules emerge in the kitchens, textile factories, and clerical areas of America's world of work. Workers in these

72. 29 C.F.R. § 1606.7(a), (b) (1987).
73. 29 C.F.R. § 1606.7(b) (1987).
74. *See* Matsuda, *supra* note 43, at 1369.
75. *Id.*

vocations are less likely to sue their employer because they lack knowledge of the law; they do not have adequate access to the legal system; they are more concerned about losing their jobs; or they worry over the length and cost of the litigation. In addition, competition among ethnic and language minorities allows employers to extract more concessions from their workers. Finally, Title VII remedies may provide for the elimination of English-only rules, but they do not serve as an effective means of affirmatively promoting cultural difference. Thus, even more stringent protections under Title VII are not a panacea for national origin discrimination.

There are less discriminatory ways of meeting an employer's concern about the use of languages other than English. First, supervisors who speak more than one language can be employed. Second, special race relations seminars, brochures, and newsletters can be means to ensure appropriate sensitivity to ethnic and cultural differences. Third, employees can be encouraged to attend English classes, either by providing information on how they may enroll in the classes or by actually subsidizing the education. Finally, if safety is a concern, multilingual material describing existing dangers and emergency procedures should be distributed to workers—in the form of posters, handouts, or multi-media presentations. Only in workplaces in which language is critical to effective operation of the business should limited English-only rules be instituted.

Businesses may argue that the costs of establishing these activities are simply too high, that an English-only rule is easier to institute and is more cost-efficient. However, the benefits of an English-only rule in promoting safety are questionable and can in fact endanger employees of limited English proficiency, since they would be unable to understand oral safety warnings or instructions. Moreover, in assessing the rule's costs, employers should include the expense of litigation, work disruptions, low worker morale, and poor public relations. A full accounting of the costs and benefits may reveal that these rules are actually inefficient.