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A Shifting Burden: Recent Developments Related to English-Only Policies in the Workplace

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English-only policies in the workplace are not new. The first reported case involving an English-only policy occured in Texas in 1979. Since that time, numerous employers have either adopted or considered adopting such policies. While employers can identify benefits of having an English-only policy, such a policy may expose an employer to claims of national origin discrimination. Applicable case law and regulations are complex and in some cases inconsistent. This article provides a brief overview of the regulations surrounding English-only policies, court decisions that define what constitutes a business necessity, and recent developments relating to English-only policies in the workplace.

Federal and State Laws Regarding English-Only Policies

Employers who adopt English-only policies must ensure that they comply with both federal and state laws. English-only policies that restrict employees from conversing in languages other than English during working hours are routinely challenged as a form of discrimination under Title VII of the 1964 Civil Rights Act. Title VII prohibits an employer from discriminating against an employee with "respect to his compensation, terms, conditions, or privileges of employment," and from depriving "an[] individual of employment opportunities or otherwise adversely affect[ing] his status as an employee" because of the individual's race, color, religion, sex, or national origin. Civil Rights Act of 1964, § 703(a)(1)-(2), 42 U.S.C. § 2000e-2.

Title VII outlaws intentional discrimination as well as employment policies and practices that have a disparate impact on a particular class of workers. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1970). English-only policies challenged under Title VII are typically brought as disparate impact claims. In the analysis of a disparate impact claim, courts utilize a three-step burden-shifting framework. *First*, plaintiffs must pesent a prima facie case of discrimination, establishing that an employer's policy or practice causes a disparate impact on the basis of the individual's race, color, religion, sex, or national origin. *Second*, if plaintiffs successfully plead a prima facie case, the burden shifts to the employer to demonstrate that the challenged practice or policy is job-related for the position in question and consistent with business necessity. *Finally*, if the employer establishes a business justification, the burden shifts back to the plaintiffs to determine whether an alternative, less discriminatory policy exists that would satisfy the employer's business necessity without the disparate impact. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-05 (1973).

EEOC Guidelines Surrounding English-Only Policies

In 1980, the EEOC issued "Guidelines on Discrimination Because of National Origin" that address when an employer's English-only policy is presumed to violate Title VII. 29 C.F.R. § 1606.7. The EEOC's Guidelines govern two types of English-only policies: policies applied at all times and policies applied only at certain times. 29 C.F.R. § 1606.7.

Under the Guidelines, English-only policies that require employees to speak English at all times are *per se* burdensome terms and conditions of employment, and will be closely scrutinized and presumed to violate Title VII. 29 C.F.R. § 1606.7(a). The Guidelines go further to note that a person's primary language is often an "essential national origin characteristic"; therefore, "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 on the basis of national origin," and may create a discriminatory working environment. 29 C.F.R. § 1606.7(a). However, English-only policies that are applied only at certain times can be implemented if there is a business necessity. 29 C.F.R. § 1606.7(b). In this case, an employer must inform employees of the general circumstances when English is required and the consequences of violating the policy. 29 C.F.R. § 1606.7(c). If an employer fails to notify its employees of the English-only policy and subsequently makes an adverse employment decision based on violation of the policy, the EEOC will consider that to be evidence of discrimination based on national origin. 29 C.F.R. § 1606.7(c).

The EEOC's Guidelines suggest that the existence of an English-only policy satisfies plaintiff's burden to present a prima facie case of discrimination and advances the court's inquiry to the second step of the burden-shifting framework. *EEOC v. Sephora USA, LLC*, 419 F. Supp 2d 408, 414 (S.D.N.Y. 2005). If these Guidelines are followed, an employer with an English-only policy thus has the primary burden of showing that its policy is justified by business necessity. However, the circuit courts have consistently disregarded the EEOC Guidelines and required plaintiffs to submit evience of discriminatory impact *before* an employer must show a business necessity.

Circuit Court Views on English-Only Policies and EEOC Guidelines

While EEOC guidelines are entitled to great deference, federal courts may reject an "administrative construction of a statute where there are compelling indications that it is wrong." *Griggs*, 401 U.S. at 433-34. Circuit courts have generally disregarded the EEOC's Guidelines and have held that English-only policies are not *per se* discriminatory, but rather plaintiffs must establish a prima facie case of disparate impact *before* the burden shifts to the employer.

In *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) the Ninth Circuit also disregarded the EEOC Guidelines. Prior to *Spun Steak*, the Ninth Circuit had issued a decision that followed the EEOC's Guidelines in ruling that English-only policies can mask an intent to discriminate based on national origin, and therefore will be deemed unlawful unless the employer can show a business justification. However, that decision was vacated as moot by the US Supreme Court and was not considered precedential (and was ignored) by the *Spun Steak* Court. *Gutierrez v. Municipal Court of Southeast Judicial District,* 838 F.2d 1031, 1039 (9th Cir. 1988), vacated as moot, 490 U.S. 1016 (1989). The Fifth Circuit, in a decision issued prior to the adoption of the EEOC's Guidelines, held to the contrary, noting that plaintiffs cannot prove discrimination based on national origin, an immutable characteristic, by alleging an employer placed restrictions on speaking a foreign language, a form of "cultural expression." *Garcia v. Gloor*, 618 F.2d 264, 268-70 (5th Cir. 1980).

Though the Ninth Circuit ruled contrary to the EEOC Guidelines in *Spun Steak*, the court noted that an English-only policy may be discriminatory if it "exacerbate[s] existing tensions, combine[s] with other discriminatory behavior to contribute to discrimination, [or is] enforced in a 'draconian manner' [so] that the enforcement itself amounts to harassment." 998 F.2d at 1489.

However, the recent Tenth Circuit decision in *Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006) may create a split in the circuit courts. In *Maldonado*, the Tenth Circuit, on appeal from summary judgment in favor of the City of Altus, held consistent with the EEOC Guidelines that a genuine issue of material fact existed as to the presence of a hostile work environment based solely on the employer's adoption of an English-only policy in the workplace. 433 F.3d at 1306.

California's Fair Employment and Housing Act's Regulations

For California employers, a potentially stricter, though similar, rule governs English-only policies. Under the Fair Employment and Housing Act ("FEHA"), it is unlawful for an employer to adopt or enforce a policy that limits or prohibits the use of any language in any workplace, unless: (1) the language restriction is justified by a business necessity, and (2) the employer has notified its employees of the circumstances and time when the language restriction is required to be observed, and of the consequences of violating the restriction. Cal. Gov. Code § 12951(a).

A business necessity, under the statute, means "an overriding legitimate business purpose such that the language restriction is necessary to the safe and efficient operation of the business, the language restriction effectively fulfils the business purpose it is supposed to serve, and there is no alternative practice to the restriction that would accomplish the purpose equally as well with a lesser discriminatory impact." Cal. Gov.

Code § 12951(b). Since the adoption of this statute in 2001, no significant case law has interpreted or applied this section of the Government Code. The statute was a codification of an exisitng regulation.

Adopting an English-Only Policy Based on Business Necessity

Regardless of the courts' debate concerning Title VII burden-shifting requirements, employers seeking to adopt an English-only policy should identify the business need the policy is designed to achieve and create a policy that meets that need in the least discriminatory fashion. In determining business necessity, it is important to note that necessity may vary from job to job. Employers seeking to avoid legal challenges in implementing an English-only policy should take note of the following situations where courts have determined that a business necessity existed, and should consult an attorney before implementing such a policy.

Courts have recently held that a business necessity existed where:

- A taxi company established an English-only policy that applied to employees working in the main office to prevent miscommunications, especially between dispatchers and drivers. *Gonzalo v. All Island Transportation, No. CV-04-3452 (BMC), 2007 WL 642959, at *7 (E.D.N.Y. Feb. 26, 2007)*.
- A retail company established an English-only policy to: (1) curb existing hostility between bilingual employees and employees who do not speak that language, and (2) assist English-speaking supervisors in understanding what is being said in the workplace. *EEOC v. Sephora, 419 F. Supp. 2d 408, 415 (S.D.N.Y. 2005).*

Recent Developments

On June 28, 2007, the Senate Appropriations Committee passed the Alexander Amendment to the Committee's spending bill. S. ___, 110th Cong. (as passed by the Senate Commerce, Justice, Science (CJS) Appropriations Subcommittee on June 28, 2007). The Alexander Amendment, named after its sponsor, Senator Lamar Alexander of Tennessee, prohibits the EEOC from using allocated funds to enforce Title VII against employers who institute English-only policies. Proposed in response to the EEOC's March 2007 decision to file a complaint against the Salvation Army for enforcing an English-only policy, the Amendment was designed to focus the EEOC on their large case backlog. In its drafting, Senator Alexander noted that the Senate has declared English "our national language and requiring it in the workplace is not discriminatory," Daily Labor Report, June 29, 2007, at A-13.

Though the Alexander Amendment, if implemented, would prohibit EEOC-initiated actions, it would not prevent private parties from bringing suits under Title VII, or other agencies, such as the Department of Justice, from pursuing these cases. The ultimate impact of this Amendment will be determined in the near future, when the spending bill moves to the Senate floor for a vote.

While recent developments have provided support for an employer's ability to implement English-only policies in the workplace, this is a complex and evolving body of law, and employers interested in adopting an English-only policy should consult an attorney.

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