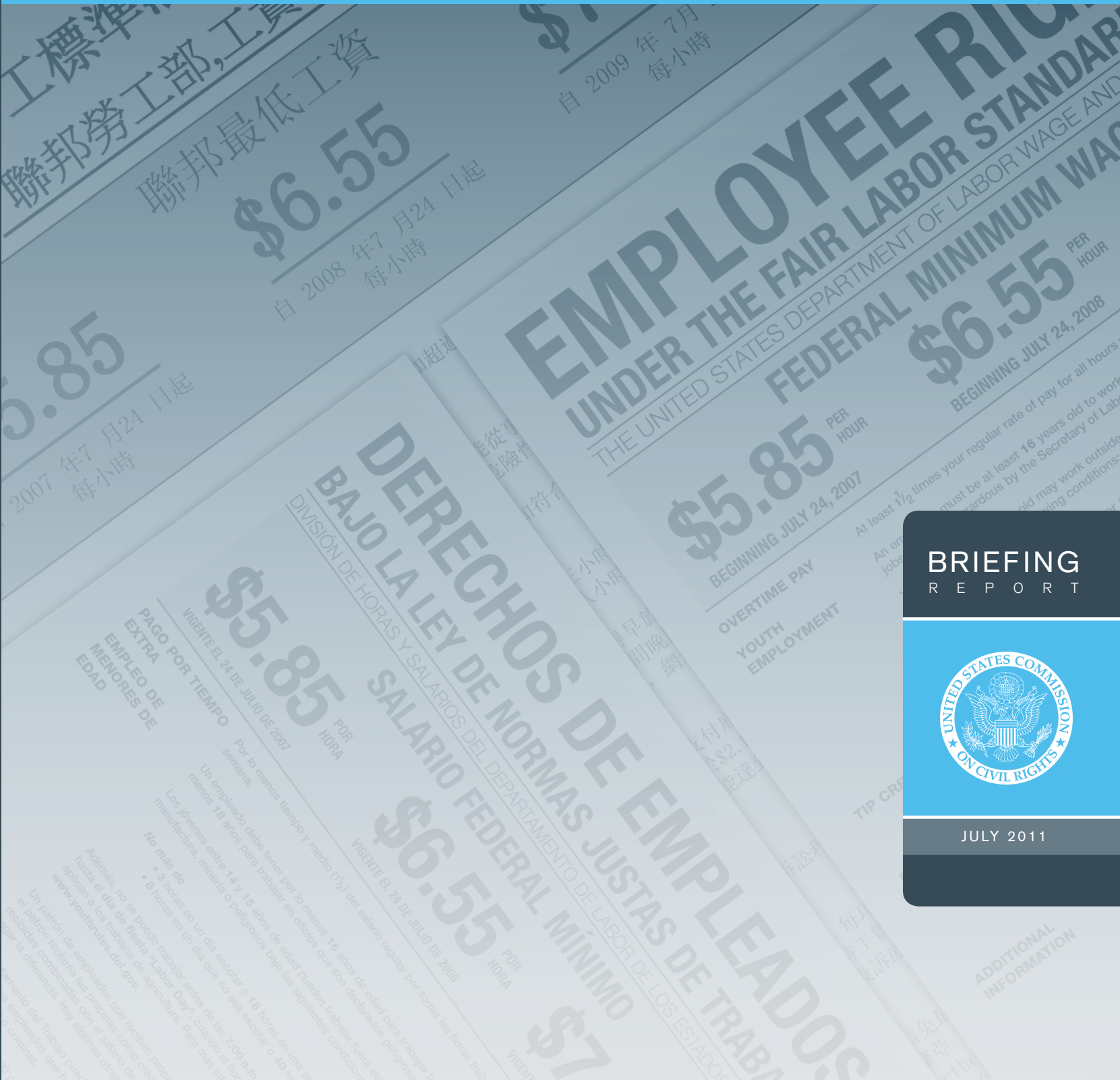


ENGLISH ONLY POLICIES

IN THE WORKPLACE

U.S. COMMISSION ON CIVIL RIGHTS
Washington, DC 20425
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BRIEFING
REPORT



JULY 2011

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INFORMATION

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

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U.S. Commission on Civil Rights
624 Ninth Street, NW
Washington, DC 20425
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English Only Policies In the Workplace

A Briefing Before
The United States Commission on Civil Rights
Held in Washington, DC

Briefing Report

U.S. Commission on Civil Rights

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The Speaker of the House

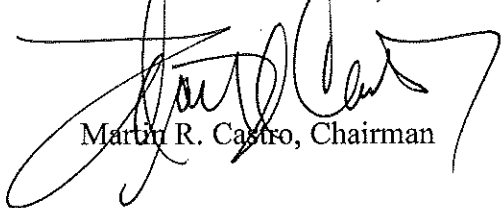
Dear Sirs:

The United States Commission on Civil Rights ("Commission") hereby transmits this report, *English Only Policies in the Workplace*. The briefing was held by the Commission on December 12, 2008 concerning the Equal Employment Opportunity Commission's (EEOC) enforcement policies that view as presumptive violations of law the requirement by some employers that their employees speak English on the job.

Please note that the briefing took place and the report was approved prior to the appointment to the Commission of myself and Commissioners Dina Titus and Roberta Achtenberg. We appreciate the courtesy that our veteran Commissioners who held the briefing and approved the report afforded the three of us by allowing us to submit our dissent to the report and its findings and recommendations. Our dissent can be found at the back of the report.

The body of this report was approved on October 8, 2010 by then-Chairman Reynolds and Commissioners Gaziano, Heriot, Kirsanow and then-Commissioner Taylor. Commissioner Yaki voted in opposition. Voting for and against the Commission's Findings and Recommendations was conducted on November 19, 2010 and December 3, 2010. Vote tallies for each of the Commission's findings and recommendations are noted in the report under "Findings and Recommendations."

For the Commissioners,

A large, stylized handwritten signature in black ink, appearing to read "Martin R. Castro".

Martin R. Castro, Chairman

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Executive Summary

In recent years, some employers have attempted to supervise their bilingual employees by specifying English as the common language of the workplace, meaning that their employees have been required to speak English rather than another language while on the job. Among the reasons employers give for these rules are (1) the need for more effective supervision; (2) the need to ensure optimal communication so as to ensure safety, quality, etc.; (3) the need to avoid unnecessary friction as employees wonder whether others are talking about them and what they are saying, especially when employee relations have a racial or gender-related dimension to them; and (4) the need to show respect for customers who may be similarly put off by conversations they cannot understand. The EEOC has taken the position that these “English Only” policies frequently violate the law.¹

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of national origin. Employers may (and frequently do) insist that an employee be proficient in English or in some other particular language, but under Title VII they cannot insist that these employees be native speakers. The EEOC takes the position that employers whose workforce includes employees who are not native English speakers cannot specify English as the common workplace language without potentially violating Title VII using disparate impact analysis. It has issued the following guidelines:

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.

Several courts have rejected or noted conflicts in court decisions on these guidelines in cases brought by bilingual employees who prefer to speak their native tongue on the job. *See, e.g., Garcia v. Spun Steak*, 998 F.2d 1480, 1489 (9th Cir. 1993); *Pacheco v. New York*

¹ 29 C.F.R. § 1606.7 (2010).

Presbyterian Hosp., 593 F.Supp.2d 599, 613 n. 6 (S.D.N.Y. 2009); *Kania v. Archdiocese of Philadelphia*, 14 F. Supp.2d 730, 735 (E.D. Pa. 1998).²

The Commission examined the EEOC's enforcement policies in this employment context. For example, should an employer, some of whose employees are bilingual, have the legal authority to specify English as the language of the workplace? Do employers have that authority under current law? Do employers understand the law as it applies to their situation? What motivates an employer to require its employees to speak English in the workplace? What happens to workplace communications when an employer is prohibited from specifying English in the workplace? What happens to customer relations or to employee harmony? Are employers currently dissuaded from specifying English on account of EEOC guidelines? Are employers exposing themselves to potential liability for failing to control racial and sexual comments in other languages by employees? Has any employer who attempted (but failed) to impose an "English Only" rule in order to better police racially- or sexually-charged employee conduct ever been sued for permitting a racially or sexually hostile working environment? How vigorously does the EEOC enforce its guidelines?

The U.S. Commission on Civil Rights convened a briefing of experts on December 12, 2008 to address these questions. A transcript of the briefing is available on the Commission's website, www.usccr.gov, and by request from the Publications Office, U.S. Commission on Civil Rights, 624 Ninth Street, NW, Room 600, Washington, DC 20425, (202) 376-8128, publications@usccr.gov.

Two panels were assembled. The first panel was reserved for Reed Russell, Legal Counsel of the Equal Employment Opportunity Commission (EEOC), who told Commissioners that the EEOC's policy that English-only policies in the workplace can violate the prohibition against national origin discrimination under Title VII of the Civil Rights Act of 1964. The second panel included: Timothy Riordan, partner in the law firm of Defrees and Fiske, who represented the defendant in *EEOC v. Synchro-Start*, a 1999 case involving an employer's requirement that employees speak only English during working hours; K.C. McAlpin, Executive Director of ProEnglish, a national nonprofit organization working to educate the public about the need to protect English as the nation's common language; Richard Kidman, owner of RD's Drive-In Restaurant and defendant in a suit brought by the EEOC; and Linda Chavez, Chairman of the Center for Equal Opportunity and former Staff Director of the U.S. Commission on Civil Rights.³

² "Since the Ninth Circuit decided *Spun Steak*, five district courts have considered the issue of whether deference should be given to the [EEOC] Guideline. Two of them deferred to the Guideline. Three did not." The two cases deferring to the guidelines were *EEOC v. Synchro-Start Prods., Inc.*, 29 F.Supp.2d 911 (N.D. Ill. 1999) and *EEOC v. Premier Operator Services*, 113 F.Supp.2d 1066 (N.D. Texas 2000). The three cases declining to defer to the guidelines were *Cosme v. Salvation Army*, 284F.Supp.2d 299 (D. Mass. 2003); *Kania v. Archdiocese of Phila.*, 14 F.Supp.2d 730 (E.D. Pa. 1998); and *Long v. First Union Corp.*, 894 F.Supp. 933 (E.D. Va. 1995). See *Equal Employment Opportunity Commission v. Beauty Enterprises*, 2005 WL 2764822 *5 (D.Conn. 2005).

³ Kerry O'Brien, Senior Manager for the Legal Program of CASA de Maryland and Laura Brown, attorney, D.C. Employment Justice Center, were originally scheduled to participate as panelists. The former informed Commission staff the night before the briefing that she would not attend; the latter did so the morning of the briefing. However, both offered written statements which have been included in this report. The Commission had previously also invited speakers from the following organizations: the Mexican American Legal Defense

Based on the testimony provided by panelists and their discussion with Commissioners, the Commission adopted findings and recommendations on various courts' acceptance or rejection of the EEOC guidelines, the potential reasons, both good and bad, behind employer English Only policies, and actions the EEOC and Congress might take to clarify and improve the state of the law as applied to English Only policies under Title VII.

Fund; the Asian American Legal Defense and Education Fund; the League of United Latin American Citizens; the Lawyers Committee for Civil Rights under Law; National Council of La Raza; the ACLU Immigrants Rights Project; and the Institute of Politics at Harvard University's John F. Kennedy School of Government. These organizations declined to attend the meeting.

Findings and Recommendations

FINDINGS

1. Title VII prohibits employers from discriminating against employees on the basis of national origin (as well as race, color, religion and sex). At the same time, however, it is clear that in passing Title VII, Congress did not intend to disturb the right of employers to control workplace practices except insofar as their activities constituted discrimination based on race, color, religion, sex or national origin. As Representative William M. McCulloch et al. put it: “[M]anagement 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 *Garcia v. Spun Steak*, 998 F.2d 1480, 1490 (9th Cir. 1993)). [Chairman Reynolds and Commissioners Gaziano, Heriot, Kirsanow and Taylor approved; Commissioners Melendez and Yaki opposed; Vice Chair Thernstrom was not present.]

2. Although Congress consciously withheld the power to issue substantive regulations in connection with Title VII when it created the EEOC, the EEOC has for decades nevertheless issued “Guidelines” that effectively bind those employers that are not in a position to risk litigation. One of these is Section 1606.7, which governs what the EEOC refers to as “Speak English Only Rules.” Under that section of the Guidelines, the EEOC asserts that it “will presume that [an English only rule that applies at all times] violates Title VII and closely scrutinize it.” An English only rule that applies only at certain times is permissible under Section 1606.7 only if it is “justified by business necessity.” [Chairman Reynolds and Commissioners Gaziano, Heriot, Kirsanow and Taylor approved; Commissioners Melendez and Yaki opposed; Vice Chair Thernstrom was not present.]

3. Section 1606.7 does not apply to “Spanish Only,” “Japanese Only” or other exclusive language rules. [Chairman Reynolds and Commissioners Gaziano, Heriot, Kirsanow and Taylor approved; Commissioners Melendez and Yaki opposed; Vice Chair Thernstrom was not present.]

4. Several courts have explicitly rejected the EEOC Guidelines on “Speak English Only Rules.” *Garcia v. Spun Steak*, 998 F.2d 1480, 1489 (9th Cir. 1993); *Kania v. Archdiocese of Philadelphia*, 14 F. Supp. 2d 730 (E.D. Pa. 1998); *Long v. First Union Corp.*, 894 F. Supp. 933 (E.D. Va. 1995). Two other courts have deferred to the EEOC in connection with Section 1606.7. *EEOC v. Synchro-Start Products, Inc.* 29 F. Supp. 2d 911 (N.D. Ill. 1999); *EEOC v. Premier Operator Services*, 113 F. Supp. 2d 1066 (N.D. Tex. 2000). [Chairman Reynolds and Commissioners Gaziano, Heriot, Kirsanow and Taylor approved; Commissioners Melendez and Yaki opposed; Vice Chair Thernstrom was not present.]

5. There are many good reasons for an employer to adopt an “English only” in the workplace policy. Among those good reasons are the need for safety, the need to supervise employees effectively and generally insure that they are following employer policies, and the need to provide customers and other employees with a friendly and courteous atmosphere in which they need not worry about the possibility that they are being spoken of in a discourteous manner. While most employers may have no need for such a policy, a significant number do. Section 1606.7 operates to chill employers who have good reasons for adopting “English only” rules in the workplace. [Commissioners Gaziano, Heriot, Kirsanow and Taylor approved; Chairman Reynolds approved part of the finding but opposed the second half of the second sentence; Commissioners Melendez and Yaki opposed; Vice Chair Thernstrom was not present.]

6. On the other hand, those employers who wish to adopt 'English-only' rules just for the purpose of harassing, embarrassing, or excluding employees or applicants for employment on account of their national origin are relatively few. Withdrawing section 1606.7 and instead advising employers and employees that 'English-only' policies are prohibited only when the employer adopted the policy for the purpose of harassing, embarrassing or excluding employees or applicants for employment on account of their national origin would improve the guidelines and make them more consistent with the intent of Congress. [Chairman Reynolds and Commissioners Gaziano, Heriot, and Taylor approved; Commissioner Kirsanow abstained; Commissioners Melendez and Yaki opposed; Vice Chair Thernstrom was not present.*]

RECOMMENDATIONS

1. The EEOC should withdraw section 1606.7. Instead, employers and employees should be informed that 'English-only' policies are prohibited only when it can be shown by a preponderance of evidence that the policy was adopted for the purpose of harassing, embarrassing, or excluding employees or applicants for employment on account of their national origin. [Chairman Reynolds and Commissioners Gaziano, Heriot, Kirsanow and Taylor approved; Commissioners Melendez and Yaki opposed; Vice Chair Thernstrom was not present.*]

2. Congress should amend Title VII to clarify the meaning of discrimination on the basis of national origin. At minimum, that clarification should make it clear that an “English-only” policy is prohibited only when it can be shown by a preponderance of the evidence that the policy was adopted for the purpose of harassing, embarrassing or excluding employees or applicants for employment on account of their national origin. [Chairman Reynolds and Commissioners Gaziano, Heriot, Kirsanow and Taylor approved; Commissioners Melendez and Yaki opposed; Vice Chair Thernstrom was not present.*]

*The vote count reflects the 11/19/2010 vote, at which each finding and recommendation was substantively discussed. At the 12/3/2010 vote, language was removed from both recommendations and substitute language was added to Finding 6 and to Recommendations.

At this vote, Chairman Reynolds and Commissioners Gaziano, Heriot, Kirsanow, and Taylor approved; Vice Chair Thernstrom and Commissioner Melendez abstained; Commissioner Yaki opposed.

Summary of Proceedings

Panel 1

Reed Russell, Legal Counsel, Equal Employment Opportunity Commission

Mr. Russell said the EEOC's position is that English-only policies in the workplace can violate the prohibition against national origin discrimination under Title VII of the Civil Rights Act of 1964.⁴ He stated that such policies may result in discipline, discomfort, and termination for workers whose primary language is not English and may act as a bar to employment.⁵

He stated that Title VII, in addition to prohibiting overt discrimination, also prohibits "practices that are fair in form, but discriminatory in operation."⁶ He stated that, if a challenged practice "has been shown to cause a disparate impact on the basis of national origin, or other protected status, the practice is unlawful, unless the employer can demonstrate that the practice is job-related to the position in question, and consistent with business necessity."⁷ He then noted that the "EEOC takes the position that an English-only policy is job-related and consistent with business necessity if it is needed for the safe or efficient operation of the employer's business."⁸ Examples of business necessity include effective job performance, work-related communications with customers or other employees, cooperative work assignments, supervision, and safety.⁹

Mr. Russell said that English-only policies not be adopted merely because of customer or co-worker preference or as a broad mechanism to address isolated workplace misconduct and harassment. At the same time, he noted that the EEOC manual indicates that some courts have concluded that widespread misconduct may justify an English-only policy.¹⁰

⁴ Reed Russell, Testimony before the U.S. Commission on Civil Rights, briefing, 624 Ninth Street, NW, Room 540, Washington, D.C., Dec. 12, 2008, transcript, pp. 16-17; 42 U.S.C. § 2000e (2000). Mr. Russell served as Legal Counsel of the EEOC from November 2007 through January 2009.

⁵ Briefing Transcript, p. 18.

⁶ Briefing Transcript, p. 19.

⁷ Briefing Transcript, pp. 19-20.

⁸ Briefing Transcript, p. 20.

⁹ Briefing Transcript, pp. 20-21.

¹⁰ Briefing Transcript, pp. 22-23.

Mr. Russell also noted the importance of providing adequate notice to employees when employers adopt English-only policies.¹¹ He indicated that, when employers fail to provide such notice, the EEOC “consider[s] such circumstances as evidence of national origin discrimination.”

Mr. Russell said that the EEOC does not seek to force employers to create or promote bilingual workplaces, but rather to prevent arbitrary and discriminatory policies against employees.¹²

He stated that “EEOC’s concern is to prevent employers from imposing speak English only rules as arbitrary and oppressive terms and conditions of employment on people from non-English speaking backgrounds in order to deprive them of an equal employment opportunity for jobs they are otherwise fully qualified to perform.”

He characterized challenges to English-only policies as rare, stating that they constitute merely two-tenths of 1 percent of EEOC charges (complaints by aggrieved workers filed with the EEOC), amounting to about 180 charges filed per year on average. From those charges, he stated that the EEOC files only two to three lawsuits each year. He pointed out that disparate impact allegations, which are the most frequent types of claims, do not result in employer liability for compensatory or punitive damages.¹³ Further, he maintained that the business necessity exception effectively balances the interests of employers and employees.¹⁴

Panel 2

Timothy J. Riordan, Partner, Defrees & Fiske

As counsel for Synchro-Start Products, Inc. in a case initiated by the EEOC,¹⁵ Mr. Riordan discussed his frustration with the EEOC’s persistence in pursuing a case where the initial employee plaintiff lost interest, the English-only policy was rescinded, and there was no evidence of discriminatory intent.¹⁶

According to Mr. Riordan, Synchro-Start initiated an English-only policy on the factory floor as a response to complaints that employees were harassing and insulting others in their native language, as well as to ensure safety on the production line. An employee then filed a claim with the EEOC, who determined after an investigation that the policy discriminated against the employees. After good-faith negotiations between the two parties, the complaining employee stated he had no personal interest in the suit other than to bring the matter to the

¹¹ Briefing Transcript, pp. 23-24.

¹² Briefing Transcript, p. 24.

¹³ Briefing Transcript, p. 25.

¹⁴ Briefing Transcript, p. 26.

¹⁵ *Equal Employment Opportunity Commission v. Synchro-Start Products, Inc.*, 29 F. Supp. 2d 911 (N.D. Ill. 1999).

¹⁶ Briefing Transcript, pp. 36-37.

EEOC's attention. The following year, Synchro-Start rescinded their policy, but refused to sign a consent decree as it contained an additional requirement of a \$50,000 payment to the complaining employee. The EEOC responded to this refusal by filing suit, and Synchro-Start responded with a motion to dismiss the lawsuit. The District Court denied the motion to dismiss and the parties entered into the discovery process. It was found that all employees were capable of speaking English, and no employee was ever disciplined for violating the policy. Mr. Riordan quoted the EEOC's compliance manual to highlight the legitimacy of the policy in the face of inter-personal conflicts and intentional usage of other languages to isolate and intimidate others. Mr. Riordan noted that the EEOC was unable to factually or legally support its claim, but his client had no choice but to settle in order to avoid future costs.¹⁷

Following his discussion of the case, Mr. Riordan said that the EEOC's resources would be better spent addressing other remedial and educational activities, rather than punitive remedies against businesses with no intent to discriminate.¹⁸

K.C. McAlpin, Executive Director, ProEnglish

Mr. McAlpin argued that the EEOC was acting illegally by bringing actions against employers maintaining English-only policies,¹⁹ stating that the EEOC is abusing its statutory authority by mischaracterizing the definition of "national origin" as established by court decisions.²⁰ He challenged the EEOC's contention that English-only policies may violate Title VII on this basis,²¹ stating that the EEOC's definition that included such words as "culture" and "linguistic characteristics" was meaningless, vague and entirely subjective. He urged acceptance of his view that the EEOC has no basis to assert a Title VII violation based on language or presume English-only policies are illegal.²²

Mr. McAlpin said that unlawfully placing this burden on the employer gives the EEOC the unfettered discretion to challenge any English-only policy. Citing *Garcia v. Spun Steak Company*,²³ he argued that the EEOC is acting outside of its statutory authority, and noted that no controlling case supports the EEOC's definition of national origin.²⁴ He contended that in 35 years of cases, no court had ever adopted the EEOC's interpretation, while in over 20 cases courts had specifically rejected the EEOC's position.²⁵

¹⁷ Briefing Transcript, pp. 29-36.

¹⁸ Briefing Transcript, p. 37.

¹⁹ Briefing Transcript, p. 37.

²⁰ See *Garcia v. Gloor*, 625 F.2d 1016 (5th Cir. 1980); *Vasquez v. McAllen*, 660 F.2d 686 (5th Cir. 1981).

²¹ Briefing Transcript, pp. 38-39.

²² Briefing Transcript, pp. 39-40.

²³ 998 F.2d 1480 (9th Cir. 1993).

²⁴ Briefing Transcript, pp. 38-39.

²⁵ Briefing Transcript, p. 41.

Mr. McAlpin related the case of a fellow panelist, Mr. Kidman, which involved an English-only policy to stop sexual and verbal harassment at RD's Drive-In. He characterized the EEOC as persecuting the Kidmans and waging a media campaign against them, using its superior resources to intimidate them and force a settlement. He condemned the EEOC's tactics as unlawful, defiant of the courts, and in violation of employers' and employees' rights.²⁶ He contended that "only lawyers blinded by ideology, or obsessed with an agenda could have looked at the facts and concluded that the Kidmans were discriminating against their Navajo employees."²⁷

He said that the EEOC is aware that, however unfounded its legal case against a defendant, its vastly superior funding will cause most small business defendants to settle rather than fight the allegations in a protracted legal proceeding. He argued that employers are caught in a "Catch 22" situation—if they fail to address racial and sexual harassment that takes place in languages other than English, they can be sued under Title VII for maintaining a hostile work environment; if they create an English-on-the-job policy, they risk public attack and prosecution by the EEOC.²⁸ In conclusion, Mr. McAlpin urged the commissioners to condemn what he termed "the EEOC's allegedly unlawful conduct."²⁹

Richard Kidman, Owner, RD's Drive-In Restaurant, Page, Arizona

Mr. Kidman, co-owner of RD's Drive-In, described the need for his restaurant's English-only policy, which was the subject of an EEOC investigation as discussed above.³⁰ He stated that, before he created the English-only policy, some of his employees harassed others using a language other than English, knowing they would not be caught. It became difficult to recruit and keep good employees. He said that his English-only policy was in line with the EEOC's guidelines, and that work environment and morale improved immediately upon its enforcement. Mr. Kidman stated that the EEOC became involved when four bilingual employees quit, claiming they were terminated because they could not speak English. They were denied unemployment benefits because they were deemed able to speak English, and subsequently filed a complaint with the EEOC.³¹

Mr. Kidman stated that the EEOC launched what he considered "a phony investigation" and reprehensibly engaged in unethical behavior, which included intimidating employees into joining the complaint, accusing him and his wife of being racist, and filing suit without responding to requests to help refashion a policy that would suit the EEOC.³² Moreover, he

²⁶ Briefing Transcript, pp. 42-43.

²⁷ Briefing Transcript, p. 42.

²⁸ Briefing Transcript, p. 43.

²⁹ Briefing Transcript, p. 44.

³⁰ Briefing Transcript, pp. 45-46.

³¹ Briefing Transcript, p. 47.

³² Briefing Transcript, p. 47.

averred that the EEOC lost recorded interviews, negotiated in bad faith, and attacked him and his wife in the press, attempting to bankrupt them.³³

A judge agreed with the Kidmans' imposition of the English-only policy, ruling that the policy was essential to protecting employees and running the business, and advised Mr. Kidman to reissue a policy subject to EEOC review.³⁴ However, Mr. Kidman asserted that the EEOC did not and still has not responded.³⁵

Linda Chavez, Chairman, Center for Equal Opportunity

Ms. Chavez stated that she and her organization do not take a position on English in the workplace rules. Rather, she stated that there should be a strong presumption in favor of allowing employers to make their own decisions about how best to run their businesses, as long as the decisions are consistent with civil rights laws. Ms. Chavez asserted that there are limited exceptions to an employer's right to determine what is best for their business, citing discrimination on the basis of race or ethnicity as an example.³⁶

Though she gave an example of a situation to illustrate how language restrictions may be used by employers as a pretext for discrimination on the basis of ethnicity, she believes that the vast majority of employers have legitimate and business-related reasons for English-only policies.³⁷ She noted that courts are split in their responses to claims of discrimination, with some upholding the policies while others forced employers to hire bilingual supervisors.³⁸ Instead of bringing forth disparate *impact* cases, Ms. Chavez suggested that the EEOC should only bring forth disparate *treatment* cases.³⁹

Differentiating language from race, gender, and national origin, Ms. Chavez stated that language is not an immutable characteristic. She supports legislation barring the EEOC from bringing language-based lawsuits under Title VII, especially in disparate impact suits.⁴⁰

Ms. Chavez also stressed that the federal government should not discourage employers from teaching their employees English, and that the workplace is an important part of the assimilation process for immigrants.⁴¹ Further, she urged Congress to provide tax credits and incentives for employers to teach English, since the majority of immigrants expect that they must learn English, and are eager to do so.⁴²

³³ Briefing Transcript, pp. 47-51.

³⁴ Briefing Transcript, p. 52.

³⁵ Briefing Transcript, p. 52.

³⁶ Briefing Transcript, p. 54.

³⁷ Briefing Transcript, pp. 55-56.

³⁸ Briefing Transcript, p. 56.

³⁹ Briefing Transcript, p. 57.

⁴⁰ Briefing Transcript, pp. 57-58.

⁴¹ Briefing Transcript, pp. 58-59.

⁴² Briefing Transcript, p. 59.

Discussion

In response to a question from Commissioner Kirsanow, Mr. Russell stated that in each year over the last ten years, on average, 180 charges alleging discrimination based on an employer's English-only policy have been filed with the EEOC, but the EEOC only chooses to litigate two or three of these cases per year. He could not remember a case in recent history that went all the way to judgment, but stated that a number of charges are resolved during the administrative process when they may be closed or issued a no-cause finding.⁴³ If the EEOC does, however, find cause to believe discrimination occurred, Mr. Russell explained that the Commission then attempts to conciliate those claims, which are anywhere from 30-100 per year. The conciliation process either results in settlement or no conciliation, and the latter may result in litigation if the EEOC's General Counsel decides that litigating the case is worth their time and resources.⁴⁴

Commissioner Kirsanow then asked if there were any cases where a court found that an employer's English-only rule was promulgated with intent to discriminate.⁴⁵ Mr. Russell referred back to the Tenth Circuit case *Maldonado v. City of Altus*⁴⁶ in which the EEOC filed an amicus brief, noting that there was at least evidence of discriminatory intent.⁴⁷

Commissioner Kirsanow asked Mr. Russell if the EEOC's guidelines clause, "cultural or linguistic characteristic common to a specific ethnic group," had ever been the subject of litigation in any of the English-only cases.⁴⁸ Commissioner Kirsanow noted that under the *Chevron* decision,⁴⁹ agencies may interpret what their authorizing statute means, but cannot amend or graft on to the statute a meaning different from that legislated by Congress.⁵⁰ Mr. Russell stated that his version of the clause stated "culture or linguistic characteristics of a national origin group," which ties into a protected category under Title VII. He then cited cases such as *Gutierrez*⁵¹ and *Spun Steak*⁵², asserting they assumed or found that primary language is tied to national origin.⁵³ He cited *Spun Steak* for the proposition that an English-only policy would have a disparate impact on individuals who did not speak English.⁵⁴

Commissioner Kirsanow set out the difference between an immutable characteristic like race, and one which could vanish over time like language. He observed that it is easier to ascribe a disparate impact to immutable characteristics. By way of example, he pointed out that the

⁴³ Briefing Transcript, p. 61.

⁴⁴ Briefing Transcript, p. 62.

⁴⁵ Briefing Transcript, p. 62.

⁴⁶ 433 F.3d 1294 (10th Cir. 2006).

⁴⁷ Briefing Transcript, p. 62.

⁴⁸ Briefing Transcript, p. 63.

⁴⁹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, the court defers to an agency's reasonable interpretation of a statute when the statute is ambiguous or Congress intentionally left a gap for the agency to fill.

⁵⁰ Briefing Transcript, p. 63.

⁵¹ *Gutierrez v. Municipal Court of the Southeast Judicial District, County of Los Angeles*, 838 F.2d. 1031 (9th Cir. 1988).

⁵² 998 F.2d 1480 (5th Cir. 1980).

⁵³ Briefing Transcript, pp. 63-64.

⁵⁴ Briefing Transcript. pp. 63-64.

national origin of Portuguese speakers could be either Brazil or Portugal, that Russian speakers could hail from a number of former Soviet Republics, and that Spanish speakers could be from scores of different countries.⁵⁵ He asked Mr. Russell if there was any litigation showing a correspondence between language and national origin which could be legitimately tied to a disparate impact theory.⁵⁶ Mr. Russell responded that cases such as *Spun Steak* and *Gutierrez* effectively accepted this theory since they took the position that an English-only policy had a disparate impact on Spanish-speaking employees.⁵⁷

Finally, Commissioner Kirsanow asked Mr. Russell if he was aware of any litigated cases in which the EEOC brought a lawsuit or complaint against an employer who maintained an other-than-English workplace policy.⁵⁸ While Mr. Russell indicated that he was not aware of any such case, he stated that as long as there was a disparate impact on a group of a particular national origin, the same analysis applies to both English and other-than-English policies.⁵⁹

Alternatively, Mr. McAlpin stated that the EEOC only considers English-only policies discrimination. In his view, *Spun Steak* found English-only policies to be a violation, but not the fact that Spanish was essentially the official language for the night shift.⁶⁰ He also noted that the EEOC was citing the minority opinion from *Spun Steak* finding a correlation between national origin and language but not the majority, which held that the EEOC was acting outside of its statutory authority. He directed Commissioners to his written testimony, which includes a list of 21 cases adjudicated at the federal, state, and Circuit Court levels that have all gone against the EEOC on this position.⁶¹ Mr. McAlpin pointed out that only two cases to his knowledge initially ruled in favor of the EEOC's position, and neither are controlling. As a result, he considered the EEOC's legal basis to be very thin.⁶²

Ms. Chavez furthered Mr. McAlpin's point by referring to a case which she found to be in favor of a language other than English. In that case, Ms. Chavez observed a disparate impact on the existing African American supervisors who were fired as a result of a ruling requiring bilingual supervisors.⁶³

To clarify the EEOC's position on *Spun Steak*, Mr. Russell stated that the case only ruled against the EEOC on the narrow ground that there was no adverse impact on truly bilingual employees. Conceding that the EEOC's position on bilingual employees is controversial, he nevertheless found that *Spun Steak* assumed that primary language is linked to national origin, and there would still be an adverse impact on those employees who spoke little to no English. Mr. Russell then clarified that the EEOC's regulation states that language is often,

⁵⁵ Briefing Transcript, p. 65.

⁵⁶ Briefing Transcript, pp. 64-65.

⁵⁷ Briefing Transcript, p. 65.

⁵⁸ Briefing Transcript, p. 66.

⁵⁹ Briefing Transcript, pp. 66-67.

⁶⁰ Briefing Transcript, p. 67.

⁶¹ Briefing Transcript, p. 68.

⁶² Briefing Transcript, pp. 67-68.

⁶³ Briefing Transcript, p. 69.

not always, a component of national origin, and that the agency would revise its position if the Supreme Court ruled that language is not tied to national origin.⁶⁴

Commissioner Gaziano inquired about the EEOC's regulation⁶⁵ and the presumption involved when conducting an investigation of an employer who promulgates an English-only policy. Commissioner Gaziano expressed skepticism that the presumption is applied differently in the subparts (subsection A applies to English-only policies that apply at all times in the workplace whereas subsection B applies to English-only policies that are more limited, such as those that apply while employees are performing official duties but not while employees are at lunch or on break)⁶⁶ Mr. Russell responded that there is a meaningful distinction between the two subparts: in subsection A, the EEOC presumes that there will be a disparate impact since primary language is linked to national origin and that there is no business justification because the rule is so broad. Mr. Russell also stated that under either subsection A or B, an investigation would occur, but it is easier for an employer to prove the necessity of an English workplace policy under B than A.⁶⁷

Continuing their discussion about the EEOC guidelines, Commissioner Gaziano posited a hypothetical based on a Fifth Circuit case about sexual harassment in a break room. In his hypothetical, sexual harassment was taking place in a language that the supervisors did not understand, and he asked Mr. Russell if the supervisors could adopt an English workplace policy in order to avoid liability.⁶⁸ Ms. Chavez commented that she found such a policy reasonable.⁶⁹ Mr. Russell responded that such a policy would be too broad, since the harassment was only occurring in the break room. Mr. Russell cautioned that a policy should only be used where there is a pervasive, overwhelming problem, and not everywhere in the workplace.⁷⁰ When Commissioner Gaziano slightly modified the hypothetical to include harassment in multiple areas in the workplace,⁷¹ Mr. Russell stated that an English-only policy may be appropriate if it were the only way to stop the conduct. Nevertheless, he added that, under Title VII, even if an employer presents such a business-necessity justification, a plaintiff-employee may show that the employer refused to adopt equally effective alternatives for dealing with the harassment.⁷² Commissioner Yaki echoed this view, stating that there are a number of steps that could and should be taken before adopting an English-only rule to address harassment.⁷³

⁶⁴ Briefing Transcript, pp. 69-70.

⁶⁵ 29 C.F.R. § 1606.7 (2008). The EEOC guideline on speak-English-only rules distinguishes between two types of rules: Subsection (a) applies to English-only rules applied at all times; subsection (b) applies to English-only rules applied only at certain times. Subsection (a) establishes that these types of rules are a burdensome term and condition of employment, and that the primary language of an individual is often an essential national origin characteristic. The EEOC presumes these rules violate Title VII. Employers applying rules under subsection (b) must justify them by business necessity.

⁶⁶ Briefing Transcript, pp. 71-72.

⁶⁷ Briefing Transcript, pp. 73-76.

⁶⁸ Briefing Transcript, pp. 76-79.

⁶⁹ Briefing Transcript, p. 79.

⁷⁰ Briefing Transcript, pp. 79-80.

⁷¹ Briefing Transcript, pp. 80-82.

⁷² Briefing Transcript, pp. 82-83.

⁷³ Briefing Transcript, pp. 83-84.

Mr. Russell mentioned generally that there exists an ample body of case law on employers' obligations and liability for sexual harassment. Specifically, according to Mr. Russell, this body of law holds that an employer may be liable for co-worker to co-worker harassment when it knows or should have known about the harassment. It can also be liable for a supervisor's sexual harassment if it did not have an effective policy of dealing with it or did not investigate. He speculated that a Title VII analysis would take into account how much a language difference may mitigate these findings.⁷⁴ Responding to Commissioner Gaziano's disagreement with the EEOC's presumption of disparate impact,⁷⁵ Mr. Russell cited *Griggs v. Duke Power* as the authority for the EEOC's disparate impact analysis.⁷⁶ He explained that the EEOC is simply upholding this decision, which held that policies which are fair in form, but discriminatory in operation, must be justified because of job relatedness and consistency with business necessity.⁷⁷

Commissioner Melendez expressed regret that there was only one panelist representing the EEOC, and wished there was testimony from those whom the EEOC is representing in litigation.⁷⁸ Using the example of Navajo Native Americans, he focused on the sensitivity involved in implementing English workplace policies.⁷⁹ Mr. Kidman responded to this issue using his personal experience with Navajo employees. He related an incident of two Navajo employees waiting on a non-Navajo customer in which they would speak Navajo to each other, look at the customer, and laugh. He alleged that this customer left and never came back. He also related an incident of a Navajo customer overhearing a Navajo cook cursing and swearing while cooking his food. In Navajo culture, according to Mr. Kidman, if a person preparing food has a bad attitude or speaks badly, that is passed through the food to the person eating it. As a result, Mr. Kidman believed he lost more customers. Furthermore, he did not know about these problems because of a taboo in Navajo culture for a Navajo to speak ill of a fellow Navajo to a white man. He also attributed 50 percent employee turnover to this problem.⁸⁰ Since implementing an English workplace policy, he states that his employee turnover was zero percent in 2008 and business has improved.⁸¹

Continuing the discussion on personnel issues, Commissioner Melendez commented that the majority of these issues are brought to the attention of supervisors through second-hand information. In a predominantly Hispanic or Native American workplace, he believed that supervisors would probably be trained to pick up multiple languages and be able to know whether or not people are being harassed. Further, he hoped there would be bilingual supervisors hired.⁸² In response, Mr. Kidman stated that some of his employees refused to communicate with their coworkers in English and that when these employees quit, it became difficult to rehire because of the restaurant's tarnished reputation.⁸³

⁷⁴ Briefing Transcript, pp. 82-83.

⁷⁵ Briefing Transcript, p. 84.

⁷⁶ 401 U.S. 424 (1971).

⁷⁷ Briefing Transcript, pp. 84-85.

⁷⁸ Briefing Transcript, p. 85.

⁷⁹ Briefing Transcript, pp. 86-87.

⁸⁰ Briefing Transcript, p. 88.

⁸¹ Briefing Transcript, pp. 87-88.

⁸² Briefing Transcript, pp. 88-89.

⁸³ Briefing Transcript, pp. 89-90.

Vice Chair Thernstrom asked Mr. Russell whether Mr. Kidman's case was an outlier, but Mr. Russell responded that he was not familiar with all of the facts related to his case. He indicated that the EEOC only litigates a few of these types of cases out of several hundred a year, and therefore this is not an area where the EEOC spends a majority of its time.⁸⁴

As a final comment, Commissioner Melendez again expressed concern that none of the Navajo plaintiffs were present at the briefing, emphasizing the importance of learning their perspective on why they reached out to the EEOC.⁸⁵

Commissioner Taylor indicated that he "would have welcomed the involvement of the plaintiffs" from the cases described, but was pleased that the absent panelists from CASA de Maryland and the D.C. Employment Justice Center had submitted testimony for the record.⁸⁶ He understood their view to be that there is a broad effort by employers to institute English-only policies as part of an anti-immigration policy. He asked Mr. Russell to reconcile this allegation with EEOC figures, and asked whether he felt this effort was widespread.⁸⁷ Mr. Russell did not see a conflict between the two, as CASA de Maryland was referring to the implementation of policies, while the EEOC figures presented the number of charges filed with the agency.⁸⁸

In response to Commissioner Taylor's comment concerning an anti-immigration policy, Ms. Chavez stated that it is inaccurate to suggest that there is a broad effort to enact English-only policies to drive out non-English speaking workers. She stated that on the contrary, she is in favor of immigration law reform, as are employers who are in desperate need of workers.⁸⁹

Mr. McAlpin contended that the recent large-scale immigration within the last forty years partially caused the language issue in the workplace. He stated that employers are simply trying to rationally respond to this in order to stay in business. He then made several comments about the EEOC's guidelines and litigation process. He disagreed with the EEOC's assertion that language is closely associated with national origin, citing twenty one attached cases which he claimed invalidate the EEOC's view.⁹⁰

When Mr. McAlpin asked Mr. Russell why the EEOC would not consider a Spanish-only policy as a national origin discrimination case, Mr. Russell responded that this was not necessarily the case. While the EEOC's guideline is specifically for English-only policies, Title VII analysis would still apply, and the employer would have to prove that there is a business justification for the policy.⁹¹ Mr. McAlpin challenged this, stating that the EEOC typically never pursues or investigates non-English-only policy claims. Mr. Russell stated

⁸⁴ Briefing Transcript, pp. 90-91.

⁸⁵ Briefing Transcript, p. 91.

⁸⁶ Briefing Transcript, p. 92.

⁸⁷ Briefing Transcript, pp. 92-93.

⁸⁸ Briefing Transcript, p. 94.

⁸⁹ Briefing Transcript, pp. 94-95.

⁹⁰ Briefing Transcript, pp. 95-97.

⁹¹ Briefing Transcript, pp. 97-98.

that it is standard for the EEOC to issue a right to sue letter for a majority of cases, but assured the panel that the investigators take every charge seriously.⁹²

Based on his experience representing a company in a lawsuit commenced by the EEOC, Mr. Riordan agreed with Ms. Chavez that there needs to be a high burden of proof before a management's prerogatives are taken away, and that the shifted burden on the employer to prove a business necessity gives the EEOC too much power. He claimed that the EEOC issued factually incorrect press releases during his case, including one after the denial of the motion to dismiss in which the EEOC effectively declared a victory.⁹³

Commissioner Yaki commented on what he considered to be deficiencies in the briefing itself, since English-only claims are a very small part of the EEOC docket, and positing that the briefing may be missing the bigger picture. Noting that the overwhelming majority of cases filed deal with Spanish-speaking claimants, he mentioned that he previously asked Mr. Russell if there was any geographical pattern among the origination of the claims. Other data sought by Commissioner Yaki included evidence of employer intimidation reducing the number of claims brought forth, and general data about what types of claims are and are not coming in and why. He posited that perhaps groups such as CASA may have more knowledge of those who did not come forward as a result of their immigrant status.⁹⁴ Mr. Russell responded that the EEOC had supplied some data relevant to these requests.⁹⁵

⁹² Briefing Transcript, pp. 98-99.

⁹³ Briefing Transcript, pp. 99-101.

⁹⁴ Briefing Transcript, pp. 101-104.

⁹⁵ Briefing Transcript, p. 107.

Speaker Statements

Note: Speakers' submitted written statements are unedited by the Commission and are the sole work of the author.

Reed Russell

Statement of EEOC Legal Counsel Reed Russell on English-Only Policies to U.S. Civil Rights Commission December 12, 2008

Good morning, Commissioners, thank you for this opportunity to explain the Equal Employment Opportunity Commission's views on English-only policies. The EEOC has a longstanding position that employers' adoption of English-only policies can implicate the prohibition against national origin discrimination under Title VII of the Civil Rights Act of 1964. The EEOC's position dates back to at least the early 1970s⁹⁶ and was promulgated in guidelines published in the Federal Register in 1980.⁹⁷

English-only policies can arise in a wide range of workplace situations. These policies typically limit the circumstances under which employees can speak foreign languages in the workplace. For bilingual workers whose primary language is not English, English-only policies can limit their opportunity to speak in the language with which they are most comfortable and expose them to discipline for inadvertently slipping into their native language. For workers with limited or no English skills, English-only rules can operate as a bar to employment, preventing otherwise qualified workers from being hired or resulting in their discipline and termination.

As with any other employment practice, an English-only policy violates Title VII if it was adopted for the purpose of discriminating against employees based on national origin or another protected category. For example, in a Tenth Circuit case, plaintiffs who worked for the City of Altus, Oklahoma, presented evidence that the city had adopted an English-only policy in order to discriminate based on national origin.⁹⁸ The evidence presented by the plaintiffs showed that management was aware that the policy would result in the taunting of Hispanic city employees, that there were no substantial work-related reasons for the policy, and that the Mayor referred to the Spanish language as "garbage" while he was giving a news interview.

In other cases, an employer will adopt an English-only policy for nondiscriminatory reasons, without intending to limit the employment opportunities of workers based on national origin. As explained by the Supreme Court, however, Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."⁹⁹

⁹⁶ EEOC Dec. 71-446, ¶ 6173 (CCH) (1970); EEOC Dec. 72-0281, ¶ 6293 (CCH) (1971).

⁹⁷ 29 C.F.R. § 1606.7.

⁹⁸ *Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006).

⁹⁹ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

Because of the obviously close relationship between an individual's national origin and primary language, English-only policies may result in a disparate impact on employees of certain national origins. For example, in a workplace where some employees are native English speakers and others are native Spanish speakers, Hispanic workers with limited English proficiency may be disproportionately excluded from certain employment opportunities as the result of an English-only policy.

If an employment practice challenged under Title VII has been shown to cause a disparate impact on the basis of national origin or another protected status, the practice is unlawful unless the employer can demonstrate that the practice is job related for the position in question and consistent with business necessity.¹⁰⁰

EEOC takes the position that an English-only policy is job related and consistent with business necessity if it is needed for the safe or efficient operation of the employer's business.¹⁰¹ Thus, employers with legitimate business needs for requiring English-only policies are free to adopt them in a variety of circumstances. Similarly, if English fluency is required for effective job performance, then an employer is free to reject job applicants who are not fluent in English, even if workers of some national origin groups are adversely impacted.

English-only policies are obviously permissible for work-related communications with customers, coworkers, or supervisors who only speak English. Thus, a cashier in a retail store or a server in a restaurant could be required to speak English when serving English-speaking customers or when speaking with his fellow English-speaking employees about work issues or with his English-speaking supervisor.

English-only policies also can be imposed for cooperative work assignments where English is needed to promote efficiency. Thus, for example, a taxi cab company might require English when communicating with the dispatcher's office.

English-only policies also might be required to enable a supervisor to monitor work-related communications between coworkers or between an employee and a customer. For example, at a coffee shop or restaurant an English-only policy may be needed to allow a supervisor to monitor the relaying of orders from the cashier to the baristas or cook.

And as mentioned, employers may impose an English-only policy where it is needed for safety. In fact, one of EEOC's own Commission decisions from the early 1980s upheld a policy at an oil refinery which required employees to speak only English during emergencies or while performing work duties in the laboratory or processing areas where there was a risk of fires or explosions.¹⁰²

¹⁰⁰ 42 U.S.C. § 2000e-2(k)(1)(A)(i).

¹⁰¹ Section 13: *National Origin Discrimination*, EEOC Compliance Manual, Volume II (BNA) (2002), <http://eeoc.gov/policy/docs/national-origin.html#VC1>.

¹⁰² EEOC Dec. 83-7, ¶ 6836 (CCH) (1983).

These are only *examples*, however, and there will be other circumstances where English-only policies will be consistent with business necessity and therefore lawful under Title VII, even if the policies result in a disparate impact on a specific national origin group in a particular workplace.

As can be seen by these examples, English-only policies should be limited in scope and apply only to employees when they are working in circumstances where English is actually necessary for the business to operate safely or efficiently. As a result, an employer that adopts a blanket policy that requires English at all times in the workplace, even during lunch and breaks and in purely personal conversations, will have more difficulty establishing business necessity than an employer that has adopted a narrower policy.¹⁰³

English-only policies should not be imposed merely because of coworker or customer preference. For example, English-only policies should not be imposed merely because some non-Spanish-speaking employees dislike eating lunch in the same room with coworkers who engage in private conversations in Spanish.

However, employers may have a duty to take appropriate corrective measures to address workplace misconduct that involves a foreign language, such as race- or sex-based comments in Spanish. Such misconduct often can be addressed under the employer's standard disciplinary procedures and therefore will not justify broad English only policies. For example, if employees are making derogatory remarks about coworkers in Spanish, they can be individually disciplined, and if they are repeat offenders, can be required to speak only in English so that non-Spanish-speaking supervisors can monitor their behavior.

Similarly, if there are isolated instances of employees using foreign languages to insult or intimidate English-speaking workers, the employer probably could adequately address the misconduct under an existing discipline policy. However, as pointed out in the EEOC's Compliance Manual Section on National Origin Discrimination, some courts have concluded that if such misconduct is more widespread, then an employer is justified in adopting an English-only policy.¹⁰⁴

To be effective in promoting the employer's business needs, an English-only policy must be clearly communicated to affected employees. Employers are free to use any reasonable means of providing notice, such as a meeting, e-mail, or posting. In some cases, it may be necessary for an employer to provide notice in English and in the other native languages spoken by its workers.

If an employer does not provide adequate notice of an English-only policy, it may face difficulty in justifying discipline taken for violations of the policy. Pursuant to EEOC's English-only guidelines, the EEOC will consider the application of the policy in such circumstances as evidence of national origin discrimination.¹⁰⁵ Failure to provide adequate

¹⁰³ 29 C.F.R. § 1606.7(a).

¹⁰⁴ Section 13: *National Origin Discrimination*, EEOC Compliance Manual, Volume II (BNA), Example 21 & n.51 (2002), <http://www.eeoc.gov/policy/docs/national-origin.html#VC2>.

¹⁰⁵ 29 C.F.R. § 1606.7(c).

notice also may belie an employer's assertion that an English-only policy is necessary for safe or efficient business operations. Nevertheless, EEOC's Guidelines on English-only policies do not require that employers create bilingual policies or operate a bilingual workplace, nor do they promote bilingualism in the workplace. Rather, EEOC's "concern is to prevent employers from imposing speak-English-only rules, as arbitrary and oppressive terms and conditions of employment, on people who come from non-English-speaking backgrounds in order to deprive them of an equal employment opportunity for jobs they are otherwise fully qualified to perform."¹⁰⁶

The EEOC enforces Title VII's limits on English-only policies primarily through the administrative processing of charges. During the past 10 years, the EEOC received an average of about 180 charges per year challenging English-only policies. This constitutes only about two-tenths of one percent of the total charges filed with the EEOC during the same time period. The EEOC also filed about two to three lawsuits per year challenging English-only policies.

As with other employment practices, the EEOC takes proactive measures to educate employers about their obligations and employees about their rights. The EEOC has applied the same legal analysis to English-only policies for nearly four decades, and I think it is fair to presume that most larger employers are aware of their legal obligations under Title VII. Nonetheless, the issue arises relatively infrequently, and some smaller employers may still be unaware of their potential liability in adopting English-only policies. Under Title VII, however, employers cannot be liable for compensatory or punitive damages for disparate impact violations.¹⁰⁷

In summary, the EEOC's position on English-only policies reasonably balances the interests of employers and employees by permitting those policies that are consistent with business necessity while preserving Title VII's mandate of ensuring equal opportunities for non-native English-speaking individuals who are able to effectively perform their job functions.

Timothy J. Riordan

December 10, 2008

I was the attorney primarily responsible for counseling and defending Synchro-Start Products, Inc. in litigation initiated by the Equal Employment Opportunity Commission ("EEOC"), a case cited in the current version of the EEOC'S Compliance Manual at §13(v)I, *EEOC v. Synchro-Start Products, Inc.*, 29 F. Supp. 2d 911 (N.D. Ill. 1999). In that case, the EEOC filed suit on behalf of a number of Synchro-Start employees whose primary language was not English, alleging that Synchro-Start intentionally violated Title VII by requiring the employees to speak only English during working hours.

¹⁰⁶ Preamble to Final Guidelines on Discrimination Because of National Origin, 45 Fed. Reg. 85,362, 85,634 (1980).

¹⁰⁷ 42 U.S.C. § 1981a(a).

On September 15, 1997, Synchro-Start promulgated a policy to its employees to speak only English while working on the factory floor. The policy was a result of complaints from a number of employees that other employees were perceived to be harassing and insulting them while speaking in their native language, which could not be understood by the complaining employees. The policy had been implemented to diffuse what was developing into a serious morale problem and to avoid potential claims of harassment or discrimination. The Company was also concerned that safety on the production line could be compromised if employees were not all speaking a common language.

Shortly thereafter, an employee filed a complaint with the Equal Employment Opportunity Commission ("EEOC") and after an investigation the EEOC made a determination that there was reasonable cause to believe that the "English Only" policy discriminated against the complaining employee and other employees whose native language was not English. Thereafter, in response to the EEOC's invitation, the Company engaged in good faith negotiations for conciliation and as of April 29, 1998, the Company and the EEOC had basically agreed upon the terms of a settlement, including the posting of a notice to all employees advising of the rescission of the "English Only" policy and execution of a conciliation agreement by the Company, the EEOC and the complaining employee. However, after the forms had been negotiated, the complaining employee refused to sign the documents. The EEOC investigator indicated that the employee had stated that he had no personal interest in the matter, that he had not been damaged in any way, that he simply wanted to bring the matter to the EEOC's attention for investigation and, therefore, he refused to participate in the settlement of the case by way of executing any documents. Although frustrated by the employees' refusal to participate in the settlement, the Company did offer to enter into the settlement as negotiated and, in fact, the Company voluntarily rescinded the policy on July 1, 1998. The EEOC then refused to enter into an agreement based on the prior discussions.

On October 7, 1998, the EEOC contacted the Company's attorneys advising that the EEOC would file a suit on behalf of the employees if the matter was not settled pursuant to an enclosed consent decree. The consent decree was generally consistent with the settlement which had been negotiated earlier; however, it contained an additional requirement for payment of \$50,000 to the complaining employee. The Company responded by indicating a willingness to enter into the settlement agreement, with minor modifications, but refused to make any monetary payment for fear of setting a precedent which would require payment to other employees who had not as yet made a complaint.

The EEOC responded by filing suit notwithstanding that the policy had been rescinded and that the employee who first complained had no interest in pursuing the matter.

Synchro-Start filed a Motion to Dismiss contending that its policy which simply required employees who are bilingual to speak English while working did not constitute an unlawful employment practice and that the EEOC Discrimination Guidelines, 29 C.F.R. §1606.7(a) and (b) shifting the burden to the employer to provide a business justification for an English only policy was invalid as beyond the scope of the agency's authority to interpret Title VII. The District court upheld the validity of the challenged EEOC discrimination guidelines and

denied Synchro-Start's Motion to Dismiss based on a finding that the EEOC's complaint . . . comported with the requirement for a viable Title VII claim."

The parties engaged in discovery which confirmed the following facts.

Synchro-Start was a manufacture of electronic products with approximately 200 employees. Substantially all of the Company's production personnel were first generation immigrants, of Polish, Hispanic and Asian descent. Although, in most instances, their native language was their primary language, all employees spoke English well enough to understand and follow directions and instructions and to perform their job requirements safely and productively. Some of the production supervisors, however, spoke only English and were not able to speak in the other languages.

On numerous occasions, individual employees complained that other employees were speaking in their native foreign languages and using their bilingual capabilities to harass and insult other workers in a language they could not understand. For example, one employee stated that Hispanic employees had spoken in their native language which she could not understand, then they looked at her, laughed and rolled their eyes, making her feel very uncomfortable and intimidated. On each occasion that such complaints were made, the plant manager talked to the supervisors to determine the validity of the complaint and the appropriate response. The supervisors then attempted to deal with the issue by discussing the matter with the group leaders and the effected employees, suggesting that the employees speak English while in the presence of other employees who did not speak the same language, so that feelings would not be hurt and to improve morale and communications.

The plant manager was also contacted by a representative of a temporary employment agency which provided Synchro-Start with employees who advised that two of the temporary employees refused to be sent back to Synchro-Start because the Synchro-Start employees intimidated them and made them uncomfortable by speaking in their own language which the temporary employees could not understand.

In response to the continuing complaints, in September of 1997, the Company instituted a policy that employees should speak only English while working. The policy did not apply while employees were on their own time, such as breaks and lunch. The Company believed that it had no alternative but to initiate this limited policy to avoid conflict, at least while the employees were on the production line. The Company was concerned that safety on the production line could be compromised and that it might otherwise be exposed to claims by the complaining employees that it had failed to protect their rights. It is important to also note that no employee was disciplined for violating the policy.

Synchro-Start's claim that it had a business necessity for adopting the policy was not only factually supported, but consistent with the EEOC's own Compliance Manual, wherein footnote 48 in its section relating to English Only Rules, the EEOC cites Roman v. Cornell University, 53 F. Supp. 2d 223, 237 (N.D.N.Y.1999) and Long v. First Union Corp., 894 F. Supp. 933, 941(E.D.Va.1995) respectively, for the propositions that "business reasons for an English-only rule may include 'avoiding or lessening interpersonal conflicts, preventing non-foreign language speaking individuals from feeling that they are being talked about in a

language they do not understand,” and “English-only policy may be legitimate and necessary for business where adopted to “prevent employees from intentionally using their fluency in Spanish to isolate and to intimidate members of other ethnic groups.

The EEOC also failed to produce any evidence to support its allegations that Synchro-Start had intentionally engaged in discriminatory practices or that some Synchro-Start employees were unable to comply with the policy because they were unable to speak any English.

Notwithstanding the EEOC’s inability to factually and legally support its claim of discrimination, when offered the opportunity to settle the case for an amount less than the expected future costs of defense, the Company had no practical alternative but to settle, which it did after almost two years of litigation.

It should be clear from the above, that my client and I were frustrated with the EEOC’s continued pursuit of this case after the original complaining employee lost interest, the policy was rescinded and facts became clear that there was no discriminatory intent on the part of the company on promulgating the rule.

It is my belief that all interests would have been better served if the EEOC had devoted its resources to remedial and educational activities, rather than the pursuit of punitive remedies against Synchro-Start which had acted in good faith with no intention to discriminate.

STATEMENT OF

**K.C. McALPIN
EXECUTIVE DIRECTOR**

PROENGLISH

FOR THE

U. S. COMMISSION ON CIVIL RIGHTS

Briefing on

Specifying English as the Common Language of the Workplace

Friday, December 12, 2008

"Language is perhaps the strongest, perhaps most enduring link which unites men"
—Alexis de Tocqueville

INTRODUCTION

Good morning. My name is K.C. McAlpin. I am the executive director of ProEnglish, a national organization that advocates making English the official language of government and other policies to protect the role of English as the common unifying language of our country. ProEnglish relies on voluntary contributions from the public for our support.

I want to thank you for giving us the opportunity to comment on language in the workplace policies and specifically on the Equal Employment Opportunity Commission's ("EEOC") policy of targeting employers with English language workplace rules for prosecution under Title VII of the Civil Rights Act.

BACKGROUND & DEFINITIONS

In 1980 without prior notice, consultation with, or authorization by Congress, the EEOC adopted guidelines that *presume* employers' English-on-the-job rules have a disparate impact on the basis of national origin and therefore violate Title VII's ban on national origin discrimination.

The EEOC formulated its Guidelines despite a 1973 court decision, *Espinoza v. Farah Mfg. Co.*,¹ which defined national origin as referring "to the country where a person was born, or more broadly, the country from which his or her ancestors came." Moreover the same year they were issued the EEOC included its Guidelines in briefs before the Fifth Circuit U.S. Court of Appeals, which immediately rejected them twice. In *Garcia v. Gloor* (1980)² the Fifth Circuit held that "national origin must not be confused with ethnic or socio-cultural traits" and concluded the Equal Employment Opportunity Act does not support an interpretation that equates the language an employee prefers to speak with national origin. And, in 1981, in *Vasquez v. McAllen Bay & Supply Co.*,³ the Fifth Circuit again rejected the Guidelines' formula that *language equals national origin* and upheld an English-on-the-job rule for truck drivers.

But let's step back for a moment and apply some common sense. We don't need the courts to tell us that the language someone speaks and their national origin are distinct and different characteristics. Someone who speaks Spanish or Chinese as their native language may have been born in any number of different countries. On the other hand, someone could have a national origin of Nigeria or India, and speak any one of dozens of different languages as their native language. The equation of language and national origin is so over and under inclusive as to render it meaningless. More than one quarter of the member countries of the United Nations have designated English as an official language.⁴ The EEOC's claim that there is a "close connection" between language and national origin is absolute nonsense.

¹ See references: Exhibit A.

² Ibid.

³ Ibid.

⁴ 53 of 193 UN member nations according to *Information Please Almanac*, *Ethnologue.com* – project of SIL International, *CIA World Fact Book* – 2006, and UN member nation Internet websites.

Yet despite this, and despite more than twenty court cases that explicitly reject the EEOC Guidelines,⁵ the EEOC continues to act on its corrupt definition and target employers that have English language workplace rules for investigation, prosecution, and harassment.

The EEOC attempts to justify its illegal anti-English policy by using carefully worded half-truths, evasions, and distortions. Thus on its website, under the heading: Discriminatory Practices -- National Origin Discrimination, the EEOC states that "It is illegal to discriminate against an individual because of birthplace, ancestry, *culture, or linguistic characteristics common to a specific ethnic group*" (emphasis added). Thus the EEOC adds broad and incomprehensible terminology to the accepted and well defined meaning of national origin, and substitutes "linguistic characteristics" for the clearly defined term "language," which could be easily rebutted.

In another example, EEOC policy guidance on English language workplace policies state, "The primary language of an individual is often an essential national origin characteristic." While that may have been true 500 years ago, in today's world a person's primary language is *rarely* an essential national origin characteristic. The fact is that language and national origin are distinct and almost entirely unrelated characteristics.

THE EEOC IS ABUSING ITS STATUTORY AUTHORITY

The EEOC Guidelines presume that employer English-on-the-job rules "when applied at all times" are a burdensome condition of employment that violate Title VII's ban on national origin discrimination. But the definition of national origin the EEOC is using is totally flawed. It makes no difference whether such a rule is applied at all times or only at certain times because the EEOC: (1) has no basis to assert any violation of Title VII where language is concerned; and (2) even less right to *presume* an employer's English workplace policy violates Title VII.

The EEOC Guidelines go on to say that even if an employer's English language policy is applied only at certain times the employer must still show that the rule is justified by "business necessity." The effect of this qualification is to give the agency the discretion to attack any English-on-the-job rule and burden the employer with having to demonstrate business necessity in court.

So, for example, when the EEOC sued the Sephora cosmetics store chain, the fact that Sephora's policy was both narrowly tailored and limited did not stop the agency from filing suit [*EEOC v. Sephora*].⁶

In fact, the EEOC has been filing language discrimination cases against employers that do not even have an English-on-the-job policy. *EEOC v. Spring Sheet Metal* is a case in point. In *EEOC v. Spring Sheet Metal* the false allegations of an employee sent home for a display of out of control temper (after being instructed by a foreman about what tool to

⁵ See case references: Exhibit A.

⁶ Ibid.

use), was sufficient to trigger an EEOC lawsuit alleging national origin (language) discrimination.

But court proceedings lag far behind the accompanying EEOC publicity campaigns that allege employers with language policies are guilty of civil rights violations. As the agency knows, such campaigns inflict serious damage to an employer's reputation in their community and undermine their will to defend themselves in court.

In examining language in the workplace cases brought by the EEOC both the 5th Circuit and the 9th Circuit Courts of Appeals have ruled that the EEOC was acting *ultra vires* i.e. outside the scope of its statutory authority, or in layman's terms, illegally. But the EEOC apparently thinks it is an agency unaccountable to congressional oversight and judicial authority. In a letter to Colorado Congressman Tom Tancredo dated Jan. 21, 2000, the EEOC says it "disagrees with the [9th Circuit] decision in *Spun Steak*," and simply declared it was empowered to act as a court and make its own statutory interpretations.⁷ In a breathtaking display of bureaucratic arrogance, the EEOC goes on to parse words, cite minority court opinions, and even cite selectively from adverse court decisions in order to justify its actions.⁸

Here is the bottom line. In thirty-five years of court rulings right up to the present there has not been one English language court decision favoring the EEOC that was ultimately upheld or which is controlling: not a single one that supports the EEOC's *language equals national origin* formulation. And there have been only two instances in which a U.S. District Court agreed with the EEOC as compared to over twenty instances at the state, federal, and federal circuit courts, in which courts and judges have *rejected* the EEOC arguments.

THE EEOC IS TRAMPLING ON EMPLOYERS' & EMPLOYEES' RIGHTS

Courts have long recognized an employer's right to set the conditions of employment, including what employees can say on the job.⁹ That right is also protected by Title VII, itself.¹⁰

By singling out employers with English language workplace policies for investigation and illegitimate civil rights prosecution the EEOC is violating an employer's fundamental right to run their business successfully and in the best interests of themselves, their customers, and their employees. Certainly, in these trying times of economic uncertainty and high unemployment, employers must be free to make optimal business decisions without fear of unwarranted prosecution by an out-of-control federal agency.

⁷ Exhibit C. See also Exhibit B.

⁸ *Ibid.*

⁹ *Waters v. Churchill*, 511 U.S. 661, 114 S. Ct. 1878, 1886 (1994) (employer may prohibit employees from cursing, and may require them to be polite to customers).

¹⁰ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) ("preservation of an employer's remaining freedom of choice" is an important aspect of Title VII of the Civil Rights Act).

In fact, if the EEOC's *language equals national origin* formulation were true, the EEOC itself would be guilty of national origin discrimination because its Guidelines presume that only English language workplace policies are violations of Title VII. Thus, the EEOC claimed the Spun Steak Company's English language policy on its dayshift was a violation.¹¹ But the Spanish language policy on its nightshift *was not*.

You have heard (or will hear) from Richard Kidman, the owner of RD's Drive-In Restaurant, and the story of the EEOC's unethical and unwarranted attack on this small business owner. I am familiar with the Kidmans' case because ProEnglish was involved in helping the Kidmans defend themselves against an EEOC lawsuit.

You need to eat a green chili cheeseburger at RD's Drive-In to understand the absurd lengths that the EEOC will go to pursue their illegitimate policy. Richard and his wife Shauna are small business heroes. Their drive-in restaurant, which grosses barely \$700,000 a year, holds its own in the small town of Page, Arizona against competition from fast food giants like McDonalds, Burger King, and Taco Bell.

In 30 years of being in business RD's has employed hundreds of local residents, the vast majority of whom have been Navajo. But in the year 2000, to protect their employees from harassment, including sexual harassment, they had no choice except to implement an English-language workplace policy. In so doing, they never guessed they would run afoul of a huge federal agency like the EEOC, with its thousands of employees and an annual budget of hundreds of million of dollars.

Here is a summary of what happened to the Kidmans after they put their language policy in place.

- The EEOC conducted a one-sided investigation in which investigators asked leading questions, attempted to intimidate RD's employees, and showed scant interest in evidence or testimony that would have justified the restaurant's policy.
- Without notifying the Kidmans of the results of the investigation or giving them an opportunity to voluntarily remedy the alleged defects in their policy, the EEOC filed a discrimination lawsuit against them in federal court. The suit sought monetary damages including back pay and interest, as well as compensatory and punitive damages that could have personally bankrupted the Kidmans because their business was unincorporated.
- The EEOC issued a press release under the headline "...national origin bias against Navajos and other Native Americans," and ballyhooing its case as "The First-Ever English-Only Lawsuit [by the EEOC] on Behalf of Native Americans." In its release Phoenix EEOC Office Director Charles Burtner announced the EEOC verdict before any trial took place. "We found that [the Kidmans'] policy and its implementation is a form of national origin discrimination."¹²

¹¹ The Spun Steak Company implemented its English language policy on its dayshift to stop ethnic slurs and harassment in Spanish that was being directed at its African-American and Asian-American employees and creating a hostile work environment for the company's almost entirely minority work force.

¹² Exhibit D.

- The EEOC rejected subsequent efforts by the Kidmans' attorney to modify their English-on-the-job policy to meet the agency's objections.
- The EEOC unleashed a public relations attack on the Kidmans consisting of public statements to reporters and letters to newspapers. These attacks inflamed local passions along ethnic lines and had a substantial negative economic impact on RD's business. The low point was EEOC Phoenix Office Director Burtner's Nov. 25, 2002 letter to *The Navajo Times* newspaper in which he wrote that the EEOC's case against the Kidmans "involves an assault on employees who speak Navajo in the work place..." (emphasis added).
- The EEOC public relations campaign also generated negative news stories about the Kidmans in local newspapers as well as national media like *CNN* and the *New York Times*.
- After the Kidmans felt compelled by the pressure of huge unpaid legal bills to attempt to negotiate a good faith settlement of the dispute, EEOC lawyers betrayed the Kidmans' trust by trying to insert provisions detrimental to the Kidmans and alter the proposed settlement in ways that had been specifically rejected. The EEOC's underhanded and unethical conduct was so offensive that it drew a formal reprimand from the judge handling the case.¹³

The Kidman's litigation was not finally resolved until six years later in November 2006. By the terms of a court imposed settlement the Kidman's admitted no guilt but were required to rescind their existing policy. However they retained the option of reissuing an English language workplace policy subject to EEOC review. They did this and today I'm happy to say that RD's Drive-In Restaurant has a legal English language workplace policy in effect. In the meantime, the problems with employee on employee harassment they had previously experienced, as well as sky-high turnover and difficulty retaining employees have all but disappeared. And perhaps best of all, the people of Page Arizona can continue eating and enjoying RD's green chili cheeseburgers.

In the end, the EEOC accomplished nothing by all its bullying, attacks, and unethical treatment of the Kidmans as employers and private citizens, not to mention the expenditure of hundreds of thousands of taxpayer dollars.

Unfortunately the Kidmans' case is not an isolated example. It conforms to a clear pattern of intimidation, misuse of taxpayer money, and heavy-handed behavior that the agency uses again and again to enforce its illegitimate anti-English agenda.

Employers have many valid and compelling business reasons for implementing an English language workplace policy. They include:

¹³ "The EEOC on more than one occasion, attempted to put terms into the agreement that clearly were not agreed to. It is clear from the documents and witnesses before the Court that certain terms were clearly negotiated out of the settlement agreement, only to be reinstated by the EEOC... Finally the Court notes, that if counsel for the parties had not resorted to unreasonable demands and ultimatums, and if counsel for the EEOC had not continually reinserted terms that were specifically negotiated out of the agreement, the parties would likely have concluded this matter in a manner favorable to both parties."—U.S. District Judge Stephen M. McNamee, Memorandum of Decision and Order, *EEOC v. Kidmans*, Sept. 14, 2004.

-
- promoting safety
 - protecting employees from ethnic slurs and other forms of harassment
 - effectively supervising employees at work
 - providing a friendly and courteous atmosphere for customers
 - maintaining a non-hostile work environment for employees
 - protecting against employee theft, substance abuse, and other forms of crime
 - insuring compliance with employer policies

Employers like the Kidmans are caught in an impossible situation. If they fail to take effective action to stop harassment including ethnic slurs and sexual harassment in languages other than English, they can be sued under Title VII for maintaining a hostile work environment. But if they take the common sense approach of implementing an English-on-the-job policy, they run the risk of attacks and prosecution by the EEOC.

And even if they fight the EEOC and win their case in court, they are unlikely to recover their legal expenses. Ken Bertlesen, the owner of the Spun Steak Company estimates it cost him and his brother \$400,000 in legal fees and expenses to successfully defend themselves against the EEOC all the way through their 9th Circuit appeal.

The EEOC *modus operandi* is this. (1) Find a plaintiff.¹⁴ (2) Conduct a one-sided investigation that assumes the employer is guilty. (3) Negotiate a settlement in which the employer admits no guilt but lets the EEOC claim victory and issue a news release to the media ballyhooing its accomplishment. (4) If the employer resists, file a lawsuit and issue a headline grabbing press release alleging national origin discrimination by the employer. (5) Bully the employer and wear down their will to resist by running up the employer's legal bills and waging a public relations campaign attacking the employer as a "discriminator." (6) Ultimately negotiate a settlement in which the employer admits no guilt but lets the EEOC to claim the "victory" it wants.

In the rare instances in which an employer has the resources and determination to fight the EEOC, the EEOC either loses at trial or agrees to settle the case on terms that vindicates the employer's policy. Such was the case with the Sephora (cosmetics) Company whose English language workplace policy was upheld by a federal court in September 2005. And just recently, the EEOC was forced to back down and accept a humiliating settlement of its lawsuit against the Salvation Army that effectively recognizes the Army's legal English-on-the-job policy.

But far more often, due to its vastly superior resources, the EEOC prevails – especially in actions against small employers – and is able to impose burdensome and costly settlements on employers who in actuality are in full compliance with the civil rights laws.

¹⁴ There is reason to think that EEOC attorneys actively search for and solicit workplace English policy plaintiffs. EEOC speakers at community outreach forums often make statements that amount to thinly veiled solicitations for plaintiffs.

This should not happen in a free society. The EEOC is acting like a multicultural police force – writing its own laws, defying the courts, and using coercive tactics to impose its agenda on law abiding employers, and chilling their freedom to manage their own businesses.

By doing so, the EEOC is not only trampling on the rights of employers. It also is violating the civil rights of employees to work in a non-hostile environment, in which they are protected from racial and ethnic slurs and all forms of harassment including sexual harassment.

In conclusion we urge the Commissioners to condemn the actions of the EEOC which are infringing upon civil rights and which are especially dangerous because they are being committed by a government agency – the very agency created by Congress to safeguard the civil rights of all employees.

Thank you for the opportunity to present our views.

McAlpin: USCCR Statement, Dec. 12, 2008

Exhibit A

1. *Espinoza v. Farah Mfg Co.*, 414 U.S. 86, 88 (1973) (court invalidated an EEOC guideline that national origin equated with citizenship. "The term 'national origin' on its face refers to the country where a person was born, or more broadly, the country from which his or her ancestors came.")

2. *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980) (court stated "national origin must not be confused with ethnic or sociocultural traits...No one can change his place of birth, the place of birth of his forebears or his race..." Because languages can be and have been learned for centuries, the court concluded the EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin.)

3. *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981) (upholding English-on-the-job rules for non-English speaking truck drivers)

4. *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983) (court rejected an interpretation of national origin under Title VII that included a person's choice of language.)

5. *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) (invalidating EEOC guideline that allowed employee to establish prima facie disparate impact case by merely proving existence of English-only policy; nothing in plain language of Title VII supported the guideline, and guideline contravened Supreme Court precedent by presuming, without requiring proof, that the policy had a disparate impact.)

6. *Pemberthy v. Beyer*, 19 F.3d 857, 869-870 (3d Cir. 1994) (court held that "no simple equation can be drawn between ethnicity and language." 868-69 "an equal protection violation cannot be established simply by showing that Latinos are disproportionately affected by peremptory challenges of jurors who can speak and understand Spanish.")

7. *Long v. First Union Corp.*, 894 F. Supp. 933, 941 (E.D. Va. 1995) ("nothing in Title VII...provides that an employee has a right to speak his or her native tongue while on the job") *aff'd*, 96 F.3d 1151 (4th Cir. 1996)

8. *Kania v. Archd. of Phil.*, 14 F. Supp. 2d 730, 733 (E.D. Pa.,1998) (surveying cases: "courts have agreed that- particularly as applied to multi-lingual employees- an English-only rule does not have a disparate impact on the basis of national origin, and does not violate Title VII.")

9. *Velasquez v. Goldwater Mem'l Hosp.*, 88 F.Supp.2d 257, 262 (S.D.N.Y.2000) ("Neither [Title VII] nor common understanding equates national origin with the language that one chooses to speak.")

McAlpin: USCCR Statement, Dec. 12, 2008

10. *Rosario v. Cacace and Desantis*, 337 N.J. Super. 578, (App.Div.,2001) (court held that the employer's English-only policy did not violate the New Jersey Law Against Discrimination even where the employer's legitimate business reason for the policy was not extremely compelling.)

11. *Olivarez v. Centura Health Corp.*, 203 F.Supp.2d 1218 (D.Colo.2002) (court found English-only policies as applied to bilingual employees do not, alone, violate Title VII)

12. *Hannoon v. Fawn Eng'g Corp.*, 324 F.3d 1041, 1048 (8th Cir. 2003) (concluding that "criticizing a foreign employee's facility with the English language" does not "constitute discrimination against a particular race or national origin")

13. *Cosme v. Salvation Army*, 284 F.Supp.2d 229, 239-240 (D.Mass.2003) (holding that an English-only rule that prevents some employees, like the plaintiff, from exercising a preference to converse in Spanish does not convert the policy into discrimination based on national origin.)

14. *Dalmau v. Vicao Aerea Rio-Grandense, S.A.*, 337 F.Supp.2d 1299, 1305-06 (S.D.Fla.,2004.) ("[A] language requirement can only be circumstantial evidence of [national origin] discrimination, since at least two inferences or presumptions must first be drawn. First, it requires an inference that the requirement was actually intended to limit the eligible applicant pool to only native-born speakers of a particular country, rather than to include all those who speak the language in other countries or who learned the language regardless of their place of birth. Second, it requires the fact finder to conclude that the language requirement has no legitimate purpose other than to weed out candidates based on national origin. This is clearly not the type of evidence that can, by itself, prove an intent to discriminate.")

15. *Barber v. Lovelace Sandia Health Systems*, 409 F.Supp.2d 1313, 1328 (D.N.M.,2005) ("There is nothing inherently discriminating about English-only policies established for legitimate business reasons. The EEOC has determined that a rule requiring employees to speak only English, when applied at all times, is presumed to violate Title VII and a English-only rule when applied only sometimes is permissible if based on business justification. See C.F.R. § 1606.7(a) and (b)(1980)".

16. *E.E.O.C. v. Beauty Enterprises, Inc.*, 361 F.Supp.2d 11, 15 (D.Conn.,2005) ("[B]ecause language-based discrimination is not per se unlawful, EEOC must prove that language is connected to national origin.")

17. *Tippie v. Spacelabs Medical, Inc.*, 180 Fed.Appx. 51, 2006 WL 1130809, 98 Fair Empl.Prac.Cas. (BNA) 320, C.A.11 (Fla.), April 27, 2006 (No. 05-14384) (...native" to compare qualifications of American employee and individual ultimately selected for promotion, was not direct evidence of national origin discrimination, under Title VII; taken in context, use of phrase "not native" was a manner of describing employee's Spanish language abilities, not her national

McAlpin: USCCR Statement, Dec. 12, 2008

origin. Civil Rights Act of 1964, § 703(a), 42 U.S.C.A. § 2000e-2(a) [2] 78 Civil Rights 78II Employment)

18. *Napreljac v. John Q. Hammons Hotels, Inc.*, 461 F.Supp.2d 981, 1029-30 (S.D. Iowa, 2006) (“Evidence that JQH could have discriminated against Napreljac because he was not able to speak English is not evidence of national origin-based discrimination. Language and national origin are not interchangeable.”)

19. *Brewster v. City of Poughkeepsie*, 447 F.Supp.2d 342, 351 (S.D.N.Y., 2006) (“...Title VII makes it unlawful for an employer to discriminate against an individual on the basis of, *inter alia*, his or her race or national origin. It does not protect against discrimination on the basis of language.”)

20. *EEOC v. Synchro-Start Products, Inc.*, 29 F. Supp. 2d 911, 912 (N.D. Ill., 1999) (The court denied defendants motion to dismiss because both the plaintiffs complaint and the guidelines of the EEOC comported with the requirements for a viable claim under Title VII of the Civil Rights Act of 1964. “Because an English in the workplace rule unarguably impacts people of some national origins much more heavily than others, it is easy to imagine a set of facts consistent with the allegations that would entitle the EEOC to relief.”)

21. *EEOC v. Sephora*, 419 F. Supp. 2d 408, 416, 417 (S.D.N.Y. 2005) (The court granted defendants’ motion for partial summary judgment finding that the use of the English policy was legally permissible.) The EEOC does “not assert that it is illegal for Sephora to require proficiency in English as a condition of employability for consultants and cashiers, but rather argue that a business necessity is needed to require those employees to speak English on stage during business hours when clients are present.” “The business necessities Sephora described are similar to those the EEOC itself has suggested are proper.”)

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Exhibit B

Congress of the United States
House of Representatives
Washington, DC 20515-0606

December 14, 1999

COMMITTEE ON EDUCATION
AND THE WORKFORCE

SUBCOMMITTEES:
EARLY CHILDHOOD, YOUTH AND FAMILIES
OVERSIGHT AND INVESTIGATIONS

COMMITTEE ON RESOURCES

SUBCOMMITTEE:
ENERGY AND MINERALS

COMMITTEE ON
INTERNATIONAL RELATIONS

SUBCOMMITTEES:
INTERNATIONAL OPERATIONS
AND HUMAN RIGHTS
AFRICA

The Hon. Ida L. Castro
Chairwoman
Equal Employment Opportunity Commission
1801 L St., N.W.
Washington, DC 20507

DEC 17 1999 31674

Dear Ms. Castro:

Thank you for the Commission's October 20, 1999 response to my August 11 inquiry about the Commission's activities regarding English-on-the-job rules and the Commission's guidelines under 29 C.F.R. section 1606.7.

While I appreciate the information you provided, I wanted to share with you that I am troubled by the Commission's activities. Your letter, for example, says: "under the EEOC's Guidelines, speak-English-only rules are presumed to have an adverse impact based on national origin, and therefore violate Title VII of the Civil Rights Act of 1964, as amended." My concern is that federal courts have repeatedly held just the opposite, and I see no evidence that the Commission's view has any legal basis.

I have a strong commitment to the principle of non-discrimination. I also have a strong commitment to the concept of a federal agency's power being limited by the Constitution and Congress's statutory delegation of authority to the agency. As a member of the Oversight Subcommittee of the House Committee on Education and the Workforce, I must judge the Commission's interpretation of Title VII as applied to English-on-the-job rules under the law as described by the federal courts.

I have now reviewed this question thoroughly. Every final federal court decision on English-on-the-job rules has held that such rules do not violate Title VII or that the Commission's guidelines are *ultra vires*. To quote just one of the more than a dozen federal courts which have looked at this question: "An agency interpretation, like that in 29 C.F.R. s. 1606.7, **at variance with the statute it interprets**, must be outside the scope of the agency's interpretive authority, and must be **wrong**." *Kania v. Archdiocese of Philadelphia*, 14 F.Supp.2d 730, 735-736 (E.D. Penn. 1998) (emphases added).

This is a very strong denunciation of the Commission's view. A federal court, after substantial review of the evidence and the law, has judicially found that the Commission's Guidelines are "at variance with the statute it interprets," are "outside the scope of the agency's

interpretive authority" (in other words, *ultra vires* -- beyond its power), and "wrong." Yet, unfortunately, the *Kania* court's position that the Commission's Guidelines are *ultra vires*, unfounded in Title VII and "wrong" is virtually unanimous among federal courts.

This is not a recent development which might have surprised the Commission. As you know, the Commission presented its draft Guidelines in briefings to the U.S. Court of Appeals for the Fifth Circuit in 1980; the Fifth Circuit rejected the Guidelines twice immediately thereafter. *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981)(English-on-the-job rule not illegal as applied to bilingual employee); *Vasquez v. McAllen Bay & Supply Co.*, 660 F.2d 686 (5th Cir. 1981)(same as applied to non-English-speaking employee).

Other cases finding either that English-on-the-job rules do not violate Title VII or that the Guidelines are *ultra vires* and unlawful include:

- *Long v. First Union Corp.*, 86 F.3d 1151 (4th Cir. 1996), *affirming* 894 F.Supp. 933 (E.D. Va, 1995). *See* 894 F.Supp. 940 (Guidelines are *ultra vires* because Congress enacted a specific and detailed framework for the burden of proof in disparate impact cases, and the Guidelines directly contradicted the plain terms of the statute it purports to interpret).
- *Gonzalez v. Salvation Army*, 985 F.2d 578 (11th Cir.), *cert. denied*, 508 U.S. 910 (1993), *affirming*, No. 89-1679-Civ-T-17 (M.D. Fla. 1990)(citing *Gloor* for proposition that, where co-workers or customers can overhear, English-on-the-job rule does not violate Title VII; notes that legitimate business purposes included the ability of managers to know what was said in the workplace, and the ability of co-workers to know what was being said around them).
- *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2726 (1994)(in rejecting language-based claim by employees who hurled racial insults at co-workers in language co-workers could not understand, Guidelines struck down as illegal and *ultra vires*). An attempt to obtain rehearing by citing Title VII was rejected by the full Ninth Circuit. 13 F.3d 296 (9th Cir. 1994).
- *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987)(on motion for summary judgment, rejecting Guidelines-based claim by radio announcer for disparate impact).
- *Tran v. Standard Motor Products, Inc.*, 10 F.Supp. 2d 1199 (D.C. Kansas 1998)(in rejecting language-based claim by employee who sexually harassed co-workers in a language other than English, found that business necessity includes insuring that all workers can understand each other, preventing injuries, and preventing co-workers from feeling they are being talked about; English-on-the-job rule did not create hostile work environment).
- *Roman v. Cornell University*, 53 F.Supp. 2d 223, 237 (N.D. N.Y. 1999)(after surveying cases, finding: "All decisions of which this Court is aware have held that English-only rules are not discriminatory as applied to bilingual employees where there is a legitimate

business justification for implementing such a rule" and "Several courts have held that an English-only policy designed to reduce intra-office tensions is a legitimate business reason.")

These decisions completely undermine the Commission's Guidelines. Surely the Commission should know of these decisions, yet they are not provided to employees or reflected in the Commission's policies.

Nor is there any countervailing controlling legal authority. There are only three decisions which might support the Commission's Guidelines – and none of those is significant or broadly applicable. The first was *Gutierrez v. Municipal Court of the Southeast Judicial District*, 838 F.2d 1031 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989). In *Gutierrez*, court employees racially insulted co-workers in a language they could not understand; the Ninth Circuit upheld a title VII claim based on the Guidelines, suggesting that the employer's remedy was to fire African-American employees and hire Spanish-speaking supervisors. Several Ninth Circuit judges decried this opinion as a "let them eat cake" approach which would exacerbate workplace tensions. 861 F.2d 1187, 1194 (9th Cir. 1988). The Supreme Court of the United States not only vacated the *Gutierrez* opinion immediately without further briefing, but did so with an unusual reference to a passage indicating that the vacated opinion was to "spawn no legal consequences." 490 U.S. 1016 (1989).

It is unlikely that the Commission would want to rely on a vacated opinion which suggests firing African-American supervisors in order to permit continued racial insults in a workplace. Fortunately, the Commission's training and policy materials make no reference to *Gutierrez*.

The other decision is a recent rejection of a motion to dismiss. *EEOC v. Synchro-Start Products*, 29 F.Supp.2d 911 (N.D. Illinois, 1999). In *Synchro-Start*, Judge Shadur notes that he was "staking out a legal position that has not been espoused by any appellate court." 29 F.Supp. 2d at 915 n. 10. In addition, Judge Shadur also noted that he was only "crediting" the Guidelines at the very early stage of deciding a motion to dismiss. 29 F.Supp.2d at 912-13. Similarly, another decision from the same District Court only two weeks before *Synchro-Start*, rejected an attempt to use the Guidelines to establish workplace hostility. *Gotfryd v. Book Covers, Inc.*, ___ F.Supp. 2d ___ 1999 WL 20925, *8 (N.D. Ill. 1999).

The Commission probably will not want to rely heavily on a District Court opinion so specifically limited and contradicted in its own district. Unfortunately, the press coverage included in your letter to me indicates that personnel in the Chicago office do not share this discretion. An EEOC attorney is quoted as claiming that "courts are divided on the legality of such English-only personnel policies." This quote, which was given at the start of the lawsuit against *Synchro-Start*, is simply incorrect. At the time this quote was given, there were no courts which had rejected such policies, as Judge Shadur later recognized in his footnote in *Synchro-Start* saying that he was the first (though in all fairness, by now the Northern District of Illinois is divided on the validity of the Guidelines, as shown by *Synchro-Start* and *Gotfryd*).

The same article quotes another EEOC attorney as saying that English-on-the-job "policies are generally a manifestation of prejudice toward ethnic minorities." There is no such finding in the judicial cases, and it is difficult to believe that the EEOC attorney is applying some general factual finding rather than personal prejudice. I find no evidence that the Commission made such a general factual finding.

The most troubling note in the package of information, however, was the Chicago EEOC office's press release of January 21, 1999, in which John P. Rowe, District Director in Chicago, says that "One of our enforcement priorities in this jurisdiction is to make the Commission's Guidelines on 'English only' rules a reality in the workplace. Judge Shadur's reference to the EEOC Guidelines and his decision permitting the case against Synchro-Start to keep moving ahead are very significant milestones and reinforce our commitment to the agency's enforcement priorities. We look forward to making further strides in this area."

It appears from this quote that the Chicago regional office has not reviewed or credited each of the more than a dozen federal judicial decisions rejecting the Commission's interpretation of Title VII as applied to English-on-the-job rules. It is difficult to determine what grounds the Chicago regional office has for believing that all those courts are wrong and the Commission interpretation is the only correct version.

There is a third (and most recent) decision, which is also contradicted in its own jurisdiction. As you know, the Commission sued Premier Operator Services of Desoto, Texas, alleging that its English-on-the-job rule violated Title VII. *EEOC v. Premier Operator Services*, ___ F.Supp.2d ___, 1999 WL 1044180 (N.D.Texas, 1999). Magistrate Stickney refused to grant summary judgment in the case, finding that he must give "some consideration" to the Guidelines where there were genuine material factual disputes. Magistrate Stickney did not cite any decision involving English-on-the-job rules other than *Gloor*, which he said was not applicable to a situation where an employee "inadvertently" uses a language other than English. Yet an earlier decision by Judge Fitzwater in the same Northern District of Texas, citing *Gloor* and *Spun-Steak*, held flatly: "English-only policies are not of themselves indicative of national origin discrimination in violation of Title VII." *Magana v. Tarrant/Dallas Printing, Inc.*, ___ F.Supp.2d ___, 1998 WL 548686, *5 (N.D.Texas 1998).

The summary of all these cases is that there is no judicial recognition of a legal basis for the Commission's Guidelines from any federal appellate court, and the lower courts largely reject the Guidelines. This lack of legal foundation for a federal enforcement policy troubles me.

I have reviewed the material you sent to me explaining the Commission's position in general and instructing its personnel about English-on-the-job rules. I find no mention of most of these cases. I find no significant legal analysis of the Commission's interpretation beyond a simple declaration of its conclusions. I find interpretations which contradict and ignore the straightforward and unanimous opinions of the federal courts which have reviewed English-on-the-job rules. In short, the materials I received from the Commission explaining its position and instructing its personnel were simply "wrong." *Kania v. Archdiocese of Philadelphia*, 14 F.Supp.2d at 735-736.

That makes the case load report you sent to me all the more disturbing. According to your letter, in recent years, the Commission has carried an annual case load of between 120 and 150 charges against employers accused of violating Title VII by having an English-on-the-job rule. In the year ending August 26, 1999, the Commission "resolved a total of 121 charges on this issue." 49 of these charges were "resolved" by finding "no violation." Another 35 of these charges were "resolved" by closing prior to the end of an investigation. 27 employers were found to have "violations," apparently of Title VII, under the Commission's uniformly-rejected interpretation.

Because you did not provide me with sufficient data on these 27 "violations" of the Commission's interpretation, I cannot tell where these employers are located, or whether the "violations" would survive a court test (for example, was the "violation" of Title VII based on the Commission's unlawful "presumption" that an English-on-the-job rule shifts the burden of proof onto an employer to justify the rule). This information is essential for me to determine the extent to which the Commission is abiding by the rules established by each of the Circuit Courts of Appeal which have rejected the Commission's interpretation.

You also listed seven lawsuits which had been filed, resolved or were pending during the year ending August 30, 1999. Three of these seven cases are in federal Circuits which have unequivocally rejected the Commission's interpretation of Title VII as applied to English-on-the-job rules.

In light of the above, please provide me with the following at your earliest opportunity:

1) a full and complete explanation of any legal rationale supporting the Commission's interpretation of Title VII as applied to English-on-the-job rules, including a) any materials relied upon by the Commission in adopting, reviewing and continuing in force 29 C.F.R. section 1606.7, and b) any materials used, reviewed or considered in any of the lawsuits referred to in your letter to me which provide any such legal rationale. I am particularly interested in reviewing the legal analyses in the materials the Commission provided the courts in *Synchro-Start* and *Premier Operator*.

2) A description of the geographic location of the described 27 employers found to be in "violation" of Title VII as interpreted by the Commission, preferably by location within the circuits covered by each U.S. Court of Appeals. In addition, a description of whether the "violation" was considered to be of "adverse impact" or "treatment" under existing definitions. Also, a description of whether the "violation" was due to a presumption which was insufficiently rebutted by the employer, or whether the "violation" was proven by the investigation. You may remove all identifying information if required by statute, but the information I am requesting relates solely to actions taken by the Commission and its personnel, so redactions should be kept to a minimum.

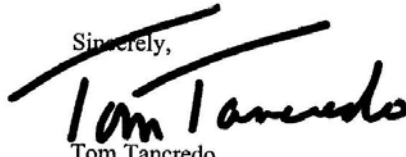
3) A complete explanation of whether, and if so, how the Commission intends to revise its materials relating to English-on-the-job rules, including employee training and interpretation manuals, to reflect the current state of judicial decisions in this area.

While I will await the receipt of further information before making up my mind on further proceedings in this matter, I urge the Commission to review carefully its policies in this area. It is not in the national interest to extend federal power in this area any further than absolutely necessary. The Commission should recognize that when federal courts repeatedly say that it is acting illegally, serious reconsideration is warranted.

In addition, I urge the Commission to revisit this issue and its Guidelines at its earliest opportunity. If, in fact, regional office personnel are conducting their own policy pursuits, the Commission should exert control. If it is the Commission's own policy to "make the Commission's Guidelines on 'English only' rules a reality in the workplace," please let me know that as soon as possible.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink that reads "Tom Tancredo". The signature is stylized with a large, sweeping "T" and a cursive "Tancredo".

Tom Tancredo
Member of Congress

Exhibit C

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

JAN 21 2000

The Honorable Thomas G. Tancredo
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Tancredo:

This is in response to your letter of December 14, 1999, regarding the policy of the Equal Employment Opportunity Commission (EEOC) on "English-only" rules. Specifically, you requested that the EEOC provide the following: 1) an explanation of the EEOC's legal rationale regarding the application of Title VII to English-only rules; 2) information regarding the 27 charges challenging English-only rules during the period of August 28, 1998, to August 26, 1999, in which the EEOC found violations; and 3) an explanation of any changes the EEOC intends to make to materials addressing the English-only rule. This letter will address each of these requests in turn.

EEOC's Analysis of the Application of Title VII to English-only Rules¹

As you know, the EEOC has adopted the following guidelines on English-only rules:

§ 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.

¹ This section summarizes the EEOC's position on English-only rules. To provide a more detailed discussion of the EEOC's analysis, we have enclosed the initial and reply briefs filed by the EEOC as *amicus curiae* in support of rehearing en banc in *Garcia v. Spun Steak Co.* Pursuant to your specific request, we have also enclosed the EEOC's response to defendant's motion to dismiss in *EEOC v. Synchro-Start Products, Inc.*, and the EEOC's opposition to defendants' motion for summary judgment in *EEOC v. Premier Operator Services, Inc.*, along with supporting materials.

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(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.²

The guidelines reflect the EEOC's position that a rule requiring the use of English in the workplace can be reasonably presumed to have an adverse impact on the basis of national origin. As recognized by courts, an individual's primary language is closely tied to his or her national origin, which includes cultural and ethnic identity. The Supreme Court noted, "Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond." *Hernandez v. New York*, 500 U.S. 352, 370 (1991); *see also Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1487 (9th Cir. 1993) ("It cannot be gainsaid that an individual's primary language can be an important link to his ethnic culture and identity."), *rehearing en banc denied*, 13 F.3d 296 (1993), *cert. denied*, 512 U.S. 1228 (1994); *Asian American Business Group v. City of Pomona*, 716 F. Supp. 1328, 1330 (C.D. Cal. 1989) ("A person's primary language is an important part of and flows from his/her national origin."). Even for bilingual persons who become assimilated into American culture and learn to speak English fluently, their primary language remains closely tied to their national origin. *Gutierrez v. Municipal Court of the Southeast Judicial Dist.*, 838 F.2d 1031, 1039 (9th Cir. 1988), *remanded with directions to vacate as moot*, 490 U.S. 1016, *vacated as moot*, 873 F.2d 1342 (9th Cir. 1989); *see also Spun Steak*, 13 F.3d 296, 298 (Reinhardt, J., dissenting from denial of rehearing en banc) (even for bilingual individual, "native language remains an important manifestation of his ethnic identity and a means of affirming links to his original culture").

An English-only rule creates an atmosphere of inferiority, isolation, and intimidation based on national origin for non-native English speakers, *regardless of whether they can comply with the rule*. *EEOC v. Synchrony Prods., Inc.*, 29 F. Supp. 2d 911, 915 (N.D. Ill. 1999). They face discipline or discharge for failing to comply with the rule. They must struggle to find the right words in English to communicate, and worry about speaking in the "correct" language. These individuals are adversely affected by knowing that their behavior has been singled out as unacceptable, and that the employer has adopted a rule that specifically applies to them. As Judge Reinhardt stated, "English-only rules not only symbolize a rejection of the excluded language and the culture it embodies, but also a denial of that side of an individual's personality." *Spun Steak*, 13 F.3d at 298 (Reinhardt, dissenting from denial of rehearing en banc).

Because of the close connection between an individual's primary language and his or her national origin, an English-only rule has a disproportionate adverse impact on protected national

² The guidelines also require employers to provide employees with adequate notice of the rule. 29 C.F.R. § 1606.7(c).

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origin groups. *E.g.*, *Spun Steak*, 998 F.2d at 1486 (it is "beyond dispute" that any adverse effect of an English-only rule would be suffered disproportionately by Hispanics); *Synchro-Start*, 29 F. Supp. at 912 (English-only rule "unarguably impacts people of some national origins (those from non-English speaking countries) much more heavily than others").

The effect of an English-only rule is to single out individuals whose primary language is not English by denying them a privilege that is granted to native English speakers. An English-only rule bars individuals whose primary language is not English from speaking in their native tongue – the language they are most comfortable with – at the workplace. Although speaking on the job is a privilege of employment, it may not be meted out in a discriminatory fashion. See *Hishon v. King & Spaulding*, 467 U.S. 69, 75 (1984) ("[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all"). Thus, because only native English speakers are permitted to speak in the language they are most comfortable with, an English-only rule has an adverse impact on bilingual employees whose primary language is not English.

Because of these effects on non-native English speakers, the guidelines reflect the EEOC's presumption that an English-only rule has a disparate impact based on national origin as explained above. See *Synchro-Start*, 29 F. Supp. 2d at 914 (EEOC has taken modest step of inferring that English-only rule disadvantages foreign national because of his or her national origin). Such a presumption avoids the need to litigate the issue "over and over again on a case by case basis." *Spun Steak*, 13 F.3d 300 (Reinhardt, J., dissenting from denial of rehearing en banc).

Nevertheless, the EEOC recognizes that there may be appropriate circumstances where an employer can require employees to speak English in the workplace. For example, if close communication between workers is required for safety reasons, such as in the drilling of an oil well or working in a laboratory with dangerous substances, it may be necessary to require that communication among coworkers be in a language understandable by all persons directly involved in the conversation. See Section 623: Speak-English-Only Rules and Other Language Policies, EEOC Compliance Manual (BNA) 623:0009-0016 (1984). By requiring an employer to explain the business justification for an English-only rule, the guidelines balance a reasonable presumption of adverse impact with the employer's right to adopt needed business practices.

The guidelines have been scrutinized by relatively few courts since their adoption in 1980. Among U.S. Courts of Appeals, only one circuit, the Ninth Circuit, has directly addressed the guidelines.³ In *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1486 (9th Cir.), rehearing en banc

³ Three other U.S. Courts of Appeals have issued decisions on English-only rules but have not addressed the EEOC's guidelines. In *Long v. First Union Corp.*, 894 F. Supp. 933 (continued...)

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denied, 13 F.3d 296 (1993), *cert. denied*, 512 U.S. 1228 (1994), the court stated that a plaintiff challenging an English-only rule would have to prove that a protected class is disproportionately disadvantaged by a policy that has a significant adverse effect on a term, condition, or privilege of employment. The court acknowledged that, if an English-only policy has any adverse effect on a term, condition, or privilege of employment, those effects would be disproportionately suffered by those of Hispanic origin. *Id.* The court also acknowledged, as did the employer, that such a policy might have an adverse effect on an individual who cannot speak English or whose English skills are very limited. *Id.* at 1488. The court found, however, that an English-only policy would not have an adverse impact on bilingual employees who could readily comply with an English-only rule. The court stated that the language spoken by a bilingual person is merely a matter of personal choice. *Id.* at 1487.⁴ Accordingly, the court rejected the EEOC's guidelines on the grounds that they impermissibly presume that English-only policies have a disparate impact without requiring proof of such. *Id.* at 1490.

For the reasons explained above, the Commission disagrees with the decision in *Spun Steak*. In addition, we note that the majority in *Spun Steak* completely disregarded the reasoning in *Gutierrez v. Municipal Court of the Southeast Judicial Dist.*, 838 F.2d 1031 (9th Cir. 1988), *remanded with directions to vacate as moot*, 490 U.S. 1016 (1989), *vacated as moot*, 873 F.2d 1342 (9th Cir. 1989).⁵ The court in *Gutierrez* determined that the ease of compliance with an

³(...continued)

(E.D. Va. 1995), the district court rejected the EEOC's guidelines, but the Fourth Circuit affirmed in an *unpublished* decision without addressing the guidelines. 86 F.3d 1151 (4th Cir. 1996) (per curiam). The Fifth Circuit decision in *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981), was issued prior to the adoption of the EEOC's guidelines. The court noted that it was considering the issue in the absence of any EEOC guidance. *Id.* at 268 n.1. Finally, in *Gonzalez v. Salvation Army*, No. 89-1679-CIV-T-17, 1991 U.S. Dist. LEXIS 21692 (M.D. Fla. May 28, 1991), the district court found that the employer had established a legitimate business reason for applying an English-only rule to a bilingual individual, but did not address the EEOC's guidelines. The Eleventh Circuit summarily affirmed the district court in an unpublished, nonprecedential decision. 985 F.2d 578 (11th Cir.), *cert. denied*, 508 U.S. 910 (1993). For these reasons, none of these Courts of Appeals decisions can be interpreted as rejecting the EEOC guidelines.

⁴ The court acknowledged that an English-only rule might have a disparate impact even on bilingual employees if enforced in a "draconian" manner, e.g., punishing an employee for a minor slip of the tongue such as subconsciously substituting a Spanish word for an English word.

⁵ The *Spun Steak* court merely stated that *Gutierrez* had no precedential value, and therefore, it was not bound by the reasoning in that decision. 998 F.2d at 1487 n.1. Although
(continued...)

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English-only rule was of little or no relevance to the issue of whether an English-only rule has an adverse impact on minorities. *Id.* at 1041. Moreover, the court found that an English-only rule has a "direct effect on the general atmosphere and environment of the workplace." *Id.*

District courts that have considered the EEOC's guidelines have been divided. As you noted, some district courts have adopted the reasoning of the *Spun Steak* majority in rejecting the EEOC's guidelines.⁶ Recently, however, the EEOC's guidelines have been upheld in two district court decisions in cases brought by the EEOC. In *EEOC v. Synchro-Start Prods., Inc.*, 29 F. Supp. 2d 911, 914 (N.D. Ill. 1999), the court rejected the majority analysis in *Spun Steak*, and found the justification for the guidelines to be persuasive.⁷ In *EEOC v. Premier Operator Services, Inc.*, No. 3:98-CV-198-BF, 1999 WL 1044180, at *6 (N.D. Tex. 1999), the court found that it was appropriate to defer to the EEOC's guidelines on English-only rules, and that evidence in the record demonstrated that bilingual individuals are better able to communicate in their primary language. The court determined that it was not controlled by a prior decision of the Fifth Circuit, *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981), which upheld an English-only rule. The court in *Premier Operator* noted that the English-only rule at dispute in the case before it applied at all times, whereas *Gloor* specifically stated that it was only addressing a policy that did not apply during breaks, not one that applied at all times, and that it was issuing a decision in the absence of EEOC guidance.

In addition to the courts that have upheld the EEOC's guidelines, Congress implicitly approved the guidelines when it amended Title VII in 1991 to clarify the standard for proving disparate impact discrimination. During Senate discussions of the possible amendment of Title

⁵(...continued)

Gutierrez was vacated and had no precedential value, it represented the views of the Ninth Circuit on English-only rules, and the validity of the case's reasoning was not affected because it was vacated on the grounds of mootness. *Spun Steak*, 13 F.3d at 301 (Reinhardt, J., dissenting from denial of rehearing en banc). Judge Reinhardt noted that the failure even to consider the reasoning of the unanimous decision in *Gutierrez* made it apparent that the only significant change was panel composition. *Id.*

⁶ *E.g.*, *Kania v. Archdiocese of Philadelphia*, 14 F. Supp. 2d 730 (E.D. Pa. 1998); *Long v. First Union Corp. of Va.*, 894 F. Supp. 933 (E.D. Va. 1995), *aff'd*, 86 F.3d 1151 (4th Cir. 1996) (see discussion of *Long* at note 3, above).

⁷ In a decision issued two weeks earlier in the Northern District of Illinois, another district court judge rejected the plaintiff's reliance on the EEOC's guidelines, finding that they did not apply to the issue before it. However, the court did not address the validity of the guidelines. *Gotfryd v. Book Covers, Inc.*, No. 97 C 7696, 1999 WL 20925, at *8 (N.D. Ill. Jan. 7, 1999).

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VII through the Civil Rights Act of 1991, Senator DeConcini stated that several of his constituents had complained about English-only rules in the workplace. Senator DeConcini asked Senator Kennedy, one of the sponsors of the Civil Rights Act of 1991, whether the EEOC guidelines promulgated at 29 C.F.R. § 1606.7 relating to English-only rules would remain intact, and Senator Kennedy responded that the guidelines had worked effectively and that the new legislation would not affect them in any way. 137 Cong. Rec. 29,051 (1991). If Congress had viewed the guidelines as an unreasonable exercise of the EEOC's enforcement authority, it presumably would have altered them.

Finally, the Commission's guidelines have been supported by the Department of Justice. After the Ninth Circuit denied the request for en banc rehearing in *Spun Steak*, the Solicitor General filed a brief in support of the petition to the Supreme Court to grant a writ of certiorari. The Solicitor General argued that the EEOC's guidelines reflect a "sound" interpretation of Title VII, and that the Ninth Circuit's decision is "wrong."⁸

The EEOC of course respects the rules of statutory interpretation set forth in court decisions. With regard to English-only rules, however, only the Ninth Circuit has issued a controlling opinion on the validity of the guidelines, and the few district courts to have considered the question have been divided. In such circumstances, the EEOC, as the enforcement agency for the federal anti-discrimination laws, has a responsibility to continue to interpret the law and to promulgate and apply the analyses it thinks best reflect the language and spirit of Title VII. With the benefit of the EEOC's views on English-only rules, courts can make better-informed decisions when they confront this issue. As more jurisdictions issue decisions regarding English-only rules, the EEOC will continue to reassess its position as it does in other areas where the law is developing.

Summary of Charges

In our prior correspondence, we reported that between August 28, 1998, and August 26, 1999, 27 charges involving English-only rules were resolved after a cause finding had been issued. After further review of the charges, we determined that 3 of the 27 cases did not involve issues regarding English-only rules.⁹

Therefore, we are providing you with information on 24 charges. Those 24 charges were filed against 14 employers in the Third, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh

⁸ A copy of the brief supporting the petition for certiorari is enclosed.

⁹ Two of the three charges challenged English-only policies, but cause findings were only issued on other issues raised in the charges. The third charge was miscoded in the computer as challenging an English-only policy.

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Circuits of the U.S. Court of Appeals. In 11 of the charges, violations were found under Title VII based, in part, on the presumption in the Commission's guidelines that an English-only policy has a disparate impact on protected national origin groups. Those charges were filed in the Third, Fourth, Fifth, Ninth, and Eleventh Circuits.

It should be noted that even for each of the above 11 charges, as instructed by Agency investigative procedures, the investigator performed an investigation to determine such matters as the scope of the English-only rule, to whom the rule applied, the manner in which the rule was applied, and the effect of the rule on the work environment. In addition, of the 11 charges, most challenged English-only rules that applied at all times in the workplace, in contrast to the less restrictive rule at dispute in *Spun Steak*, which did not apply during breaks or lunch periods.

EEOC offices in a jurisdiction that has issued a decision contrary to the guidelines continue to conduct the administrative process pursuant to the guidelines. Because the EEOC is charged with enforcing a federal law that has nationwide application, the EEOC's policy is applied uniformly in all jurisdictions at the administrative level. Of course, the EEOC would not file a suit to enforce the guidelines if such suit has been precluded by governing circuit law.

The table below summarizes the 24 charges resolved between August 28, 1998, and August 26, 1999, after a violation was found because of an English-only rule:

Circuit Ct of Appeals	# Charges	# Employers	#Chgs Disparate Impact	#Chgs Disparate Treatment	#Chgs Both Disparate Treatment & Impact	#Charges Relied on Guidelines ¹⁰
Third	1	1	1			1
Fourth	4	1	4			4
Fifth	4	4	3	1		3
Seventh	8	2			8	
Ninth	4	3	1		3	1
Tenth	1	1		1		
Eleventh	2	2	1		1	2
TOTAL	24	14	10	2	12	11

¹⁰ Where violations were found under Title VII based, in part, on the presumption in the Commission's guidelines that an English-only policy has a disparate impact on protected national origin groups.

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Revisions to Materials on English-only Rules

At this time, the EEOC does not believe that a change in its longstanding position on English-only rules would be appropriate. Accordingly, no changes in training materials or other EEOC documents will be made at this time. If the EEOC changes this view, it will propose appropriate changes to the guidelines, and revise internal materials to reflect any modified position.

We hope that this information is helpful in addressing the questions you have about the EEOC's policies on English-only rules. Please note that this letter does not constitute a written opinion or interpretation of the EEOC within the meaning of section 713(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-12(b).

Sincerely,



William J. White, Jr.
Acting Director of Communications
and Legislative Affairs

Enclosures

The U.S. Equal Employment Opportunity Commission

FOR IMMEDIATE RELEASE
September 30, 2002

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Exhibit D

EEOC SUES ARIZONA DINER FOR NATIONAL ORIGIN BIAS AGAINST NAVAJOS AND OTHER NATIVE AMERICANS

First-Ever English-Only Lawsuit by Commission on Behalf of Native Americans

PHOENIX - The U.S. Equal Employment Opportunity Commission (EEOC) announced that it filed a national origin discrimination lawsuit under Title VII of the Civil Rights Act of 1964 on behalf of Native American employees who were subjected to an unlawful English-only policy precluding them from speaking Navajo in the workplace and terminating them for refusing to sign an agreement to abide by the restrictive language policy. The lawsuit, the first-ever English-only suit by the Commission on behalf of Native Americans, was filed by the EEOC's Phoenix District Office against RD's Drive-In, a diner located in Page, Arizona - a community adjacent to the Navajo reservation.

Reiterating a message she delivered last June to the 25th Anniversary Conference of the Council for Tribal Employment Rights - whose members represent the employment interest of Indian tribes on reservations in several states - EEOC Chair Cari M. Dominguez said: "The Commission is committed to advancing job opportunities and protecting the employment rights of Native Americans."

The suit, *EEOC v RD's Drive In*, CIV 02 1911 PHX LOA, states that in approximately June 2000, RD's posted a policy stating: "The owner of this business can speak and understand only English. While the owner is paying you as an employee, you are required to use English at all times. The only exception is when the customer can not understand English. If you feel unable to comply with this requirement, you may find another job."

This policy, in an early form, prohibited employees from speaking "Navajo" in the workplace. Two employees, Roxanne Cahoon and Freda Douglas, refused to agree to the policy because they believed it to be discriminatory. As a result, they were asked to leave their employment by RD's. In addition, at least two other employees resigned prior to being terminated because they could not agree to the policy. The vast majority of the employees working at the time spoke Navajo.

Charles Burtner, Director of the EEOC's Phoenix District Office, said: "We investigated this case. We found that the policy at issue, by its own terms, extended to breaks and appeared to be directed primarily to the use of the Navajo language. We found that this policy and its implementation is a form of national origin discrimination, which violates Title VII. Further, the employer's decision to terminate employees who questioned the policy is particularly troubling. Again, we found these terminations to be a form of retaliation,

which is illegal."

Mary O'Neill, Acting Regional Attorney of the Phoenix District Office, said: "This case represents a rare lawsuit by the EEOC challenging workplace language restrictions directed at native languages. It is amazing that, in a country that cherishes diversity, an employer will prohibit the use of indigenous languages in the workplace and terminate Native American employees who question whether that is lawful. In fact, in 1990, Congress enacted a statute specifically designed to protect and preserve Native languages."

The lawsuit seeks monetary relief, including back pay with prejudgment interest and compensatory and punitive damages. The Commission is also seeking an injunction prohibiting future discrimination and any other curative relief to prevent the company from engaging in any further discriminatory practices. The EEOC filed suit only after investigating the case, finding that discrimination took place, and exhausting its conciliation efforts to reach a voluntary settlement.

In addition to enforcing Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on sex, race, color, religion, or national origin, the Commission enforces Title I of the Americans with Disabilities Act, which prohibits discrimination against people with disabilities in the private sector; the Age Discrimination in Employment Act of 1967; the Equal Pay Act of 1963; the Civil Rights Act of 1991; and the provisions of the Rehabilitation Act of 1973 which prohibit discrimination affecting people with disabilities in the federal sector. Further information about the Commission is available on the Agency's web site at www.eeoc.gov.

This page was last modified on September 30, 2002.



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Richard Kidman

My name is Richard Kidman. Since 1977, my wife and I have owned and managed a small independent fast food restaurant called RD's Drive-In located in Page, Arizona.

For thirty-one years, we struggled to maintain employee morale at our restaurant by requesting that employees be courteous to one another. One issue that kept causing problems was the use of a second language that was understood only by some of the employees. Some of our employees were bilingual but many, including my wife and myself, speak only English. All our employees however, speak and understand English.

Approximately ten years ago, we began having a very difficult time recruiting new employees and holding on to those we already had. In May 2000, one of our reliable employees gave me an emotional verbal notice that she would no longer be working for me. She explained that some workers were saying terrible things to her on the job. We discovered that some employees were being subjected to verbal and sexual harassment even in our presence because we could not understand the language. Some of our bilingual workers were using their ability to speak a second language as a weapon.

We understood that our business was at risk of being sued if we allowed this hostile environment to continue. We knew we had to act. I asked the employee who gave her notice to please stay and give us a chance to fix the problem and she agreed.

In order to stay in business we had to create a workplace policy that would stop the harassment. My son searched the Internet to find out how to deal with language harassment issues and located the Equal Employment Opportunity Commission's (EEOC) website. There, he found guidelines of when an English-on-the-job policy was permitted. It reads that such a rule is acceptable if "an employer shows that the requirement is necessary for conducting the business. If the employer believes such a rule is necessary, employees must be informed when English is required and the consequences for violating the rule." The guidelines fit our situation perfectly.

We followed the EEOC's guidelines and in June of 2000, we implemented an English-on-the-job policy. We required all employees to read the policy and sign to indicate that they understood the policy and the consequences of violating it. Those individuals who had been harassing other employees signed the policy and changed their behavior. The work environment and employee morale began to improve immediately.

Four employees (three who were bilingual and one who spoke English exclusively) disagreed with the policy and left their jobs. They applied for state unemployment benefits but were denied because the judge determined that they quit RD's without good cause since they spoke English fluently. The four then filed a complaint with the EEOC.

In 2001 the EEOC launched what I consider to be a phony investigation. Some of our employees said they were contacted and encouraged by the EEOC to join a lawsuit against us. Our lead cook turned down such an invitation responding, "Why do I want to sue the Kidmans? They treat me just fine." One employee felt so intimidated by the EEOC's conduct that she left town and went to live with her parents for over a year. Others were told they

could earn a lot of money by joining a lawsuit against us. The lead investigator, Melanie Allison, contacted me in August of 2001 informing me that she had concluded that we were being “racist” and had violated Title VII of the Civil Rights Act and that fines and compensation would be approximately \$30,000. I responded that I would not accept that finding and would be contacting a lawyer.

We retained the services of David Seldon, an employment lawyer in Phoenix. He offered to work with the EEOC to make necessary changes that would be acceptable to the EEOC. The EEOC refused to respond.

A year after the EEOC investigation, we learned from media reports that the EEOC had filed suit against us. It was apparent to me from the very beginning that the EEOC had no intention of going to a jury trial; they wanted to either force us to settle on their terms or to bankrupt us. Either way, they could declare victory. The director of the EEOC’s Phoenix Office, Charles D. Burtner sent a letter dated November 25, 2002 to *The Navajo Times*, the primary newspaper of our customers, saying that our case involved “an assault on employees who speak Navajo in the work place...”¹⁰⁸ This type of public relations warfare hurt our business and some readers called for a boycott of our restaurant.

During the discovery phase of our legal battle, we provided over 100 witnesses who were willing to testify about our language in the workplace problem. The EEOC provided no witnesses beyond the four complainants. We learned that three of the recorded interviews of key individuals taken during the investigation were “mysteriously” lost by the EEOC. We were surprised and dismayed that they would make a determination against us based on paraphrased statements provided by the investigator about those key interviews. Despite the testimony of management and numerous employees that the language issue was a serious problem, the EEOC still considered our policy, which conformed to their guidelines, as discriminatory. It was obvious that the EEOC had a preconceived agenda.

Rather than scheduling a trial, U.S. District Judge Stephen M. McNamee, ordered us to participate in a series of settlement conferences with a magistrate. The first two conferences failed to achieve anything.

Instead of letting the case go to trial the judge ordered us to attend a third settlement conference with a magistrate. By this time our legal bills had escalated well into six figures. Fortunately, a national organization, Pro-English, helped us with legal expenses. Still, we felt pressured to try and reach a settlement because the judge appeared determined to keep the case out of court. We discussed numerous items but reached no agreement.

The next day when we reviewed the proposed settlement draft as emailed to us by the EEOC, we found that things had been added that had never been discussed in conference and in other cases the wording had been changed in ways that would be damaging to us. Our lawyer had left the country that morning and we refused to agree to and sign the settlement without consulting him. The EEOC lawyers attempted to bully us into signing the document immediately.

¹⁰⁸ The Navajo Indian Reservation 1980); Vasquez v. McAllen, 660 F.2d 686 (5th Cir. 1981).

The EEOC was negotiating in bad faith. They were using deceit, thinly veiled threats, and every underhanded tactic they could to get us to agree to a settlement that would allow them to claim a public relations victory and continue to attack us in the media. Due to financial pressure, Mountain States Legal Foundation agreed to take over the task of representing us pro-bono.

We could not agree on terms to repair the settlement so the EEOC filed a new lawsuit against us to compel us to accept their version, claiming that we had agreed to something we had not. We learned it is a big mistake to attend a settlement conference with the EEOC. Judge McNamee rejected most of the EEOC's demands but determined that some key items had been agreed to in conference and ordered a settlement based on those items. From the last page of his order regarding the EEOC's conduct he states,

"The Court must point out that this case does not reach the high water mark of civility among lawyers. The EEOC on more than one occasion, attempted to put terms into the agreement that clearly were not agreed to. It is clear from the documents and witnesses before the Court that certain terms were clearly negotiated out of the settlement agreement, only to be reinstated by the EEOC... Finally the Court notes, that if counsel for the parties had not resorted to unreasonable demands and ultimatums, and if counsel for the EEOC had not continually reinserted terms that were specifically negotiated out of the agreement, the parties would likely have concluded this matter in a manner favorable to both parties."

In early 2007, the 9th Circuit court upheld the judge's order as binding. However, the proceedings established that our English-on-the-job policy was essential to protecting our employees and customers from abuse and vital to running our business. It also established that our willingness to consider rescinding our English-on-the-job policy was based on having the right to reissue it as part of a comprehensive employment policy, subject to EEOC review.

In May 2007 a new policy was created and sent to the EEOC for their review and comment. They acknowledged receipt of the policy, but refused to comment on it within the time frame allowed. To date, we have heard nothing from them regarding our policy. After incurring over \$700,000 in costs, we were denied our day in court by the unethical and underhanded manipulations of the EEOC. Were it not for the generous help of our attorneys, Mountain States Legal Foundation, ProEnglish, and numerous individual contributors, we would be out of business. The EEOC must have spent an enormous amount of money in their effort to bully us. We almost lost our family business simply because we wanted to create a safe environment for our employees by instituting an English-in-the-job policy pursuant to EEOC guidelines.

In closing let me say as a small businessman who strives to earn a living, and do the best I can for my family, my employees, and my community, this experience has left me feeling very mistreated and abused by an agency of my own government.

Linda Chavez

“Specifying English as the Common Language of the Workplace: Every Employer’s Right or Violation of Federal Law?”

December 12, 2008

Thank you, Mr. Chairman, for the opportunity to testify this morning before the Commission.

My name is Linda Chavez, and I am president of One Nation Indivisible. I am also chairman of the Center for Equal Opportunity, a nonprofit research and educational organization that focuses on public policy issues that involve race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation.

I have served as Staff Director of the U.S. Commission on Civil Rights (1983-1985), and Chairman of the National Commission on Migrant Education (1988-1992). In 1992, I was elected by the United Nations’ Human Rights Commission to serve a four-year term as U.S. Expert to the U.N. Sub-commission on the Prevention of Discrimination and Protection of Minorities, and I was Co-Chair of the Council on Foreign Relations’ Committee on Diversity from 1998-2000. I am the author of, among other books, *Out of the Barrio: Toward a New Politics of Hispanic Assimilation* (Basic Books 1991), which dealt with, among other things, the English language movement and Hispanics and language rights.

In our free-market economic system, there should be a strong presumption that employers are left to run their businesses in the way they deem best. The exceptions to this principle are and ought to be limited. An argument that, in particular, a particular policy is simply “unwise” or “unfair” ought therefore to be addressed to the employer, and the decision about whether it is persuasive or not left to the employer or, in cases where a collective bargaining agreement exists, ought to be left to the employer and the union to negotiate.

The obvious possible exception to this principle in the matter we are discussing this morning involves discrimination on the basis of race or ethnicity. There is a national consensus that employers ought not to be allowed to engage in such discrimination, and of course that consensus is reflected in our civil rights statutes, in particular Title VII of the 1964 Civil Rights Act.

Accordingly, the question we ought always to keep before us when we are scrutinizing an employer’s language policies is whether that policy discriminates against an employee because of his skin color or his ethnic group. If the answer is yes, then there is a role for the Equal Employment Opportunity Commission. Otherwise, the EEOC should back off.

Now, it is conceivable that an employer might use language or language proficiency as a pretext for discriminating on the basis of ethnicity. For instance, if an employer in South Texas whose business is grave-digging, and who in the past has expressed his reluctance to hire Mexican Americans, one day announces that he will refuse to hire anyone with a trace of

a non-English accent--well, I'm prepared to believe that his new policy is probably designed to keep out Mexican Americans, and I would support the EEOC investigating the employer and, if it reached that conclusion, bringing a lawsuit.

But the overwhelming majority of employers who want their employees to be able to speak English, and speak it intelligibly to their coworkers and customers, and who want it to be spoken in the workplace, are not doing so because they want to keep members of a particular ethnic group out of the workplace or harass them once they are there. Instead, the employer will have perfectly legitimate and nondiscriminatory reasons for the policy, of which there are many. For example, an employee might revert to a language other than English to insult other employees or customers, or to engage in insubordinate behavior and avoid detection by a supervisor. In one California case on record, a Spanish-speaking employee routinely used Spanish to hurl vicious racial insults at her African American and Asian co-workers, but sued when her employer attempted to enforce an English-on-the-job rule. While an appellate court upheld the employer's right to force employees to speak English on the job, not all courts have come down the same way. And in at least one case, the court's solution to an employer's claim that English was needed to ensure supervisors' ability to monitor whether employees were hurling racial insults was to force the employer to hire bilingual supervisors, which, in effect, forced the company to fire the existing black supervisors who did not speak Spanish.

Let me also say that, even if the EEOC is able to cobble together a "disparate impact" lawsuit against a particular employer, as a matter of its own discretion it should not sue the employer unless the agency thinks it can prove a "disparate treatment" case. I know that, unfortunately, Title VII allows for disparate impact lawsuits, but this doesn't mean that the EEOC has to bring one every time it can. In this language area, in particular, the EEOC's limited time and resources are better spent going after real discrimination. Unlike race, gender, or national origin, language is not immutable but learned. Discriminating against someone because she is a woman, or black, or because she or her parents were born in another country is different from insisting that she learn to type before being hired as a secretary or learn to speak English before being hired to take orders in a fast-food restaurant. And would we support a disparate impact claim if a firm that primarily does business in Latin America refused to hire a sales representative who did not speak Spanish even if such a rule was more likely to exclude white or black employees born and raised in the United States?

I would favor, by the way, legislation that would bar the EEOC from bringing these language-based lawsuits, and certainly where the EEOC can assert only a disparate impact. I would urge this Commission to urge Congress to do pass such legislation. Senator Alexander, as you all know, has played a leading role in supporting a bill like this.

I am not a lawyer, so I don't want to dwell further on the legal analysis here this morning. I am instead attaching two legal analyses that, while somewhat dated, are I think nonetheless very helpful. The paper by Barnaby Zall that my organization published in 2000 does not reflect some more recent, and more problematic, court decisions in this area--a trend fed by the EEOC's unwise policies. (The erroneous equation of language and national origin may also have been fed by Executive Order 13,166, which in turn rests on the disparate-impact

regulations that have been promulgated under Title VI of the 1964 Act--a promulgation which, in the view of the Center for Equal Opportunity, is *ultra vires* and illegal. See <http://www.ceousa.org/content/view/338/96/>.)

What I want to stress, instead, is why as a matter of policy it is a very bad idea for the federal government to be doing anything that discourages English acquisition.

America has always been a multiethnic society, and it is becoming more so. We have always been a nation of immigrants. That is a great strength, but for such a society to work, we must celebrate our unity. We must cultivate our common bonds, and we must be able to communicate with one another. Our common language is the most important social glue that keeps us together.

It does immigrants no favor to remove incentives for their mastering English. Forcing employers to run their workplaces on a multilingual basis is not only dubious as a matter of law, and costly in its economic effect -- it is disastrous as a matter of national policy. The workplace has always played an important role in assimilating new immigrants into American society. It should be encouraged, not discouraged, in playing that role.

For instance, we have urged Congress to provide tax credits and other incentives to employers to teach English to their employees. It would be very odd for the federal government, on the one hand, to urge employers to teach their employees English--while, on the other hand, prosecuting them or other employers when, for nondiscriminatory reasons, they adopted policies that English be spoken.

The overwhelming majority of immigrants expect that they must learn English and are eager to do so.

Thank you again, Mr. Chairman, for the opportunity to testify today. I look forward to any questions you and the other Commissioners may have.

Appendix A: Article from Barnaby Zall, *English in the Workplace: The EEOC's Abuse of Its*

Authority, A Policy Brief, Center for Equal Opportunity, November 2000.

Article constituting Appendix A begins on next page followed by an article by Roger Clegg that constitutes Appendix B.

Appendix A: Barnaby Zall



POLICY BRIEF

November 2000

ENGLISH IN THE WORKPLACE: THE EEOC'S ABUSE OF ITS AUTHORITY

by Barnaby Zall

EXECUTIVE SUMMARY

Many employers prefer their employees to speak English in the workplace—to promote safety and efficiency, for instance, or to avoid workplace tensions. Most employees comply willingly with such rules. But the federal Equal Employment Opportunity Commission (EEOC) believes that such rules are unlawful discrimination on the basis of national origin.

The EEOC has promulgated enforceable rules (called "guidelines") outlawing most requirements that English be spoken on the job. Federal courts, however, are virtually unanimous in rejecting the EEOC position. Some courts have called the EEOC rules "illegal," and almost every employer who fights the EEOC in court comes away victorious.

In some instances, the EEOC position has been taken to extremes. In several cases, for example, the EEOC has sided with employees who sued for the right to hurl vicious racial insults at their coworkers. The employers in those cases won, though they had to go to court to protect their rights to keep their workplaces insult-free.

Nevertheless, the EEOC recently told Congress that it charges, on average, 120 employers a year with violations of these rules. Most of these charges are settled without formal legal action, but about seven employers a year are sued for violating the EEOC rules. Of those cases, too, most are settled.

Based in part on the aggressive EEOC enforcement policy, the Clinton administration has published new civil rights guidelines that treat restrictions on language choice as equivalent to national origin discrimination. In Executive Order 13,166, President Clinton directed all federal agencies to accommodate even a single applicant for benefits or services who doesn't speak English; the federal Department of Justice expanded that idea to all federal grantees through the EEOC rules.

The EEOC policy is illegal and bad public policy. The courts have rejected the EEOC policy, and the agency should not ignore the federal courts. Congress should decide the boundaries of civil rights by passing laws; unelected and unaccountable federal agencies should not make new laws by regulation.

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Introduction

What if one of your best employees came up to you one day and said, "Priscilla is swearing at me"? Could you tell Priscilla to stop swearing at her coworkers?

What if Priscilla was being rude to customers? Could you tell her to be nice? And what if Priscilla was hurling racial insults at her coworker? Could you tell her to stop?

Usually the answer to all these questions is that the employer can stop the worker from using inappropriate language on the job. Employers generally have the power to set the conditions for work, including what employees may say on the job. *Waters v. Churchill*, 511 U.S. 661, 114 S. Ct. 1878, 1886 (1994) (employer may prohibit employees from cursing, and may require them to be polite to customers). And the employer who permits racial insults in the workplace is simply asking to be sued. But the answer is different when the worker is using a language other than English. At least according to the federal Equal Employment Opportunity Commission.

The EEOC and Language Choice on the Job

The EEOC is supposed to protect workers and workplaces against racial and other discrimination. But a worker's choice of language to use on the job has never been considered a protected characteristic, like race, sex, or creed.

Yet, to the EEOC, an employer's rule requiring employees to speak English on the job is presumed discriminatory. The EEOC has been increasingly eager to investigate and charge employers with "national origin" discrimination over workplace language rules. Employers who contest the charges in court almost always prevail, but most such charges are settled administratively. The EEOC is not at all reluctant to issue press releases and otherwise smear employers who want to fight for their rights.

Think the examples used above are just hypothetical? Unfortunately not. Priscilla Garcia was disciplined by her employer, the Spun Steak Company of South San Francisco, for hurling racial insults in Spanish at her Asian and African-American coworkers. These were not mild or ambiguous insults either, but the most vicious and hurtful.

Ken Bertelson, Spun Steak's owner (and himself an immigrant), was faced with numerous complaints from coworkers. He decided that workers should speak English on the job to avoid racial and ethnic tensions (and to assist the federal meat inspector who worked in the plant). Garcia sued, based on EEOC guidelines which say that employers who require English to be spoken on the job are engaging in national origin discrimination. The EEOC joined in Garcia's suit.

The U.S. Court of Appeals for the Ninth Circuit (which includes much of the western U.S.) slapped the EEOC down hard. *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994). The Ninth Circuit upheld the traditional right of employers to decide what can be said in the workplace: "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."

The Ninth Circuit called the EEOC English-on-the-job rules "wrong" and said they were not supported by any act of Congress. The court then rejected the EEOC guidelines, and threw out the Garcia/EEOC lawsuit.

Nevertheless, the EEOC has continued to promote its English-on-the-job guidelines. Perhaps this aggressive approach would be acceptable if requiring workers to speak English on the job were illegal and if the EEOC were really enforcing the antidiscrimination laws. But the EEOC's policy is at odds with the law and, indeed, *Spun Steak* is not the only case that slapped down the EEOC and its restrictions on English-on-the-job rules. Several dozen courts have come to the same conclusion over the last twenty years. The EEOC has told Congress it knows about the universal rejection its positions get in court, but it's going ahead with its enforcement policy anyway.

In other words, the EEOC is aggressively pursuing a policy that it knows is wrong.

Title VII of the 1964 Civil Rights Act

Congress has never passed a statute making workplace language choice an element of the discrimination laws. The basic workplace federal antidiscrimination statute is Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), which reads:

Employer practices: It shall be an unlawful employment practice for an employer:

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

Congress therefore plainly never considered a worker's choice of language one of the "suspect classes" or "protected groups" in the statute it wrote.

Choice of Language As "National Origin" Discrimination

Because choice of language is not mentioned in Title VII, the EEOC had to shoehorn it into one of the listed categories. So it chose "national origin" discrimination. To the EEOC, requiring a worker to speak English is like discriminating against the worker because of the country the worker or his ancestors came from.

"National origin" is not defined by statute, and the legislative history of national origin is "quite meager." *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 88 (1973).

During debate on the 1964 Civil Rights Act, Representative Roosevelt stated: "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." 110 CONG. REC. 2,549 (1964). The Supreme Court says: "The term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza*, 414 U.S. at 88. See also *Pejic v. Hughes Helicopters*, 840 F.2d 667, 672-73 (9th Cir. 1988) (persons of Serbian national origin are members of a protected class under Title VII). "The terms 'national origin' and 'ancestry' were considered synonymous." *Espinoza*, 414 U.S. at 89.

Language is a very poor indicator of ancestry. It is not ordinarily precise enough to indicate a person's national origin. A variety of countries have Spanish as their official language, for example, and many people who speak Spanish (or even a particular dialect) are not from one of those countries. Not only do many people speak Spanish who are not from a particular country, but many people with ancestors from a particular Spanish-speaking country may not speak Spanish themselves. That kind of ambiguity and lack of precision means that an English-only rule, for instance, isn't precise enough to justify the serious consequences of charging an employer with discrimination.

Not surprisingly, the Supreme Court has never said that language is a "proxy" for national origin discrimination. *Sandoval v. Hagan*, 197 F.3d 484, 509 n.26 (11th Cir. 1999), *pet'n for certiorari granted*, Sept. 25, 2000. The lower courts have followed suit. In *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984), the Second Circuit said, "Language, by itself, does not identify members of a suspect class." The Second Circuit recently reaffirmed *Soberal-Perez* in *Toure v. United States*, 24 F.3d 444, 446 (2d Cir. 1994) (rejecting request for multilingual forfeiture notices).

Most other courts agree, including:

- *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) ("The EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin.").
- *Nazarova v. INS*, 171 F.3d 478, 483 (7th Cir. 1999) (permitting deportation notices in English).
- *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973) (permitting English-language benefit termination notices).
- *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975) (civil service exam for carpenters can be given in English).

Only a Few Cases Have Equated Language and National Origin

There have been only a few court decisions that have upheld the equation of language and national origin:

- In *Lau v. Nichols*, 414 U.S. 563 (1974), the Supreme Court held that failure to provide some form of educational assistance to a non-English-speaking child is a violation of the nondiscrimination requirements promulgated by the then-Department of Health, Education and Welfare for Title VI of the Civil Rights Act. This principle was recently applied in *Sandoval v. Hagan*, 197 F.3d 484, 496-97 (11th Cir. 1999), *pet'n for certiorari granted*, Sept. 25, 2000, to strike down Alabama's English-language driver's license exam requirement.
- *Carino v. University of Oklahoma Board of Regents*, 750 F.2d 815, 818-19 (10th Cir. 1984) (employment termination because of foreign accent constituted national origin discrimination).
- *Berke v. Ohio Department of Public Welfare*, 628 F.2d 980-81 (6th Cir. 1980) (refusal to hire because of foreign accent amounted to Title VII discrimination on the basis of national origin).

None of these cases, however, dealt with employers who required workers to speak English on the job. The handful of cases supporting the EEOC's rule in the employment context are discussed on pages 7-8, below. *See also* *Fragante v. City and County of Honolulu*, 881 F.2d 591 (9th Cir. 1989) (rejecting national origin challenge to discrimination on the basis of foreign accent).

The EEOC's English-on-the-Job Rule

Despite near unanimity against it in the courts, the EEOC is enforcing a "guideline" (which has the same force as a regulation) that equates workplace language rules with national origin discrimination. *See, e.g.*, EEOC Guidelines, 29 C.F.R. 1606.7:

TITLE 29--LABOR PART 1606--GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN

Sec. 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.

Ordinarily, courts will defer to a federal agency's expertise in interpreting the law it is charged with enforcing. But more than a dozen federal courts have rejected the EEOC's "guideline" or its underlying presumption of national origin discrimination, including:

- *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) ("The EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin."). The EEOC presented its workplace language guidelines in draft form to the court in *Gloor*, but the court rejected them.
- *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489-90 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994) (permitting English-on-the-job rule and explicitly rejecting EEOC guidelines). *Spun Steak* is currently the leading case on the EEOC guidelines.
- *Gonzalez v. Salvation Army*, 985 F.2d 578 (11th Cir.) (table), *cert. denied*, 508 U.S. 910 (1993).
- *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987) (permitting radio station to choose language an announcer would be required to use).
- *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981) (upholding English-on-the-job rule for non-English-speaking truck drivers).
- *Garcia v. St. Luke's Medical Center*, 660 F.2d 1217 (7th Cir. 1981) (upholding hiring practices requiring English proficiency).
- *Long v. First Union Corp.*, 894 F. Supp. 933, 941 (E.D. Va. 1995) ("there is nothing in Title VII which protects or provides that an employee has a right to speak his or her native tongue while on the job"), *affirmed*, 86 F.3d 1151 (4th Cir. 1996).
- *Gotfryd v. Book Covers, Inc.*, 1999 WL 20925, *8 (N.D. Ill. 1999) (rejecting attempt to use EEOC guidelines to establish hostile workplace).

- *Magana v. Tarrant/Dallas Printing, Inc.*, 1998 WL 548686, *5 (unreported) (N.D. Tex. 1998) (“English-only policies are not of themselves indicative of national origin discrimination in violation of Title VII”).
- *Tran v. Standard Motor Products, Inc.*, 10 F. Supp. 2d 1199, 1210 (D. Kan. 1998) (“the purported English-only policy does not constitute a hostile work environment”).
- *Mejia v. New York Sheraton Hotel*, 459 F. Supp. 375, 377 (S.D.N.Y. 1978) (chambermaid properly denied a promotion to front desk because of her “inability to articulate clearly or coherently and to make herself adequately understood in . . . English”).
- *Prado v. L. Luria & Son, Inc.*, 975 F. Supp. 1349 (S.D. Fla. 1997) (rejecting challenge to English workplace policy).
- *Kania v. Archdiocese of Philadelphia*, 14 F. Supp. 2d 730, 733 (E.D. Pa. 1998) (surveying cases: “all of these courts have agreed that—particularly as applied to multi-lingual employees—an English-only rule does not have a disparate impact on the basis of national origin, and does not violate Title VII.”).

Some Vacated Cases and Lower Courts Support the EEOC

There are four court decisions that support the EEOC’s interpretation equating language and national origin.

But two of these are appellate decisions by Judge Stephen Reinhardt of the Ninth Circuit that were vacated by the U.S. Supreme Court. In other words, these decisions are no longer effective (*U.S. v. Munsingwear*, 340 U.S. 36, 40 (1950) (vacating case “prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences”));

- *Gutierrez v. Municipal Court of the Southeast Judicial District*, 838 F.2d 1031 (9th Cir. 1988) (solution to employees hurling Spanish-language racial insults at coworkers was to fire black supervisors and hire bilingual supervisors), 861 F.2d 1187, 1194 (9th Cir. 1988) (Kozinski, J., dissenting from denial of rehearing *en banc*) (Reinhardt’s proposal to fire supervisors was a “let them eat cake approach” that would exacerbate racial tensions in the workplace), *vacated*, 490 U.S. 1016 (1989).
- *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 947-48 (9th Cir. 1995) (striking down Arizona’s English-as-the-official-language law and finding that, “since language is a close and meaningful proxy for national origin, restrictions on the use of languages may mask discrimination against specific national origin groups, or more generally, conceal nativist sentiment”), *vacated*, 520 U.S. 43 (1997).

Two recent lower court rulings also upheld the EEOC English-workplace guidelines, but the first was in the preliminary stages and does not represent a final decision, and the second contradicts an earlier ruling in the same district:

- *EEOC v. Synchro-Start Products*, 29 F. Supp. 2d 911, 915 n.10 (N.D. Ill. 1999) (on advice of law clerk, judge was “staking out a legal position that has not been espoused by any appellate court”).
- *EEOC v. Premier Operator Services*, 1999 WL 1044180 (N.D. Tex. 1999) (magistrate supports use of EEOC guidelines). This magistrate’s ruling contradicts *Magana v. Tarrant/Dallas Printing, Inc.*, discussed on page 7 above.

Arrayed against the twenty-year record of dozens of rejections by other courts, the four opinions upholding the EEOC interpretation are slim reeds on which to support a nationwide agency policy. The Supreme Court, meanwhile, has repeatedly refused to review appellate court rejections of the EEOC policy, while vacating Judge Reinhardt’s two attempts to reinforce the EEOC.

The EEOC Has No Legal Support for Its Positions

Nevertheless, the EEOC forges on with its own agenda. Faced with the stark reality of court rejection, the EEOC says that the courts are wrong and it is right. The EEOC said that it “disagrees with the decision in *Spun Steak*.” It dismisses *Long* and *Kania* as simply following *Spun Steak*.

The EEOC recently responded to congressional inquiries about its continuing enforcement of the workplace language guidelines. The EEOC cited no case which authorized its guidelines (except for the vacated *Gutierrez v. Municipal Court*, which the EEOC said was still valid). Lacking any judicial support, the EEOC fell back on another federal agency’s support, noting that the Department of Justice had supported the EEOC guidelines when the EEOC attempted to get the Supreme Court to review the Ninth Circuit’s rejection of the guidelines in *Spun Steak*.

In addition, the EEOC suggested that “Congress implicitly approved the guidelines when it amended Title VII in 1991 to clarify the standard for proving disparate impact discrimination.” The EEOC cited a statement by Senator Kennedy “that the guidelines had worked effectively and that the new legislation would not affect them in any way.” 137 CONG. REC. 29,051 (1991). But there is no evidence that any other Senator, let alone a majority of Congress and the President, passed or intended to pass any legislation in 1991 endorsing the EEOC’s interpretation.

The EEOC Continues to Enforce Its Guidelines

EEOC enforcement of the guidelines continues. Seven lawsuits were filed against employers in 1998 (up from nine suits total in the years 1985-93). Like all such suits, most are settled quickly.

The EEOC reports that in 1998 (the last year for which figures are available) it investigated 120 challenges to workplace language rules. This is roughly the same figure as for each of the last ten years. More than two dozen charges were filed in 1998 after investigations (charges are filed if employers do

not immediately acquiesce in EEOC “suggestions” for changes in workplace rules).

Despite the overwhelming judicial rejection of its guidelines, the EEOC continues to enforce its guidelines—even in jurisdictions in which the courts have rejected them! Of the 1998 charges, more than half were in appellate circuits which had rejected the guidelines.

The EEOC explains: “EEOC offices in a jurisdiction that has issued a decision contrary to the guidelines continue to conduct the administrative process pursuant to the guidelines. . . . Of course the EEOC would not file a suit to enforce the guidelines if such suit has been precluded by governing circuit law.”

The net result: Employers who have every right to control the language in their workplaces are intimidated into changing their policies by a federal agency promoting illegal guidelines. Twisting a national consensus against discrimination into a political fight over language choice, the EEOC is undermining both employers’ rights and the legitimacy of federal workplace rules.

Presidential Order Expands the Problem Beyond the EEOC

On August 11, 2000, while flying to the Democratic National Convention on Air Force One, President Clinton vastly expanded this misunderstanding of national origin discrimination by signing Executive Order 13,166. This law requires all federal agencies to provide all services and benefits in languages other than English. Though the scope of the required accommodation of non-English-speakers will depend on particular circumstances, an agency must respond to the request of even a single person who demands the use of a language other than English (even if only by the agency contracting with a telephone translation service). All federal grantees are also subject to the new requirement.

Based on the EEOC position, Executive Order 13,166 says that failure to use languages other than English will be considered national origin discrimination. The Department of Justice, which will review and approve all such agency plans, issued comprehensive policy guidelines equating language and national origin. This policy change expands the EEOC position to every federal agency and recipient of federal funds.

Public Policy Implications of Workplace English Rules

Historically, employers have been able to control the language used in their workplaces. After all, the Supreme Court reasoned in 1994, employers ought to be able to stop employees from cursing and being rude to customers. *Waters v. Churchill*, 511 U.S. 661 (1994).

Many employers are faced with workplace problems based on language choice. In some cases, such as in hazardous occupations, public health and safety is a key issue, and employees must be able to communicate quickly and effectively. *Dimaranan v. Pomona Valley Hospital Center*, 775 F. Supp. 338 (C.D. Cal. 1991) (employee wanted to give patient care in a language patients couldn’t understand). In other cases, there are questions about translations. *Tanforan Park Food Purveyors Council v. NLRB*, 656 F.2d 1358 (9th Cir. 1981) (Samoan translation of ballots may have been incomprehensible or offensive). In

a few cases, language rules are required to prevent discrimination against American workers. *Posadas de Puerto Rico Assocs v. Secretary of Labor*, 698 F. Supp. 396, 398 (D.P.R. 1988) (employers cannot use inappropriate language requirements to ensure that only alien workers will qualify for available jobs). In many cases, employers' rules are based on efficiency or customer preference. *Jurado v. Eleven-Fifty Corp*, 813 F.2d 1406 (9th Cir. 1987) (permitting radio station to choose language an announcer would be required to use).

Gradually, however, employers' decisions over language (as in other areas) became part of larger struggles over political ends. Lawsuits became weapons in policy battles. The EEOC's Guidelines and the Clinton administration's last-minute attempt to expand national origin discrimination into language choice are only the latest of these efforts.

The unfortunate confluence of politics and legal action obscures the fact that language choice, especially the choices which result in greater English fluency, are generally a good thing for employers, employees, and the society in general. Though multilingual fluency may be good for individual advancement, the cornerstone of any government policy should be in assisting as many people as possible to be fluent in English. English fluency is essential for full participation in modern society and, increasingly, in modern international commerce. Economists have demonstrated that English illiteracy is costly to both the worker and society.

Government policies that retard or limit English fluency, on the other hand, have little or no value. While increasing access to government services and benefits may be valuable in the abstract, policy decisions which simply burden government and employers are unwise in the face of alternatives such as increasing English fluency.

The EEOC and Clinton administration position that federal agencies and grantees, and private employers, must provide benefits, services, and workplaces in languages other than English is harmful, in the long run, to those who would be better served by learning English. As has been the case in Israel and a variety of other countries, intensive language instruction can help even adult workers achieve more economically and societally. Employers in the U.S. are learning this lesson as well, and providing English instruction in the workplace is a popular and growing benefit in many service industry companies.

The EEOC Should Be Stopped

The EEOC guidelines are illegal. The Ninth Circuit said as much in *Spun Steak*, 998 F.2d at 1489-90.

The EEOC's equation of language and national origin is wrong. "The EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin." *Garcia v. Gloor*, 618 F.2d at 270.

Every time the EEOC guidelines are tested in court, the agency loses. It can't cite one significant legal source of support for its policy. Yet the EEOC continues to enforce its illegal guidelines against dozens of employers every year.

How can it get away with this? No one will fight it. Most challenged employers cave in without a fight. Though the few who fight the EEOC do end up winning in court, the cost to their reputations and pocketbooks can be

significant. It's just too painful and costly to fight the federal antidiscrimination agency. So the policy continues.

What is needed is either aggressive congressional oversight and budgetary restrictions, or a brave employer to establish a nationwide class-action precedent. Unfortunately, neither seems likely in the near future.

So the EEOC seems likely to continue its lawless ways.

For another Center for Equal Opportunity criticism of the EEOC's policies in this area, see Roger Clegg, "Tongue-Tied," Labor and Employment News (Winter 1998), at 1 (Federalist Society newsletter).

Appendix B: Roger Clegg, "Tongue-Tied," *Labor and Employment News* (Winter 1998)

(Federalist Society newsletter).

<http://fedsoc.server326.com/Publications/practicegroupnewsletters/labour&employment/tongue-laborv2i3.htm>

Tongue-Tied

Roger Clegg [President and General Counsel, Center for Equal Opportunity]

Title VII of the Civil Rights Act of 1964 forbids employers from discriminating on the basis of, among other things, "national origin." To what extent does this prohibition limit an employer's ability to discriminate on the basis of language? Two basic kinds of employer practices are commonly implicated. The first is the requirement that employees speak only English on the job. The second is that the English they speak not be less intelligible because of lack of fluency or a foreign accent.

Logically, of course, language and national origin are distinct. Some people of a particular national origin will desire to speak a non-English language on the job, or will not speak English well, but others will not. Conversely, some people not of that national origin will desire to speak a non-English language on the job, or won't speak English well. Not every Mexican American will want to speak Spanish on the job or will speak English badly or with a Spanish accent. And there will be some people who aren't Mexican Americans who will want to speak a foreign language on the job or who won't speak English well.

The EEOC's Position

The Equal Employment Opportunity Commission's "Guidelines on Discrimination Because of National Origin" are set out in 29 C.F.R. part 1606. Section 1606.1, "Definition of national origin discrimination," begins: "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.*"

The italicized passage has some surface appeal but is also potentially troublesome. It is certainly conceivable that an employer might choose to exclude those with a "physical, cultural or linguistic characteristic of a national origin group" as a means of discriminating against that group. For instance, if an employer refused to hire people with Chinese accents, but not those with Japanese or Spanish accents, then there would be strong evidence that he wanted to exclude applicants of Chinese national origin. But in a disparate treatment case the ultimate question will always be whether national origin was in fact the reason for the exclusion. The fact that a characteristic is merely correlated with national origin is not dispositive. For instance, it may be the case that Italians are, disproportionately, reckless drivers; but it is unlikely that a trucking company intends to discriminate by requiring good driving skills.

Section 1606.6, "Selection procedures," cautions that "Fluency-in-English requirements, such as denying employment opportunities because of an individual's foreign accent, or inability to communicate well in English," "may be discriminatory on the basis of national origin," and thus the Commission "will carefully investigate charges" involving such requirements "for both disparate treatment and adverse impact."

Section 1606.7, "Speak-English-only rules," provides (emphasis added):

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.*

This certainly makes clear that the EEOC doesn't like it when employers require employees to speak English at all times, but it does not explain the Commission's reasoning. What does it mean to say, "The primary language of an individual is often an essential national origin characteristic"? As discussed above, language and national origin are always distinct issues; so, presumably, this says nothing more than that, in the EEOC's view, the two are highly correlated. The quoted passage then twice assumes the conclusion. It simply asserts that prohibiting employees from speaking the language they'd like to speak disadvantages employment opportunities "because of national origin"; and that it may create a hostile atmosphere "based on national origin which could result in a discriminatory working environment."

Disparate Impact

The clear distinction between language and national origin ought to protect most English-only and English-fluency policies from disparate treatment claims, but employers have more to fear from disparate impact lawsuits. There is no doubt, after passage of the 1991 amendments, that disparate impact analysis is available under Title VII for national origin discrimination, and the EEOC regulations and its Compliance Manual explicitly promise to use that approach (in addition to disparate treatment). If the Commission or a private plaintiff can show that an English-only rule or English-fluency requirement has a disparate impact on those with a particular national origin, then the employer must prove "that the challenged practice is job related for the position in question and consistent with business necessity." (1) Thus, the EEOC asserts in 29 C.F.R. 1606.7 (b) that a speak-English-only rule that is applied *only at certain times* may be permissible if "the employer can show that the rule is justified by business necessity." (2)

The EEOC's Compliance Manual—which devotes Section 623 to "Speak-English-Only Rules and Other Language Policies," namely fluency requirements and accent discrimination—outlines the Commission's disparate impact approach in greater detail. According to the manual, "a speak-English-only policy or practice is presumed to have an adverse impact against the affected group"—that is, it will "adversely affect an individual's employment opportunities on the basis of national origin where that individual's primary language is not English"—and "charges of this nature do not require an analysis under the Uniform Guidelines on Employee Selection Procedures." (3) The Compliance Manual discusses some possible business necessity defenses (4), such as productivity and good communication among coworkers, with customers and clients, and with supervisors; the manual is decidedly skeptical about mere customer and coworker "preference" or an employer's desire to improve employees' English-language skills.

Don't Forget IRCA

While Title VII is the most important statute in this area, it is not the only one. The Immigration Reform and Control Act (IRCA) prohibits discrimination against employees on the basis of national origin or because of citizenship status (with some exceptions, the most important being illegal aliens). IRCA is enforced by the Justice Department's Office of Special Counsel for Immigration Related Unfair Employment Practices. This statute applies to businesses with four or more employees, while Title VII applies only to businesses with fifteen or more employees. According to an Office of Special Counsel "Fact Sheet," it brings national origin cases only against employers with from four to fourteen employees, leaving the rest to the EEOC. (5)

The Justice Department agrees with the EEOC that language discrimination can be national origin discrimination. The Office of Special Counsel states flatly in a brochure: "YOU ARE DISCRIMINATING IF YOU ... Demand that employees speak only English on the job." Another brochure says, "National origin discrimination refers to unequal treatment because of nationality, which includes place of birth, appearance, *accent, and can include language.*" That brochure also equates discrimination on the basis of someone appearing to be "foreign"

with national origin discrimination. The Office of Special Counsel has run subway and newspaper ads warning that the "ability to speak fluent English" must not "affect [an employer's] decision about hiring a prospective employee," according to the Manhattan Institute's Walter Olson.

It is not clear that a disparate impact model is available under IRCA. There do not appear to be any judicial decisions recognizing disparate impact, nor any disparate impact cases brought by the government, under IRCA.

Rethinking the Government's Role

The courts have been frequently skeptical of the EEOC's position in this area.(6) Walter Olson has written columns documenting dubious efforts by the government to bar fluency requirements,(7) and the confusion in this area and the aggressiveness of the EEOC also was the subject of a recent Wall Street Journal article.(8)

The fundamental problem with the government's approach is that it assigns a heavy presumption that any language-based policy is a form of national origin discrimination. This is misguided not only logically, but legally and as a matter of policy, too. The Supreme Court has made clear that national origin discrimination means hostility to a particular ancestry, not a general preference for things American or dislike of things foreign.(9)

Finally and most fundamentally: as a policy matter, why should the government assume that an employer who wants his employees to speak English and speak it well is really trying to discriminate against, say, Mexican Americans because of where they came from? Why should it assume that the company doesn't have a legitimate, nondiscriminatory reason for such a policy? Are hardworking employees so plentiful that employers will want to hire them and then antagonize them for no good reason?

In a global economy and multi-ethnic country, it seems especially dubious to have the government second-guessing the private sector's language and communications judgments. Indeed, a fluency requirement could involve a language other than English, in which case its beneficiaries and complainants might be surprising. The EEOC's Compliance Manual, ironically, supplies this example of a business practice some plaintiffs would challenge as a violation of the law, even though there are sound reasons for it in a multilingual society:

R, a movie theater, requires that all of its employees who have contact with the public be bilingual in English and Spanish. [Plaintiffs] allege that R's bilingual requirement has an adverse impact on Blacks. R claims that its bilingual requirement is a business necessity since it is located in a community which is primarily Hispanic and the majority of its customers speak only Spanish.

Rather than harass employers who are unlikely to harbor any national origin animus, the EEOC should hold its tongue.

1. 42 U.S.C. sec. 2000e-2(k)(1)(A)(i).

2. But even then, according to Section 1606.7 (c), the employer must inform its employees of when the rule applies and what the consequences for violating it are—otherwise, "the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin."
3. EEOC Compliance Manual, 165-66, sec. 623.6.
4. Id.170-74, sec. 623.6(d).
5. Cf. 8 U.S.C. 1324b (b)(2) (aimed at preventing overlap in EEOC/Title VII complaints and Office of Special Counsel/IRCA complaints).
6. See Christine Cesare & Lisa Lerner, "English Only" Policies: A Guide for the Perplexed, 10 Emp. L. Strategist 1 (Feb. 1996); Tim A. Thomas, Annotation, Requirement that Employees Speak English in Workplace as Discrimination in Employment under Title VII of the Civil Rights Act of 1964, 90 A.L.R. Fed. 806 (1988 & 1997 Supp.); When Does Adverse Employment Decision Based on Person's Foreign Accent Constitute National Origin Discrimination in Violation of Title VII of the Civil Rights Act of 1964?, 104 A.L.R. Fed. 816; Michael J. Zimmer et al., Cases and Materials on Employment Discrimination 773-82 (1997 & 1998 Supp.); see also Lisa L. Behm, Protecting Linguistic Minorities Under Title VII: The Need for Judicial Deference to the EEOC Guidelines on Discrimination Because of National Origin, 81 Marq. L. Rev. 569 (1998).
7. Anti-Discrimination Ad Absurdum, N.Y. Post, Aug. 24, 1997; Say What?: Civil rights enforcers go after "accent discrimination," Reason, Nov. 1997, at 54.
8. Ann Davis, English-Only Rules Spur Workers to Speak Legalese, Wall St. J., Jan. 23, 1997, at B1.
9. The Supreme Court ruled in *Espinoza v. Farah Manufacturing Co.*, 44 U.S. 86 (1973), that it was not national origin discrimination when a pre-IRCA employer refused to hire a noncitizen. The Court there—per Justice Marshall, with Justice Douglas the only dissenter—endorsed an early EEOC opinion, that "'national origin' refers to the country from which the individual or his forbears came..., not whether or not he is a United States citizen..." (id. at 94, quoting EEOC General Counsel's Opinion Letter, 1 CCH Employment Prac. Guide para. 1220.20 (1967)). The Court had correctly noted, "Certainly the plain language of the statute supports [that] result" (id. at 88), and thought Title VII's legislative history "suggest[ed] that the terms 'national origin' and 'ancestry' were considered synonymous" (id. at 89). What's more, the Court expressly rejected the EEOC's attempt to ban discrimination against foreigners by arguing that it would have a disparate impact on the basis of national origin (id. at 92-95). It would seem to follow that discrimination against all foreign languages and accents doesn't violate the law; only discrimination against a language or accent associated with a particular national origin.

Kerry O'Brien**Senior Manager, Legal Program CASA de Maryland**

The issue of English-only workplace policies is of great concern to the community we serve. As our country becomes increasingly multi-lingual, so do the individuals that make up its workforce. The problems that arise out of these often faulty, over-generalized and misplaced policies jeopardize the safety of many employees who are non-native speakers and raise questions about the true reasons for their implementation.

According to the U.S. Census Bureau roughly 55 million residents age 5 and older speak a language other than English at home. That number eclipses the entire population of countries like Colombia and Argentina. Still, we are seeing more and more employers insisting that their employees speak only English at work. Although the EEOC guidelines allow for the implementation of these policies when they can be shown to be a business necessity, they also make clear the potential harms that must be weighed when making these decisions. English-only rules are viewed by the EEOC as a “burdensome term and condition of employment” with the potential to “create an atmosphere of inferiority, isolation and intimidation based on an individuals’ national origin.” With this perspective in mind, the number of jobs that could qualify under the business necessity provision are limited.

With immigration issues at the forefront of social and political discourse, English-only policies walk a very fine line between justified workplace requirements and unlawful discrimination. At times, the justifications given by employers for these language restrictions are so contradictory that they result in significant employee confusion and frustration. For example, one group of women employed by a retail chain in Maryland expressed their fear that if they were to answer questions from their largely Spanish speaking clientele in anything but English they would be subject to termination. At the same time, they were concerned that clients would complain about the quality of their customer service if they refused to answer their questions in a manner they could understand. In a situation like this it hardly seems necessary for a business to forbid its employees from communicating effectively with its clients. There is no doubt that employers are using these policies to enforce an anti-immigrant point of view, and therefore systematically violating the federal laws of the United States.

A second and perhaps more important issue is that of ensuring that companies are taking adequate measures to protect the health and safety of their employees. English-only policies restrict communication between employees, supervisors and clients. This limitation could severely inhibit the ability of these individuals to protect themselves and each other in emergency situations. Enforcement of English-only rules could result in an employee’s inability to gauge the severity or existence of a health or safety risk until it is too late. The relatively sudden outbreak of English-only workplace policies over the last several years highlights an even bigger issue, which is the implementation of English-only ordinances in cities, counties and towns across the country. In Maryland alone there have been English-only regulations passed or proposed in Frederick County, the town of Thurmont, Walkersville, College Park, and Taneytown, to name a few. These policies serve only to

deepen the hostility between immigrant and non-immigrant communities in these towns and increase the divide that makes integration all but impossible.

Laura Brown

Good morning. My name is Laura Brown and I am an attorney with the D.C. Employment Justice Center. The mission of the Employment Justice Center is to secure, protect and promote workplace justice in the D.C. metropolitan area, and in striving to achieve its mission, the EJC advises, counsels and/or represents over 900 limited English proficient individuals each year in the full range of employment-related legal disputes.

I appreciate the opportunity to testify here today, and I believe that the EJC brings a unique and compelling perspective to this hearing. While others here today, such as my colleague from the EEOC, will no doubt delve into the legal arguments for rightfully prohibiting an employer from imposing an “English-only” rule in its workplace, I wish to add context to these arguments by speaking from my experience of working with clients in the EJC’s workers rights clinics. Simply and practically speaking, “English-only” rules in the workplace are unfair to non-native English speaking workers and, in fact, ultimately undermine the employer’s articulated purposes for implementing them in the first place.

At the Employment Justice Center’s weekly workers’ rights clinics, approximately 40% of the workers we see are limited or not English proficient. The majority of these are native Spanish speakers. A brief examination of the types of work they do and the workplaces in which they labor reveals that an adoption of an “English-only” workplace rule by any of their employers could not be justified by legitimate business necessity and, indeed, would be completely illogical.

The people the EJC sees are construction workers, kitchen employees, maids, janitors, landscapers, nannies, parking attendants, and security guards, among other occupations. Their workplaces are hotels, restaurants, construction sites, office buildings, parking garages, and private homes. These employees are rarely the only employees in their workplaces who speak the same primary language that they do. In fact, the availability of jobs frequently spreads within an ethnic community by word of mouth, resulting in pockets of, for example, Amharic-speaking Ethiopian parking garage attendants, French-speaking Haitian housekeepers, and Spanish-speaking Latino construction workers, landscapers, and banquet servers.

While a customer leaving his or her car at a parking garage in D.C. may be spoken to in English, finding out, for example, when he will return to pick up the car, the most substantive conversation which typically occurs about how and where that car is ultimately parked often takes place in Amharic. Likewise, while an attendee at a banquet in one of Washington’s posh hotels will most likely be served in English, the directions given to the team of servers about logistics, and details like a server’s instruction to his co-worker about bringing more coffee to the table, will likely be in Spanish.

To implement an “English-only” rule in either of these contexts would not only be unfair; it would be disastrous. The workers in both of these contexts deal with customers to some degree, but the vast substance of their work depends on successful communication with their co-workers; requiring them to speak English amongst themselves, even on the job, would lead to confusion and an inability to best serve the customers. While some might opine that this inability to perform work effectively in English should reasonably constitute grounds for dismissal, this is neither reasonable nor realistic in either of these industries, who could not survive without these groups of employees.

The reasons most commonly articulated by employers for implementing “English-only” workplace rules are to improve employees’ English proficiency, promote workplace harmony, enhance the effectiveness of employee supervision, and promote safety and efficiency in the workplace. Implicit in these goals is the assumption that because employees are prohibited from speaking in their own native languages, they will communicate in English. This theory is not born out in the workplace; individuals who are prohibited from speaking their own native languages in the workplace are instead silenced.

This resultant lack of communication exacerbates the problems which “English-only” rules are, according to their proponents, ostensibly being instituted to resolve. When employees don’t talk to each other, non-English speaking minorities are further isolated and marginalized. Certainly, this does nothing to promote workplace harmony. Similarly, isolation and minimal communication does nothing to foster safety or efficiency. A safe and efficient work place is not one in which employees are prohibited from communicating in the language that they speak most clearly and fluently.

Because of the further marginalization which results from their implementation, “English-only” rules do not motivate or provide an incentive for workers to learn English. The importance of learning English is often accompanied by a call to promote the assimilation of ethnic minorities into American society. However, cultural assimilation does not happen by the further marginalization of an ethnic minority; this only serves as a further obstacle to assimilation. Employers who wish to contribute to the assimilation of their ethnically diverse workforces would be more successful if they offered the opportunity for free English classes to their non-English speaking workers, or fostered an atmosphere in which they strived to learn as much Spanish as their employees learned English.

In conclusion, despite the rationalizations for promulgating “English-only” rules, in reality these rules are usually the manifestation of English speaking employers’ discomfort and distrust in managing a workforce that they have come to depend on. We have always prided ourselves as a “nation of immigrants” and as a country with rich cultural traditions which reflect the background of its people. Our society has and continues to evolve and develop through the introduction of new cultures which shape who we are. Rather than implementing “English-only” rules, employers and their workers would be better served if employers could embrace the realities of a multi-cultural workforce and engage in some creative problem-solving with their workforce in order to address some of the communication issues by which they are challenged. Thank you for your time and attention.

Speaker Biographies

Reed Russell

Legal Counsel, U.S. Equal Employment Opportunity Commission

Reed L. Russell has been sworn in as Legal Counsel of the U.S. Equal Employment Opportunity Commission (EEOC), overseeing internal and external policy guidance for the nation's premier civil rights agency. Russell, most recently counsel with the Washington office of Akin Gump Strauss Hauer & Feld, was appointed last month by President Bush.

"We are delighted to welcome Reed Russell as EEOC's Legal Counsel," Chair Naomi C. Earp said. "Reed's professional background, which encompasses legal, military and business experience, renders him uniquely suited to address existing and emerging employment law issues and trends. I would also like to thank Peggy Mastroianni for her diligent work as Acting Legal Counsel during the past four years."

The EEOC's Office of Legal Counsel (OLC) serves as the principal advisor to the Commission on enforcement matters. OLC represents the Commission in defensive litigation and administrative hearings. OLC prepares Commission decisions on charges for which there is no precedent. OLC writes regulations, conducts outreach and education efforts, and coordinates all federal issues affecting equal employment opportunity.

"EEOC's OLC office is involved in analyzing and shaping policy on the cutting-edge EEO issues that affect employers and employees across the country every day," Russell said. "Getting to help shape such policy and work with so many experts on EEO law was an opportunity I could not pass up."

For the past eight years, Russell practiced employment law at Akin, primarily litigating wage and hour and some employment discrimination class actions, as well as handling individual employment discrimination cases and counseling employers on employment practices.

Russell served in the Army Reserves and the National Guard, including an active duty tour in Iraq from June 2005 until March 2006, where he was an advisor to Iraqi Special Police in Ramadi and later Baghdad. He was class valedictorian at Catholic Law School in 1999, and graduated from Wake Forest University in 1991 with a bachelor's in business administration.

Russell and his wife have two young sons, and expect to welcome a baby daughter from South Korea in the spring of 2008.

The EEOC is responsible for enforcing federal laws prohibiting employment discrimination. Further information about the EEOC is available on its web site at www.eeoc.gov.

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Timothy J. Riordan concentrates his practice in litigation, employment, corporate and municipal law. He also serves as general counsel for numerous companies and a suburban park district.

He has tried numerous bench and jury trials in state and federal courts in Illinois and other states involving personal injuries, employment and commercial law. He has also represented clients before various administrative agencies such as the Federal Equal Employment Opportunity Commission, the Illinois Department of Human Rights, and the Federal Aviation Administration.

For example, he has been responsible for a multi-million dollar claim in the Federal Court of Claims for extras on a construction project; a suit in federal court for trademark infringement against a nationally known retailer and sports celebrity; the prosecution and defense of sexual harassment and discrimination claims and claims arising out of non-competition agreements and other aspects of employee-employer relationships.

Mr. Riordan received a B.A. degree in Philosophy from Loras College in 1962 and a J.D. degree from Northwestern University School of Law in 1965.

Mr. Riordan was an Assistant Attorney General for the State of Illinois in the revenue litigation department from 1965 - 1966 and a Special Assistant Attorney General for the State of Illinois specializing in insurance company insolvencies and condemnations from 1969 to 1975.

He has been admitted to practice in Illinois, the United States District Court for the Northern District of Illinois, United States Court of Appeals for the Seventh Circuit, the Illinois Court of Claims, the Circuit Court of White County, Arkansas, the District Court of the District of Massachusetts, the District Court of the District of Arizona, and the United States Court of Federal Claims.

Mr. Riordan is a member of the Chicago Bar Association where he has actively served on various committees, including the Younger Members Committee, Judicial Candidates Committee, Probate Committee, Circuit Court Committee, Federal Court Committee, and the Labor and Employment Law Committee.

K.C. McAlpin

Executive Director, ProEnglish

K.C. McAlpin grew up in Houston, Texas. He is a C.P.A. with an international business degree from the University of Texas at Austin and a master's degree in international management from the Thunderbird Garvin School of International Management in Glendale, Arizona. For several years he worked for an oil company in South America, Central America, and the Caribbean. Later he worked as a financial analyst for a Fortune 500 company and then as international controller for a high-tech company, before turning to public interest work in 1995.

K.C.'s experience working overseas speaking foreign languages made him appreciate the critical role that language fills in promoting empathy and understanding between people. He also became aware of the conflicts that inevitably arise when people are unable to speak a common language. His concern about the erosion of English as the common language in the United States led him to join and become active in ProEnglish, a national non-profit organization dedicated to preserving English as our common language and to making it the official language of the United States. He was named the organization's executive director in 2000.

Media Experience

K.C. has appeared frequently as a guest on radio and television programs including ABC's "Good Morning America;" Fox Morning News; CNN News; CSPAN; National Public Radio; CNBC; CNN's "Both Sides" with host Jesse Jackson, and "The Lou Dobbs Show;" MSNBC's "Connected Coast to Coast;" and numerous other media programs. K.C. can be reached for media programs at (703) 816-8821.

Richard Kidman

Richard Kidman of RD's Drive-In in Page, Arizona is the defendant in *EEOC v. Kidman*, in which the EEOC brought suit under Title VII over an English-only policy governing employees at the restaurant.

Linda Chavez

Linda Chavez is chairman of the Center for Equal Opportunity, a non-profit public policy research organization in Sterling, Virginia. She also writes a weekly syndicated column that appears in newspapers across the country and is a political analyst for FOX News Channel. Chavez authored *Out of the Barrio: Toward a New Politics of Hispanic Assimilation* (Basic

Books 1991), which the Denver Post described as a book that “should explode the stereotypes about Hispanics that have clouded the minds of patronizing liberals and xenophobic conservatives alike.” National Review described Chavez’s memoir, *An Unlikely Conservative: The Transformation of an Ex-Liberal* (Basic Books 2002), as a “brilliant, provocative, and moving book.” Chavez’s latest book, *Betrayal: How Union Bosses Shake Down Their Members and Corrupt American Politics* (Crown Books, 2004), describes how unions divert hundreds of millions of dollars into political campaigns, often without their members’ knowledge or permission, and the public policy consequences that ensue. In 2000, Chavez was honored by the Library of Congress as a “Living Legend” for her contributions to America’s cultural and historical legacy. In January 2001, Chavez was President George W. Bush’s nominee for Secretary of Labor until she withdrew her name from consideration.

Chavez has held a number of appointed positions, among them Chairman, National Commission on Migrant Education (1988-1992); White House Director of Public Liaison (1985); Staff Director of the U.S. Commission on Civil Rights (1983-1985); and she was a member of the Administrative Conference of the United States (1984-1986). Chavez was the Republican nominee for U.S. Senator from Maryland in 1986. In 1992, she was elected by the United Nations’ Human Rights Commission to serve a four-year term as U.S. Expert to the U.N. Sub-commission on the Prevention of Discrimination and Protection of Minorities.

Chavez was also editor of the prize-winning quarterly journal *American Educator* (1977-1983), published by the American Federation of Teachers, where she also served as assistant to AFT president Al Shanker (1982-1983) and assistant director of legislation (1975-1977).

Chavez serves on the Board of Directors of ABM Industries, Inc., Pilgrim’s Pride, and IDT Capital, a subsidiary of IDT Corporation, as well as on boards of several non-profit organizations. Chavez is also active in the Republican Party and chairs the Latino Alliance, a federally registered political action committee.

Chavez was born in Albuquerque, NM, on June 17, 1947, received a Bachelor of Arts degree from the University of Colorado in 1970. She is married and is the mother of three sons. She currently lives in Purcellville, Virginia.

Kerry O’Brien

Senior Manager, Legal Program at CASA de Maryland

Kerry O’Brien is Senior Manager of the Legal Program at CASA de Maryland. From 1998 to 2005, she was engaged in building and growing the District of Columbia’s first workers’ rights center. From 1998 to 2000, she was the Crowell & Moring Equal Justice Works fellow at Bread for the City, where she started an employment practice. In 2000, she co-founded the D.C. Employment Justice Center with Judy Conti and was co-director until 2005. The EJC is an employment rights center for low-wage workers which provides legal services, mainly through a weekly Wednesday workers’ rights clinic, advocates for positive workplace laws

and organizes workers to build power. Kerry and Judy were named Lawyers of the Year by the Metropolitan Washington Employment Lawyers Association and also won fellowships from the Echoing Green Foundation for social entrepreneurship. She was also a rule of law liaison for the American Bar Association in Yerevan, Armenia, and a campaign coordinator at the Service Employees International Union. She is a 1998 cum laude graduate of Georgetown University Law Center and a 1992 graduate of the University of Texas at Austin. She is proficient in Russian and Spanish, and in 2008, completed a course at the Academia Espanol in Medellin, Colombia. She is licensed to practice law in Maryland and D.C.

Laura Brown

Managing Attorney, Legal Services

Laura Brown joined the D.C. Employment Justice Center as the Legal Services Managing Attorney in September 2008. She has overall responsibility for managing the EJC's Workers' Rights Clinic. Prior to coming to the EJC, Laura was a staff attorney at Quality Trust for Individuals with Disabilities in Washington D.C. Laura has also worked as an associate at the law firm of Woodley & McGillivray, a Washington D.C.-based law firm specializing in federal wage and hour cases and union representation, and as a staff attorney/business agent with UNITE HERE Local 25, the hotel and restaurant employees' union in D.C. As a student at Santa Clara University School of Law, Laura both volunteered and clerked at the Workers' Rights Clinics of the Employment Law Center in San Francisco, the program on which EJC's legal services program was modeled. Laura is a member of the District of Columbia and California bars.

Statements of Commissioners

Abigail Thernstrom

STATEMENT OF COMMISSIONER THERNSTROM English Only Policies In the Workplace

The question of the rights of employers to demand that employees speak English is not easily resolved. Title VII of the 1964 Civil Rights Act makes it unlawful for an employer “to discriminate against any individual . . . because of such individual's race, color, religion, sex or national origin.” There is, however, no settled definition of discrimination.

The statutory provision bars policies or practices that impose particularly heavy burdens on members of protected groups that cannot be defended as a business necessity and operate as barriers to equality in workplace. Are there objective criteria that can be used to measure such unacceptable burdens?

Specifically, with respect to English-only policies, is a prohibition on expressions of cultural identity a burden as defined by Title VII?¹⁰⁹ If so, there would seem to be a statutory right of employees to speak the language of their choice in the workplace. And, likewise, there would be an entitlement to other expressions of cultural identity. They might include dress and hairstyles that at least some employees believe to be central to their cultural self-definition. But are judges and federal agencies likely to be good arbiters in deciding questions of cultural identity? Do they have some special expertise when it comes to identifying the values or practices that are integral to the culture of a racial, ethnic, or other protected group?

The answer, I think, is clearly, no. What aspects of cultural identity should be protected in the workplace is not a matter of rights; it is one that should be negotiated and decided by the parties involved on the basis of facts and priorities in particular contexts. Indeed, within specific companies, rules that seem legitimate in one corner of the business are likely to be less so in another. To take the clearest example, chitchat in the lunchroom is different than dealing with a customer who expects to be able to converse in English.

To turn the expression of cultural identity into a protected right is to start down a road that leads to a place we do not want to be – namely, a more segregated America. Ethnic culture should not be equated with race; the one is fluid, the other immutable, and to conflate the two exacerbates the sense of group differences that is already too high. Moreover, broadening the

¹⁰⁹ The phrase “cultural or linguistic characteristics” appears throughout this briefing report. I use the more compact term “cultural identity.”

category of protected rights risks creating a society in which Latinos and others are less likely to acquire a skill essential to economic mobility. English is the lingua franca of their adopted country; they need to know it.

Most Americans believe in racial integration, but of a pluralistic sort. That is, they want an end to segregation -- policies that perpetuate a racial and ethnic hierarchy. But their ideal is not the eradication of all group differences – an end to any sense of group distinctiveness, group loyalties, and cultural pride.

Thus, they have no problem when Latinos choose to cluster in certain residential areas; they enjoy Korean and Indian restaurants that enrich the American palate, and they celebrate the electrifying beauty of the Tango and that of jazz, one of the great contributions of African Americans to American culture. But they also believe that the assertion of group distinctiveness in a pluralistic society has its limits. There are contexts – some workplaces among them – in which employees free to speak Spanish (the most obvious example) hurts the business. That is, in some contexts, employees, when on the job, need to be (for want of a better description) just plain Americans. Individual self-expression cannot always be honored in the workplace.

The language of Title VII stresses discrimination that deprives individuals of “employment opportunities.” I would confine its scope (with few exceptions) to circumstances in which anti-discrimination laws serve the function of ending status distinctions based on race and other ascribed characteristics. Their point should be to end patterns of domination and exclusion and to open doors without regard to race, ethnicity, and other group identities.

Policies that prohibit behavior, when it is a matter of individual choice, are not discriminatory. They do not block opportunity. They insist only that employees comply with workplace rules – a decision in their hands. Those rules may reduce the comfort level of, say, Latinos on the job, or of women or men who are forced to conform to a dress code. But Title VII does not promise cultural comfort.

If group members can voluntarily change their behavior by speaking English when they prefer Spanish, or can adopt a conventional hairstyle when they are happier with an “ethnic” one, they have not been denied opportunity within the meaning of civil rights statutes. Depending on the circumstances, they may suffer from offensive cultural intolerance, but that intolerance is not legally proscribed discrimination.

Indeed, a ban on English-only policies has its potential downsides for Latino employees. Some may find the pervasive use of Spanish as coercive. Bilingual workers may feel pressure to identify themselves as part of the group more strongly than they would otherwise wish.

Other employees will experience assimilationist pressures as coercive. Yet complex pluralistic societies demand a high degree of cultural assimilation. It is the glue that makes pluralism work. The alternative is separation, conflict, and cultural intolerance – precisely that which civil rights statutes are in part designed to prevent.

Striking the right balance between assimilation and expressions of cultural identity is not a goal that lends itself to clear-cut legal rules. Legal formulas are not necessarily the best way to organize a complex, diverse society. Not all desirable policies need be codified into law. To argue, as I have, for a limited reading of the protection that Title VII provides is not to suggest that employers themselves should not try to accommodate employees who see their native language as an important part of their cultural identity. I argue for a diversity of policies fashioned in a diversity of settings – fluid rules that address a changing workplace and a changing workforce.

Dissent

Martin R. Castro, Roberta Achtenberg, Dina Titus

Dissent Statement of Chairman¹¹⁰ Martin R. Castro, Commissioner Roberta Achtenberg and Commissioner Dina Titus

“At a time when the national need dictates that we should be increasing the exposure of our citizens to other languages and cultures, that exposure is declining. Cultural isolation is a luxury the United States can no longer afford, but we are nevertheless, culturally isolated.”

U.S. Senator Paul Simon¹¹¹

These words were written originally by Senator Simon in 1980, and are just as true now as they were then—indeed, even more so. We cannot view language in the parochial way we have in the past, especially when our global competitors have populations that are increasingly multi-lingual and multi-cultural.

We also cannot view English-only rules in the workplace in isolation from national origin discrimination, from the broader issue of the need and desire of limited English proficient persons to learn English, from efforts by the local, state and federal governments to legislate language primacy, or from English-only as a reaction to immigration.¹¹² As stated by Kerry O’Brien of CASA de Maryland, “There is no doubt that employers are using these policies to

¹¹⁰ Martin R. Castro was designated Chairman by President Obama on March 9, 2011. On March 11, 2011, the President’s designation received a unanimous concurrence from the Commission’s members.

¹¹¹ Simon, Senator Paul. *The Tongue – Tied American—Confronting the Foreign Language Crisis*. New York: Continuum, 1980, reprinted 1992, at 1-2.

¹¹² See, Alex Johnson, *Pro-English Measures Being Revived Across U.S.*, MSNBC, Jun. 15, 2009, available at www.msnbc.msn.com/id/31176525/ns/us_news-life/. The agenda set forth by panelist K.C. McAlpin’s organization, ProEnglish, includes: (1) Adopting laws or constitutional amendments declaring English the official language of the United States, and of individual states; (2) Defending the right of individual states to make English the official language of government operations; (3) Ending bilingual education (e.g. foreign language immersion) programs in public schools; (4) Repealing federal mandates for the translation of government documents and voting ballots into languages other than English. Available at: <http://proenglish.org/about-us/mission>.

enforce an anti-immigrant point of view, and therefore systematically violating the federal laws of the United States.”¹¹³

While we were not members of the Commission at the time of the briefing or of the vote on the Report, we feel that the importance of this issue requires that we comment on the Report, its conclusions, and on the substantive issue of English-only policies in the workplace. We wish to thank our Republican and Independent colleagues for supporting our wish to have this statement included in the Report.

The narrow issue presented in the Report should be whether the Equal Employment Opportunity Commission’s (“EEOC”) Guideline on “Speak English Only Rules” is properly tailored to address discrimination in the workplace.¹¹⁴ We believe the EEOC Guideline is purposely crafted to address situations of discrimination, while at the same time allowing an employer to utilize tailored, rather than blanket, English in the workplace policies to address effective job performance, work-related communications with customers or other employees, cooperative work assignments, supervision and safety.¹¹⁵ Any concern raised by the pro-English only witnesses would be adequately addressed by the Guideline.

Is the English language at risk?

We believe that the real underlying reasons for most of these English-only policies in the workplace are not the reasons indicated in the Findings, such as “protecting employees from ethnic slurs,” “supervising employees,” or “providing a friendly and courteous atmosphere for customers.” Rather, the real reason for these workplace rules is a false belief that the English language is under siege by more recent arrivals to this country who are not assimilating—and do not want to assimilate—and that English-only rules will force these persons to learn English.

¹¹³ “English Only Policies in the Workplace” (“Report”), p. 44.

¹¹⁴ 29 C.F.R. § 1606.7 (2010) (“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.

¹¹⁵ Briefing Transcript (Dec. 12, 2008), p. 20-1 (Reed Russell speaking).

According to the U.S. Census Bureau, more than 95% of the population five-years of age or older speaks English at least “well,” with more than 91% of the population speaking it “very well.”¹¹⁶ This should be no surprise, as few immigrants who come to this country could fail to appreciate the value of learning English. Latinos, for example, overwhelmingly want to learn English.¹¹⁷ According to the Pew Hispanic Center, 92% of Latinos believe “it is very important that English be taught to children of immigrant families.”¹¹⁸

Unfortunately, these unfounded fears are not new to our country. We have a long history of English-only reactions to past waves of newcomers,¹¹⁹ However, each succeeding generation of immigrants not only integrates into society and masters English, but the primacy of English remains intact. The same is the case now. Today’s immigrants are learning English as quickly, if not more so, than past generations.¹²⁰

There is a relationship between National Origin Discrimination and Language Use

The Report largely treats national origin discrimination as an afterthought. This is captured perfectly in the Executive Summary which simply deems English-only policies as “attempt[s] to supervise ... bilingual employees”¹²¹ and then proceeds to lay out a series of rhetorical questions asking what policies are permissible for the EEOC and employers, and what the side effects of these policies could be.¹²² Lost from the discussion is a serious

¹¹⁶ “Language Use in the United States: 2007,” American Community Survey Reports (Apr. 2010), available at: www.census.gov/hhes/socdemo/language/data/acs/ACS-12.pdf.

¹¹⁷ According to “Language Rights: An Integration Agenda for Immigrant Communities,” a briefing book co-authored by the Mexican American Legal Defense and Educational Fund and the Asian American Justice Center, the largest non-English language group in the U.S. is Spanish-speakers. Language Rights: An Integration Agenda for Immigrant Communities,” (June, 2008), p. 5, available at: http://www.maldef.org/resources/publications/language_rights_briefing_book_June%202008.pdf.

¹¹⁸ “Hispanic Attitudes Toward Learning English,” Pew Hispanic Center, Fact Sheet, June 7, 2006, available at: <http://pewhispanic.org/files/factsheets/20.pdf>.

¹¹⁹ For instance, in the late 19th and early 20th Century—well-before U.S. entry into the First World War—there was pervasive anti-German sentiment in parts of the United States. The state of Wisconsin, went so far as to enact legislation mandating that all schools in the state, including parochial schools, conduct their classes only in English. “Americanization and the Bennett Law,” Wisconsin Historical Society, available at: http://www.wisconsinhistory.org/turningpoints/tp-031/?action=more_essay.

¹²⁰ “The very high immigration level of the 1990s does not appear to have weakened the forces of linguistic assimilation. Mexicans, by far the largest immigrant group, provide a compelling example. In 1990, 64 percent of third-generation Mexican-American children spoke only English at home; in 2000, the equivalent figure had risen to 71 percent.” Richard Alba, *Language Assimilation Today: Bilingualism Persists More Than in the Past, But English Still Dominates*, (Dec. 2004), p. 1, available at: mumford.albany.edu/children/reports/language_assimilation/language_assimilation_brief.pdf. Despite the interest amongst immigrants to learn English, one factor that may be slowing the rate of language acquisition among present-day immigrants is a lack of supply of English-as-Second-Language (“ESL”) programs. Despite the increases in the immigrant population in recent decades, there have been reductions in the funding and availability of these programs. As a result, ESL supply has not only failed to keep up with increased demand, but has been moving in the opposite direction. See, Dowell Myers & John Pitkin, *Assimilation Today*, (Center for American Progress, Sept. 2010), p. 21, available at: www.americanprogress.org/issues/2010/09/pdf/immigrant_assimilation.pdf

¹²¹ Report, p. 1.

¹²² Id., p. 2.

acknowledgment that discrimination on the basis of national origin is a real and continuing problem.¹²³

In *Lau v. Nichols* the U.S. Supreme Court made clear that, for purposes of enforcing the Civil Rights Act of 1964 (“CRA”), language and national origin are interrelated.¹²⁴ The Court held that Chinese-speaking students “receive fewer benefits than the English-speaking majority from [their] school system which denies them a meaningful opportunity to participate in the educational program” and that this denial of opportunity was prohibited by Title VI of the CRA.¹²⁵ This interpretation of Title VI had been advanced by the Department of Health Education and Welfare (“HEW”). Additionally, HEW took the position that such “discrimination is barred which has that *effect* even though no purposeful design is present.” The *Nichols* Court also accepted this discriminatory effect, rather than discriminatory intent standard.¹²⁶

In 2000, President Clinton issued Executive Order No. 13166, which reaffirmed the Executive Branch’s commitment to addressing policies with discriminatory impacts. Executive Order 13166 also reaffirmed the Executive Branch’s understanding that there exists a strong connection between language use and national origin, in the context of enforcing prohibitions on national origin discrimination.¹²⁷ In the wake of *Alexander v. Sandoval*,¹²⁸ there was some thought that the then-recently inaugurated Bush Administration might abandon the use of indirect enforcement modalities such as Executive Order 13166 and the EEOC’s English-only Guideline. The Bush Administration however, ultimately did not seek to challenge Executive Order 13166 or the *Lau v. Nichols* precedent, but instead reiterated the government’s support for the use of indirect methods of civil rights enforcement.¹²⁹ The Obama Administration recently reaffirmed the mandate of Executive Order 13166.¹³⁰

Deficiencies in the Briefing, the Report and its Findings and Recommendations

We believe that the briefing relied on a set of witnesses that were not able to provide a sufficiently diverse and thorough treatment of the briefing’s topic. Two of the English-only supporters, Mr. Riordan and Mr. Kidman, were on the defendants’ side of employment

¹²³ Statistical data regarding national origin discrimination charges can be found on the EEOC’s website here: <http://www.eeoc.gov/eeoc/statistics/enforcement/origin.cfm>.

¹²⁴ 414 U.S. 563 (1974).

¹²⁵ Id. at 568.

¹²⁶ Id.

¹²⁷ Text of the Executive Order *available at*: <http://www.justice.gov/crt/about/cor/Pubs/eolep.pdf>

¹²⁸ 532 U.S. 275 (2001) (Denied the right of private action for discrimination suits brought under Title VI on a disparate impact basis).

¹²⁹ See, Memorandum from Assistant Attorney General Ralph Boyd (Oct. 26, 2001) (Discussing the Administrations support for Executive Order 13166), *available at*: www.justice.gov/crt/about/cor/lep/Oct26memorandum.pdf. Linda Chavez’s written statement also makes reference to a letter that her organization prepared which criticized the Bush Administration for its support of disparate impact enforcement. See Letter to Merrily Friedlander from Edward Blum & Roger Clegg, (Feb. 14, 2002), *available at*: www.ceousa.org/content/view/338/96/.

¹³⁰ Memorandum from the Attorney General (Feb. 17, 2011), *available at*: www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf

lawsuits and a third, Mr. McAlpin, was also involved with Mr. Kidman's lawsuit. As a result, the Commission received rather anecdotal accounts of two lawsuits presented by highly interested parties. Were these accounts just a small part of the record upon which the Report is based, this might not be a problem. Unfortunately the Commission did not gather fuller and broader accounts of English-only litigation issues—and then went on to approve a Report that rests on such an inadequate record. We believe that Commission investigations can be enriched by hearing from those on the defendants' side of lawsuits, but this must be just one perspective among many that the Commission needs to include in order to get a well-rounded account of an issue. The fact that the Commission invited such a narrow and overlapping set of English-only proponents probably struck the groups who declined to participate as indicative of a lack of interest on the part of the Commission to adequately cover the serious issue of national origin discrimination.¹³¹

Finding #1 notes that Title VII prohibits certain forms of discriminatory practice by employers, but that the statute was not meant to otherwise infringe on the creation of workplace rules. The EEOC Guideline, however, recognizes both the need to prohibit employers from engaging in discriminatory practices as well as the right of employers to establish non-discriminatory workplace practices. The fact that the Guideline expresses these dual interests is not mentioned in this finding.

Finding #2 inaccurately characterizes the legal status of the EEOC's Guidelines. By implying that the Guidelines only have a *de facto* effect and only in the absence of litigation, the Finding suggests that the Guidelines do not carry any weight in a court of law. This is simply not the case.¹³²

Finding #3 ignores the testimony of Reed Russell, leaving the impression that the EEOC is singling out the English language. Mr. Russell, however, testified that the legal reasoning behind the EEOC Guideline is equally applicable to any other "[fill in the blank]-only" language policies that have a discriminatory effect.¹³³ In light of Mr. Russell's explicit rejection of the premise underlying this Finding, we do not think that this Finding is supported by the record established at the briefing.

Finding #4 notes that courts are divided over the EEOC's English-only Guideline. We believe it is worth noting that this Finding accurately notes that there are only a few cases

¹³¹ As noted in the report, the Commission sent invitations to: Kerry O'Brien, Senior Manager for the Legal Program of CASA de Maryland; Laura Brown, attorney, D.C. Employment Justice Center; the Mexican American Legal Defense Fund; the Asian American Legal Defense and Education Fund; the League of United Latin American Citizens; the Lawyers Committee for Civil Rights under Law; National Council of La Raza; the ACLU Immigrants Rights Project; and the Institute of Politics at Harvard University's John F. Kennedy School of Government. Report, p. 2 n3.

¹³² "In evaluating this contention it should first be noted that Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title. This does not mean that EEOC guidelines are not entitled to consideration in determining legislative intent. But it does mean that courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law or to regulations which under the enabling statute may themselves supply the basis for imposition of liability." *General Electric v. Gilbert*, 429 U.S. 125, 141 (1976) (Citations omitted).

¹³³ Briefing Transcript (Dec. 12, 2008), p. 97.

that directly address and challenge the EEOC's Guideline. By contrast, Mr. McAlpin claimed that in more than 20 cases, courts rejected the EEOC Guideline.¹³⁴ An examination of the cases listed by Mr. McAlpin quickly reveals that most have little or nothing to do with the EEOC Guideline or they are consistent with the Guideline's acceptance of limited English-only or language proficiency requirements.¹³⁵

Finding #5 is problematic in several ways. First, the Finding promotes as "good reasons" to adopt English-only policies: "the need to provide customers and other employees with a friendly and courteous atmosphere in which they need not worry about the possibility that they are being spoken of in a discourteous manner." In essence, this putative "good reason" opens the door for employers to discriminate against people on the basis of alleged customer or employee discomfort with people of particular national origins. Second, the Finding asserts without any substantiation that a "significant number" of employers have valid need for English-only rules and that the EEOC Guideline chills their adoption of these rules. No

¹³⁴ Report, p. 23, 28-30.

¹³⁵ Many of the cases cited by Mr. McAlpin make the point that language use is not synonymous with national origin. This is true, but also beside the point. As mentioned above, in *Lau v. Nichols*, the Supreme Court held that language was closely related to national origin. As a result, policies and practices that had a discriminatory effect on people because of their language use could run afoul of the CRA's prohibition of discrimination on the basis of national origin. The cases in Mr. McAlpin's list which note that language use and national origin are not interchangeable are: *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980); *Pemberthy v. Beyer*, 19 F.3d 857 (3d Cir. 1994); *Velasquez v. Goldwater Mem'l Hosp.*, 88 F.Supp.2d 257 (S.D.N.Y.2000); *E.E.O.C. v. Beauty Enterprises, Inc.*, 361 F.Supp.2d 11 (D.Conn. 2005); *Napreljac v. John Q. Hammons Hotels, Inc.*, 461 F.Supp.2d 981 (S.D. Iowa, 2006) [*Napreljac* is also a language proficiency case]; *Brewster v. City of Poughkeepsie*, 447 F.Supp.2d 342 (S.D.N.Y., 2006).

Another set of cases on his list are language proficiency cases. As long as it is an actual business necessity (i.e. not a pretext), employers can require that their employees have a certain level of language proficiency. Such a requirement could have a (permissible) disparate impact on would-be employees—including native-born English-speakers in instances where the language required is something other than English. The cases on his list that make this point are: *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981); *Hannoon v. Fawn Eng'g Corp.*, 324 F.3d 1041, (8th Cir. 2003); *Dalmau v. Vicao Aerea Rio-Grandense, S.A.*, 337 F.Supp.2d 1299 (S.D.Fla.,2004); *Tippie v. Spacelabs Medical, Inc.*, 180 Fed.Appx. 51, 2006 WL 1130809, 98 Fair Empl.Prac.Cas. (BNA) 320, C.A.11 (Fla.), April 27, 2006 (No. 05-14384); *Napreljac v. John Q. Hammons Hotels, Inc.*, 461 F.Supp.2d 981 (S.D. Iowa, 2006) [This case is also a language/nation origin equivalency case].

Other cases cited by Mr. McAlpin feature limited English-only policies which, depending on the circumstances, can comport with the EEOC Guideline. Those cases are: *Olivarez v. Centura Health Corp.*, 203 F.Supp.2d 1218 (D.Colo.2002); *Cosme v. Salvation Army*, 284 F.Supp.2d 229, (D.Mass.2003); *EEOC v. Sephora*, 419 F. Supp. 2d 408, 416, 417 (S.D.N.Y. 2005). Additionally, a couple other cases merely restate the EEOC Guideline without rejecting it: *Barber v. Lovelace Sandia Health Systems*, 409 F.Supp.2d 1313 (D.N.M., 2005); *EEOC v. Synchro-Start Products, Inc.*, 29 F. Supp. 2d 911 (N.D. Ill., 1999).

Additionally, Mr. McAlpin's list features a New Jersey state court opinion interpreting state law, not the EEOC Guideline: *Rosario v. Cacace and Desantis*, 337 N.J. Super. 578 (App.Div., 2001); a Title VI case dealing with government documents printed in English: *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983); and a case that distinguishes a person's citizenship from his or her national origin, allowing certain preferences to be given to people with U.S. citizenship: *Espinoza v. Farah Mfg Co.*, 414 U.S. 86 (1973).

In the end, only three of Mr. McAlpin's "more than twenty" cases—the three cases noted in Finding #4—are on point and in conflict with the EEOC Guideline.

recognition is given to the discriminatory impact these rules might have or to the possibility that pretextual use of these “good reasons” could lead to employee discrimination. The EEOC Guideline is well-tailored to address those instances where English-only workplace policies are needed, while also making clear that English-only policies can have a discriminatory intent or effect and, therefore, must be implemented only when needed.

Finding #6 makes the unsubstantiated assertion that English-only policies are rarely adopted for the purposes of “harassing, embarrassing, or excluding” people. Nothing is cited to support this claim. Based on this Finding and the others before it, all an employer would need to do to create a safe harbor would be to claim that he or she was merely adopting a policy in order to provide a “friendly atmosphere.” Such a situation would greatly undermine civil rights enforcement.

Recommendations #1 and #2 display either a lack of understanding of, or indifference to, the continuing presence of discrimination in our society, and to the practical challenges of rooting out discriminatory conduct and policies. The EEOC Guideline is cognizant of the fact that gross and overt discrimination has diminished, but that subtle and covert discriminatory practices continue. The Guideline is consistent with other practical, indirect methods adopted by the government and accepted by the courts in order to eliminate persistent or evolving instances of discrimination.¹³⁶ The close relation between the language a person speaks and his or her nation of origin is recognized both by common sense and by the law.¹³⁷ At the same time, language use is not identical with national origin, and as a result there are circumstances in which it can be subject to prohibition in a manner in which a person’s national origin may not. Section 1606.7 embodies these reasonable distinctions, and so we believe that the EEOC should, therefore, continue to maintain the Guideline.

In addition, we do not support the recommendation that Congress should narrow in any way the scope of Title VII of the Civil Rights Act of 1964. Were Congress to limit Title VII as suggested in Recommendation #2, it could engender substantial amounts of discrimination on the basis of national origin, whether inadvertently or by resort to pretext.

Constructive Recommendations

Rather than allowing for employers to have the unfettered ability to enact potentially discriminatory work-place rules, we should examine other methods to address the real or perceived concerns raised by the proponents of English-only rules. As mentioned above, the concerns of English-only proponents extend beyond that of ensuring safe and productive workplaces.¹³⁸ For instance, we should work together to provide constructive and accessible methods by which persons can learn English, quickly, effectively and proficiently. We need to increase, not reduce, the resources that provide English acquisition programs to students in our elementary and secondary schools, as well as to adult learners. We should identify, disseminate and fund best practices in English acquisition that may exist for teaching English. We should

¹³⁶ See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (Establishing the use of disparate impact analysis for Title VII cases).

¹³⁷ *Lau v. Nichols*, supra Note 13.

¹³⁸ Concerns already addressed by the balanced approach taken by the EEOC Guideline.

enact legislation which would support the learning of English for all ages and groups, and assist local communities to better integrate new immigrants.¹³⁹ We also agree with Linda Chavez that there should be tax incentives for employers who offer English acquisition programs for their employees.¹⁴⁰

The above steps would do more to address the concerns raised in the Report, while not having the discriminatory impact that the Report's Recommendations would cause.

Commissioner Statement-Rebuttals

Todd Gaziano

Statement of Commissioner Todd Gaziano

Language discrimination, as such, is not prohibited by Title VII of the Civil Rights Act of 1964 or any other federal employment statute. English-language policies violate Title VII only if they are used to discriminate against employees born in, or with ancestors from, countries where English isn't commonly spoken. But English-only rules would be a very crude method of national origin discrimination in the workforce for the obvious reason that many (if not most) people who move to America and can lawfully work here do speak English and few native-born Americans, regardless of their national origin, have difficulty speaking English by the time they enter the workforce.

Because there are many legitimate, non-discriminatory reasons why an employer might institute an English-only policy, including for safety and customer relations reasons and to prevent unlawful hostile environment discrimination, there is no reason to presume such policies are adopted to discriminate against employees with particular national origins. Yet the EEOC does presume that all such policies are unlawful.¹⁴¹ Based on its unjustified presumption of discrimination, the EEOC requires all employers with such a policy to satisfy an arduous "business necessity" test that it stands in judgment of and very few can pass—unless employers are willing to litigate for years and pay enormous litigation costs.

¹³⁹ Such legislation could be modeled on the "Strengthening Communities through English and Integration Act of 2008."

¹⁴⁰ Report, p. 37.

¹⁴¹ The dissent relies on the unsupported assertion of Kerry O'Brien of CASA de Maryland that "There is no doubt that employers are using these [English-only] policies to enforce an anti-immigrant point of view, and therefore systematically violating the federal laws of the United States." Neither Ms. O'Brien nor the dissent cite any evidence in support of this assertion. Conversely, there is overwhelming evidence that American employers understand the great economic benefits from hiring immigrants. The counterfactual assertion of hostility to immigrants also ignores the reasonable, non-discriminatory reasons that employers have for English-only rules, such as to prevent harassing speech in a language the supervisor cannot understand. Finally, the case described by Mr. Kidman in which native-born employees were insulting each other in the Navajo language had nothing to do with immigration or immigrants, and yet the EEOC handled it no differently than cases involving foreign-born workers.

EEOC's presumption of discrimination finds no support in the text or legislative history of Title VII and has been rejected by many courts. Such a presumption is an unauthorized attempt to shift the burden of proof to the employer to prove that its policy satisfies a "business necessity" without any prior showing of a discriminatory purpose or effect.

The clearest example of the EEOC's unreasonable and illogical presumption is the even stronger presumption of discrimination it accords to employer policies requiring employees to speak English at all times in the workplace. See EEOC Guidelines, 29 C.F.R. § 1606.7(a). It states without exception that such a policy "is a burdensome term and condition of employment." In support of this Guideline, the EEOC General Counsel argued at the Commission briefing that employers have no possible justification to require employees to speak English when they are on break in the company break or lunch room. But that argument is erroneous for reasons that should be quite clear to the EEOC.

An important non-discriminatory reason for employers to adopt an English-only policy is to prevent various types of prohibited harassment in the workplace. As the Commission found, such a policy may be necessary to protect employees from having to "worry about the possibility that they are being spoken of in a discourteous manner," which could include sexual and racial harassment that create a hostile work environment.¹⁴² Once an employer is on notice of such harassing language in its workplace, even if it does not involve supervisory employees, further inappropriate racial taunting or sexual harassment not only undermines workplace productivity but may also subject the employer to liability under Title VII. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998) (employer may be liable for harassment by co-workers where supervisor knew of the harassment and did nothing) (citing *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1016 (8th Cir. 1988)).

In such a situation, there is no liability-free area of the employer's facility where sexually- or racially-harassing comments can be uttered without consequence. Would-be sexual or racial harassers may be more likely to use the break room for this purpose than their work stations. Because supervisors and other witnesses are more likely to detect harassment and to discourage speech that creates a hostile environment, it may be appropriate or even necessary

¹⁴² No one denies that language may be related to national origin and that a case might exist in which language is used as a means of national origin discrimination. See *Lau v. Nichols*, 414 U.S. 563 (1974) (school district not providing supplemental English language instruction to students of Chinese ancestry who do not speak English discriminated against students on the basis of their national origin and therefore violated Title VI of the Civil Rights Act of 1964). In his concurrence in *Lau*, however, Justice Blackmun cautioned "[a]gainst the possibility that the Court's judgment may be interpreted too broadly," arguing that the holding was limited to the narrow facts of the case and might not apply to subsequent public education cases. *Id.* at 571-72 (Blackmun, J., concurring). *Lau* should carry even less weight in the employment context. Yet the EEOC wrongly presumes that every employer who institutes an English-only rule discriminates on the basis of national origin. Most reported cases involving English-only rules concern employers who already have hired many employees who speak a language in addition to English. These employers would be among the least likely to harbor discriminatory sentiments. Moreover, if employers are not permitted to have English-only rules when a non-discriminatory reason presents itself, they may be less inclined to hire multilingual speakers, as Commissioner Heriot points out in her accompanying statement. Employers who need to monitor what their employees are saying, as the EEOC requires in some situations, would be more inclined to hire workers who only speak English.

for an employer to institute an English-only policy throughout its workplace. Indeed, two of the Commission witnesses testified that complaints about harassing speech were the reason for their English-only policies. *See* Statement of Timothy J. Riordan; Statement of Richard Kidman. Mr. Kidman described a situation in which restaurant staff were insulting other employees in Navajo, which supervisors did not understand. There was no reason in that case for the employer to think his native-born Navajo employees were not equally fluent in English or that its new rule would cause hardship for its Navajo staff.

When that and similar examples were posed to EEOC's General Counsel, he refused to back down from his break-room myopia or acknowledge the difficult position faced by employers. Instead, he responded that an employer might videotape the conversations in the break room to detect possibly harassing speech. An employer whose employees take breaks throughout the day would need to place mikes in various locations throughout the break room, with separate sound equipment for each mike, to capture every conversation. The employer also might need a dedicated team of simultaneous translators, conversant in various languages, to report any harassing speech before it created liability for the company. Perhaps the United Nations can afford that set-up, but few employers who produce anything can. Yet, this is the solution EEOC advances to defend its position.

The good news is that since 1993 most courts have rejected the EEOC's Guidelines. The bad news is that some courts still follow them, and the time and cost of litigating against the EEOC prohibit many employers from being able to afford their day in court. The EEOC should abandon the wrong-headed presumptions in its Guidelines and, and as the Commission recommended, "withdraw section 16.07" and instead inform employers and employees that "English-only policies are prohibited only when it can be shown by a preponderance of evidence that the policy was adopted for the purpose of harassing, embarrassing, or excluding employees or applicants for employment on account of their national origin." Congress should also enact legislation explicitly rejecting the EEOC Guidelines and creating safe harbors for appropriate English-language policies in the workplace.

Gail Heriot

STATEMENT OF COMMISSIONER GAIL HERIOT

The passage of Title VII of the Civil Rights Act of 1964 was historic. But it was not intended to assert federal control over every aspect of the workplace. Its carefully limited purpose was to prohibit employment discrimination based on race, sex, color, religion and national origin. As Representative William M. McCulloch and his co-authors put it:

“[M]anagement 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.”¹⁴³

At the time, this was likely seen as an obvious point. But it was not unimportant. Free enterprise has always been the engine that drives the nation’s prosperity. For that and other reasons, the best way for the federal government to promote the general welfare, including the welfare of women and minorities, has usually been to allow individuals the freedom to run their own business affairs when acting in a peaceable and honest manner. When exceptions like Title VII become necessary, they should be understood as precisely that: Exceptions. They must not be allowed to swallow the rule.

Somewhere along the line, however, this obvious, but important point seems to have been lost. Bit by bit, Title VII has been expanding to encompass practices that it was not originally intended to cover and that as a matter of sound policy it should not have been permitted to cover.¹⁴⁴ The subject of this briefing report is just one example: Under current EEOC

¹⁴³ Statement of William M. McCulloch, H.R. Rep. No. 914, 88 Cong., 2d Sess (1964). McCulloch was the ranking member of the House Judiciary Committee and was considered by many on both sides of the aisle to have been indispensable in drafting and securing the passage of the Act. See J.Y. Smith, Former Rep. William McCulloch Dies, *The Washington Post* (February 23, 1980). Indeed the Post obituary states that he has been called “the patron saint of civil rights legislation.” See also Richard Lyons, “Mr. Civil Rights” Recalls Hard Grueling Fight, *The Washington Post* (October 26, 1972)(referring to McCulloch as “Mr. Civil Rights”).

¹⁴⁴ Part of the explanation for Title VII’s expansion lies with amendments to the original law. For example, as a result of the Civil Rights Act of 1991, 42 U.S.C. 1981a, lawsuits over comparatively minor issues have become more financially lucrative than they had been before. Not surprisingly, this has meant that many more such cases are brought or credibly threatened. At first blush, this may seem to some like a good thing. Title VII is all about eliminating discrimination, and stronger penalties would presumably advance that goal. But life is full of trade-offs, and it is impossible to eradicate all the vestiges of any kind of wrong without creating other equally serious wrongs. A sense of proportion is necessary. When employers feel that every decision they make could potentially give rise to a lawsuit by a disaffected employee, relationships between employers and employees and among employees are bound to be profoundly altered. A great deal of legitimate, non-discriminatory conduct that the employer fears will be mistaken for discriminatory conduct will also be chilled. And a more bureaucratized, regimented and inflexible workplace culture will be created. Such costs must always be measured against whatever gains the higher penalties might create.

The reasons for the change in monetary incentives to litigation are complex and (surprisingly to some) rooted in the medieval practices of English courts.

At the time of the passage of the Civil Rights Act of 1964, it was assumed that juries would be unsympathetic to the plight of discrimination victims—not just in the American South where the problem of discrimination was greatest, but elsewhere too. This presented a serious challenge, since the Seventh Amendment of the U.S. Constitution guarantees civil litigants, including defendants, the right to a jury trial in federal lawsuits arising at common law. If defendants had a right to a jury trial in Title VII cases, Title VII could become a dead letter—or at least so many people thought. See U.S. Const. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law”).

But the Seventh Amendment does not apply to all lawsuits. It applies only to “Suits at common law”—that is, lawsuits that historically would have been brought in common law courts (as opposed to the courts of equity).

Congress could ensure that juries would play no role in the enforcement of Title VII by fashioning Title VII lawsuits in such a way that they would be regarded as cases in equity and not as actions at common law.

The key was in the remedies Congress provided. For the most part, lawsuits brought for money damages are regarded as “Suits at common law.” By contrast, lawsuits that ask for injunctive relief are ordinarily regarded as cases in equity. Congress was thus careful to limit the remedies for Title VII actions to injunctions (with back pay considered a special kind of contractual specific performance and hence a species of injunction). As a result, Title VII did not give rise to a right of jury trial. If Congress had provided for money damages intended to compensate the victim for the consequences of the defendant’s discriminatory conduct (such as emotional suffering or loss of credit rating) serious Seventh Amendment concerns would have been raised.

For race (but not for sex, color, religion or national origin), change began a few years later when previously seldom-invoked Reconstruction Era laws, Sections 1981 and 1982, were interpreted to outlaw private racial discrimination. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)(Section 1982); *Runyon v. McCrary*, 427 U.S. 160 (1976)(Section 1981). These statutes allowed for broad compensatory damages that are characteristic of actions at common law and hence gave rise to a right of jury trial. But a plaintiff was under no obligation to bring a cause of action under one of them if he or she was concerned that a jury trial might not be in his or her interest. He or she could choose to sue under Title VII only.

Jones and *Runyon* were both extremely controversial interpretations of Section 1981 and 1982. See Gerhard Casper, *Jones v. Mayer: Clio, Bemused and Confused* Muse, 1968 Sup. Ct. Rev. 89 (1968)(concluding that *Jones* was wrongly decided); Charles Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88, Part One 1117-1260* (1971)(concluding that the Supreme Court seriously misread the legislative history in *Jones*); George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 Sup. Ct. Rev. 303 (2003). See also Ben Gilbert, *Ten Blocks from the White House: Anatomy of the Washington Riots of 1968* (1968)(recounting historical events thought by some to have influenced the *Jones* decision).

Whether or not the *Jones* and *Runyon* decisions correctly construed legislative intent, their approach was largely codified as to Section 1981 by the Civil Rights Act of 1991. Also by 1991, the concern that juries would be unsympathetic to victims of discrimination had faded considerably. Indeed, some thought that juries would be more sympathetic than judges. The law was thus changed to allow for jury trials under Title VII and also to allow for the kinds of compensatory damages traditionally recoverable only in “Suits at common law.” This applied not just to race but also to sex, color, religion and national origin. Little public attention was focused on the dynamic such changes would create, especially in areas like harassment law. Under the original 1964-version of Title VII, it was ordinarily not in the employee’s interest to undertake a lawsuit unless either back pay was at issue or the plaintiff considered the problems associated with the workplace environment serious enough to go to the trouble of obtaining an injunction to change them. Back pay, of course, is at issue only in cases in which (1) the plaintiff was not hired, not given a promotion or raise in pay, or fired and (2) the plaintiff was unable to secure an equally well-paying position elsewhere in a short period of time.

Under the new provision, an employee is more likely to bring an action where issues of pay are not involved. For example, there has been a marked increase in the number of complaints based on a theory of sexual harassment in which the plaintiff employee never left her job or obtained another job at equal or greater pay. Lawsuits involving employer-imposed rules that employees regard as nuisances would fall into this category.

One interesting aspect of all this is that penalties for employment discrimination were increasing at the same time that (and indeed because) perceptions were changing about the likelihood that juries would be sympathetic to discrimination victims. Put differently, the increase in penalties was coming at the same time that the average American (and hence presumably the average employer) was apparently becoming less likely to engage in discriminatory behavior against women and minorities.

guidelines, employers can be made strangers in their own workplace—forbidden to require their employees to speak in a language they themselves can understand. My fellow commissioners and I believed this to be agency overreach.

Since the Commission's approval of the report, three new appointees have been added to the Commission, and these three commissioners have submitted a joint dissenting statement.¹⁴⁵ In defending the EEOC policy, their statement begins with a quote by the late Senator Paul Simon in which he generally advocates an increase in the study of foreign languages by American school children. (Draft Dissent at 1.) For what it is worth, I am inclined to agree with Senator Simon. It would be nice if more American school children learned to be fluent in a foreign language. It might even help our country compete in the global marketplace, as the dissenting commissioners claim in their first paragraph. But, at best, Senator Simon's remark is tangentially related to the issue in this report.

The real issue at the heart of this report is: Who gets to decide whether there will be a uniform language spoken at a particular workplace? Anyone can see that whether to have a uniform language can be a genuine dilemma. On the one hand, there may be reasons that it is more convenient, efficient and conducive to workplace harmony if different languages can be spoken. Some employees may be more comfortable in a language other than English and in some cases it may promote safety and quality if employees can converse in the language they know best. On the other hand, there may be reasons that it is more convenient, efficient and conducive to workplace harmony for only one language to be spoken. In some workplaces, safety and quality issues may require that everyone understand what everyone else is saying at all times. In others, it may be important that employees be closely supervised, and that means they will need to speak a language the supervisor understands too. In still others, employees and customers may be particularly sensitive to feelings of exclusion if they cannot understand what is being said around them.

Every workplace is different. Whose role will it be to balance the relevant considerations?¹⁴⁶ Will it be the employer, in negotiation with employees and applicable unions, deciding what works best at a particular workplace? Or will the decision go to distant regulators deciding for us all?¹⁴⁷

¹⁴⁵ Chairman Martin Castro and Commissioners Roberta Achtenberg and Dina Titus replace Chairman Gerald Reynolds and Commissioners Ashley Taylor, Jr. and Arlan Melendez respectively. It has been the Commission's practice that former members do not file statements. Consequently neither Reynolds, Taylor nor Melendez has done so. Pursuant to the Commission's rules, I received a copy of the dissenting commissioners' statement in draft form. All my references to the statement are to that draft.

¹⁴⁶ Ordinary Americans explicitly acknowledge the need for employer discretion in this area. When asked by Rasmussen Reports whether employers should be permitted to require its employees to speak "English only" while on the job, 77% of Americans responded that they should, while only 14% said they should not and 9% were unsure. See Poll: Most Americans Support English-Only in the Workplace (November 27, 2007).

¹⁴⁷ The dissenting commissioners cite Wisconsin's century-old legislation requiring parochial schools to conduct classes only in English to bolster their argument in favor of the EEOC's policy. I certainly agree that Wisconsin's law was an abuse, but I draw a very different lesson for it than do the dissenting commissioners. Wisconsin was wrong to dictate to parochial schools the language they must conduct classes in. If parochial school students preferred to conduct classes in English or Latin, they should certainly be free to negotiate for those languages, but ultimately it is the parochial schools themselves that must make the call. If they choose

Congress has prohibited employment discrimination on the basis of national origin. So when employers require their employees to speak English for the purpose of harassing, embarrassing or excluding employees or applicants for employment on account of their national origin, the EEOC should intervene.¹⁴⁸ But the EEOC has no authority to prohibit English only rules in order to promote Senator Simon's vision of multilingualism or to promote the dissenting commissioners' vision of global competitiveness. It is simply not up to them. And it is strange that the dissenting commissioners would offer these reasons as their very first defense of the EEOC policy.¹⁴⁹

German, so be it. Similarly, the EEOC is wrong to dictate to private employers that they must conduct a multilingual business. If employees wish to negotiate with their employers over this, again, they should be free to do so. But ultimately it is the employers that should be making the call, subject to the knowledge that if their employees are displeased, they may lose those employees.

¹⁴⁸ The dissenting commissioners cite *Lau v. Nichols*, 414 U.S. 563 (1974), for the proposition that "language and national origin are interrelated." I readily concede the point, just as I hope that the dissenting commissioners will readily concede that they are not the same thing (as several courts much more directly on point to the issue before the Commission than *Lau* have held). In *Lau*, which was decided under Title VI rather than Title VII, the San Francisco Unified School District had failed to provide any language-appropriate instruction for about 1800 students of Chinese ancestry who did not speak English and were thus effectively not being educated at all. The Court held this to be a violation of Title VI. This is rather far removed from EEOC's policy on English only rules. Although the Court found it unnecessary to rule on the Fourteenth Amendment claim in *Lau*, on the facts of the case, it would seem to me that liability could have been established on that ground too even under the standard of *Washington v. Davis*, 426 U.S. 229 (1976).

¹⁴⁹ The dissenting commissioners also argue in their statement that, contrary to the beliefs of some, the English language is not "under siege." (Draft Dissent at 2.) It is unclear whether this (or even a false belief that English is in jeopardy on the part of employers) has any bearing on Title VII issues. If I understand what the dissenting commissioners mean by this military metaphor, they may well be right that English is not "under siege." I certainly take no position on the question of whether English language acquisition is proceeding more quickly or less quickly than it did in the past among immigrant communities. Nevertheless, the inner statistician in me compels me to point out that the statistics they use to support their point contain a significant methodological flaw.

They state, "In 1990, 64 percent of third-generation Mexican-American children spoke only English at home; in 2000, the equivalent figure had risen to 71 percent." In interpreting these numbers it is important to keep in mind the U.S. Census's definition of the relevant terms: A first-generation child is a child born in a foreign country. A second-generation child is defined as the offspring of *at least* one foreign born parent. A third-generation or higher child is the offspring of two American-born parents. (Note that the dissenting commissioners have slightly misstated these figures. They apply to "third-generation or higher," not "third-generation." Since the rate of English spoken at home by fourth, fifth and higher generation children is overwhelmingly likely to be higher than that by third-generation children, these numbers overstate the latter and understate the former.)

These definitions makes it very difficult to compare across decades when immigration is expanding or contracting, since the numbers of mixed-generation marriages can be expected to change during such periods too. The period between 1990 and 2000 was part of a long-period of steadily increasing immigration. As the pool of first-generation immigrants increases, the chance that a second-, third- or higher generation adult will marry a first-generation immigrant increases. The children of such a union will be classified as second-generation under the U.S. Census definitions. And if those children marry first-generation immigrants themselves, a chain of "second-generation" children can in theory be maintained for a significant period of time. This is the crucial point: Especially given that it is the least-assimilated second-, third- and higher generation adults who are more likely to marry a first-generation immigrant, this may artificially inflate the rate at which

There are many good reasons that an employer may wish to require its bilingual employees to speak only English in the workplace. There is therefore no need to assume in the absence of evidence that an employer's motivations are discriminatory. Among the good reasons are these:

- (1) An employer may be concerned that its monolingual customers and employees will be made uncomfortable because they cannot understand what is being said by the bilingual employees. These monolingual customers and employees may imagine, correctly or incorrectly, that they are being talked about or that they are being made the butt of jokes by the bilingual employees—especially if they can hear their names interspersed among words they cannot understand.¹⁵⁰

third-generation or higher children appear to be English-language assimilated. None of this is to say that mixed-generation marriages hasten or delay English-acquisition. It could be either. Marrying a first-generation immigrant will likely slow the English-acquisition of the children of the second-generation parent relative to what would have been if the second-generation parent had married another second-generation adult. On the other hand, from the perspective of the first-generation immigrant, having a second-generation spouse rather than a fellow immigrant spouse likely speeds the English-language acquisition of his or her children. Without more sophisticated data, it is impossible to know how this nets out overall.

What is certain is that looking at the rates of English language use by third-generation and higher is a highly misleading way to go about comparing English-language assimilation by immigrants across decades. The likelihood of an increase in the number of mixed-generation families in times of increasing immigration throws off the analysis.

It is also worth pointing out that the very same article the dissenting commissioners cite to show that rates of English spoken at home for third-generation (and higher) children are increasing contains a chart indicating that the rate for second-generation children decreased slightly over the same period. See Richard Alba, *Language Assimilation Today: Bilingualism Persists More than in the Past, But English Still Dominates*, Lewis Mumford Center for Comparative Urban and Regional Research, University of Albany (December 2004)(Figure 2), available at http://mumford.albany.edu/children/reports/language_assimilation/language_assimilation_brief.pdf. It should go without saying that cherry picking statistics is not a good practice. In any event, both sets of figures must be viewed with more than a little skepticism for the reasons above and other reasons.

Indeed, even if both numbers had pointed in the same direction, it still would not have been reliable evidence that overall rates of English language acquisition increased from 1990 to 2000 as the dissenting commissioners contend. If that seems counter-intuitive, think of it this way: Suppose we have two groups, 100 members of the NBA, all of whom are well over six feet tall and 100 members of the hypothetical Pee Wee League, all of whom are children standing four feet high. Then we do two things: (1) the shortest member of the NBA is transferred to the Pee Wee League; and (2) five additional children join the Pee Wee League, all of whom are four feet tall. The average height of both groups has, of course, increased. But the average height of the combined group of 205 has decreased.

This does not mean that English language acquisition by Mexican American immigrants and their descendants was or was not proceeding more quickly in 2000 than in 1990. The point is simply that the rate of English use at home by third-generation and higher children is just one piece of the puzzle—and likely a highly misleading one given the likelihood of an increase in mixed-generation marriages. An accurate or even reasonable measure of the phenomenon the dissenting commissioners purport to measure is much harder to come by than their statement would suggest.

¹⁵⁰ See *Garcia v. Spun Steak Co*, 998 F.2d 1480 (9th Cir. 1993). The court in *Garcia* described the employer's reasons behind its decision to adopt an "English Only" work rule this way:

- (2) An employer may be concerned that its bilingual or multilingual customers and employees will be made uncomfortable because they understand only too well what is being said by bilingual or multilingual employees. Sometimes the insults and harassment are quite open to those who speak the language. The monolingual employer/supervisor on the other hand does not understand and hence cannot properly discipline the offending employees. Allowing the problem to continue could cause the employer to lose employees or customers or could even open the employer up to liability for claims of sexual or other kinds of harassment.¹⁵¹

Prior to September 1990, [bilingual] 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.

Similarly, in *EEOC v. Synchro-Start Products, Inc.*, 29 F. Supp 2d 911 (N.D. Ill. 1999), the employer had a staff of approximately 200 employees. Nearly all were first-generation immigrants of Asian, Hispanic or Polish descent. As its attorney, Timothy J. Riordan described it at our briefing:

On numerous occasions, individual employees complained that other employees were speaking in their native foreign languages and using their bilingual capabilities to harass and insult other workers in a language they could not understand. For example, one employee stated that Hispanic employees had spoken in their native language which she could not understand, then they looked at her, laughed and rolled their eyes, making her feel very uncomfortable and intimidated. On each occasion that such complaints were made, the plant manager talked to the supervisors to determine the validity of the complaint and the appropriate response. The supervisors then attempted to deal with the issue by discussing the matter with the group leaders and the effected employees, suggesting that the employees speak English while in the presence of other employees who did not speak the same language, so that feelings will not be hurt and to improve morale and communications.

The plant manager was also contacted by a representative of a temporary employment agency which provided Synchro-Start with employees who advised that two of the temporary employees intimidated them and made them uncomfortable by speaking their own language which the temporary employees could not understand.

See Statement of Timothy J. Riordan at 20.

¹⁵¹ In *Gloor v. Garcia*, 618 F.2d 264 (5th Cir. 1980), the employer, a lumber and supply company, argued, among other things, that its English only rule “would permit supervisors, who did not speak Spanish, better to oversee the work of subordinates.”

- (3) An employer may be concerned that if all employees are not speaking the same language miscommunications will occur that will lead to safety or quality problems.¹⁵²

Nevertheless, the EEOC has for years had guidelines that assert that it “will presume [an English-Only rule that applies at all times] violates title VII and will closely scrutinize it.” Under the same guidelines, an employer may adopt an English-Only rule that applies only “at certain times,” but only “where the employer can show that the rule is justified by business necessity.”¹⁵³

¹⁵² This appears to have been a consideration in *Garcia v. Spun Steak*, 998 F.2d 1480 (9th Cir. 1993) and in *EEOC v. Synchro-Start Products, Inc.*, 29 F. Supp 2d 911 (N.D. Ill. 1999).

Other employer motivations for English only rules may be unique to particular industries. For example, in *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987), the defendant employer was a radio station. When one of its employee disc jockeys began broadcasting in a mixture of English and Spanish, management concluded that their ratings were suffering and asked him to desist. The employee stated in an affidavit:

“Benson wanted me to stop speaking Spanish altogether. I did not comply with Benson’s wishes because it would have taken my character away. He told me to speak English or quit. I told him I would not quit, he would have to fire me. I refused to give up my bilingual presentation.”

Id. Of course, the employer’s position is easy to understand in this case. The employer earns profits by keeping its rating as high as possible. The employer was understandably concerned that a bilingual program sandwiched between English programming will cause monolingual English speakers to switch stations without picking up an equal or larger number of listeners who prefer bilingual programming. Insofar as the bilingual program picks up any additional listeners, they will likely be lost as soon as the program is over and the format switches back to English. Mixed formats tend to confuse listeners. It is not usually a profit maximizing move. What is remarkable about the *Jurado* case is that it was filed at all.

¹⁵³ Section 1606.7 specifically states:

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

As is so often the case with regulatory guidelines of any kind, they are deceptive when they suggest that English only rules that apply only “at certain times” will be permitted if they are justified. In practice, it is extremely difficult to persuade the EEOC of business necessity.

Those who offer advice to employers warn of the difficulties. For example, the National Federation of Independent Business tells its 350,000 small-business members that they “may be in for a rude awakening in the form of a civil-rights lawsuit if [they] have an English-only workplace.”¹⁵⁴ Another organization--- Wolters Kluwer Law & Business/CCH--calls the business necessity standard “stringent” and states:

“Under the best-case scenario an English-only policy subjects an employer to potential litigation. For example, even in jurisdictions where narrowly tailored English-only policies have been held lawful, such as Florida, the EEOC routinely accepts charges challenging such policies.”¹⁵⁵

Another popular web site on human resources issues offers this advice:

“It’s very tempting for employers to mandate their employees speak only English during working hours. It’s also—in most cases—very wrong. ... If you wish to mandate an English-only workplace, we strongly suggest you review the policy with an employment attorney prior to implementation. It’s not worth it!”¹⁵⁶

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.

(Citations omitted.)

The reason for the EEOC’s distinction between policies that apply to employees on break is not clear. If the reason the employer adopts the policy is to prevent harassment of other employees, the danger is higher while the employees are on break, not lower. Perhaps the EEOC would take the position that when these guidelines were initially drafted, the Civil Rights Act of 1991’s new remedial provisions were not yet law and lawsuits for racial, sexual, religious and national origin harassment were not as common as they are today. See *supra* n. 2. Hence they gave the employer’s need to police employees little weight. If so, circumstances have now changed.

¹⁵⁴ National Federation of Independent Business, *English-Only Workplace Policies: Tread Cautiously to Avoid Discrimination*, available at <http://www.nfib.com/business-resources/business-resources-item?cmsid=29535>.

¹⁵⁵ HR Issues and Answers: *Approach Workplace English-Only Policies Cautiously* (October 6, 2003), available at <http://hr.cch.com/hhrlib/issues-answers/approach-workplace-english-only-policies-cautiously.asp?date=October-6-2003>.

¹⁵⁶ See *English Only in the Workplace? Bad Idea*, *Managing People in the 21st Century* (June 15, 2009), available at <http://managingpeople.blogspot.com/2009/06/english-only-in-workplace-bad-idea.html>.

Indeed, the witnesses at our briefing told stories of ruinous litigation instigated by the EEOC against the businesses they owned or represented when the English only rules under scrutiny were perfectly justified.¹⁵⁷ It is hardly surprising under the circumstances that employers make every effort to steer clear of confrontations with the EEOC the best they can. Only an employer who is convinced that its decision will pay large dividends will take the risk of trouble. The employer's ability to adapt to the facts on the ground is reduced. Innovation is chilled.

After they argue that English only policies somehow harm global competition, the dissenting commissioners argue that EEOC's stringent approach is justified because the typical employer adopting an English only rule is in fact somehow ill-motivated. Their statement quotes Kerry O'Brien, Director of Services at CASA de Maryland: "There is no doubt that employers are using these policies to enforce an anti-immigrant point of view, and therefore systematically violating the federal laws of the United States."

This is a stretch. It doesn't take unusual sensitivity to recognize that it is often considered rude to speak in a language that others in the room do not understand—whether that language is Spanish, English or ancient Etruscan.¹⁵⁸ It can make those who do not understand feel excluded. When that can be avoided without significant inconvenience, it should be.

It is unnecessary to take my word concerning the sensitivities of those who perceive themselves to be excluded. The internet is alive with expressions from ordinary employees about their feelings.¹⁵⁹ Experts on workplace decorum also weigh in. Cynthia Lett, author of "That's So Annoying—An Etiquette Expert on the World's Most Irritating Habits," gave this advice in response to an inquiry from an unhappily excluded employee.

It is considered rude for foreign language speakers to converse in their native tongue if English speakers are apt to be listening. It is exclusionary and makes those who don't understand uncomfortable. Since the point of demonstrating good etiquette (either business or social) is to make others

¹⁵⁷ See Statements of Richard Kidman at 31-4 (describing his business's experiences with litigation); K.C. McAlpin at 22-30 (describing cases that he has learned about through his work with the group Pro-English, including a case involving the Sephora cosmetics chain's policy and that of the Salvation Army) and Timothy J. Riordan (describing his experiences as a lawyer for Synchro-Start, a firm that had an English only-policy) at 19-21. See also Tr. at 29-37 (Riordan's oral testimony); 37-45 (McAlpin's oral testimony) and 45-53 (Kidman's oral testimony).

¹⁵⁸ Similarly, it does not take an industrial engineer to see why a uniform language may often be desirable in the workplace as a way to promote safety and quality. One of the best-loved stories in Western Civilization is that of the ill-fated Tower of Babel. That project was abandoned when workers suddenly found themselves speaking in a multitude of languages. See Genesis, ch. 11, v. 1-9. Similar stories involving an epic project that must be abandoned on account of a confusion of languages occur in many other cultures too. See Sir James Frazer, *Folklore in the Old Testament: Studies in Comparative Religion, Legend and Law* (1918).

¹⁵⁹ Something to Talk About: Different Languages at Work, Monster Blog (July 25, 2006), available at http://monster.typepad.com/monsterblog/2006/07/something_to_ta.html, (stating that some people have "suggested that non-English workplace conversations might be seen as exclusionary and create a "language-hostile" environment.").

comfortable, putting others in the position of not understanding what you are saying may make them believe you are saying something you don't want them capable to understand, thus they are uncomfortable and suspicious of both of you.

What you do in your own home or together in a strictly social situation, where all others speak the same language, is different than in a business where you know you are the only ones who understand.¹⁶⁰

Are Ms. Lett and the thousands of others who have expressed their feelings of exclusion simply venting their anti-immigrant rage? The dissenting commissioners apparently think so. But perhaps my own experience with my grandmother will shed light on the issue.

My grandmother lived most of her life in rural Maine, where, apart from an occasional French Canadian, non-English speaking immigrants were fairly rare. Like Ms. Lett, she felt that speaking a language that not everyone in the room understands is generally rude, and she told me so in no uncertain terms when I was about ten years old. In her case, however, it is rather difficult to accuse her of being "anti-immigrant" or "anti-any-particular-national-group." The conduct she wished to correct was not that of an immigrant, but rather of my

¹⁶⁰ Cynthia Lett, *Business Etiquette: Foreign Language at Work* (May 28, 2004), available at <http://en.allexperts.com/q/Business-Etiquette-2294/foreign-language-work.htm>.

Similarly, DiversityInc, a popular magazine/webzine that bills itself as "the leading source information on diversity management," spoke to "leaders from Latino professional groups for their best advice on speaking Spanish and how it can affect your daily professional life." It received answers like this one:

"One can acknowledge a coworker as Spanish speaker with a greeting but then should revert to English so that no one is excluded," says Manny Espinoza, CEO of the Association of Latino Professionals in Finance and Accounting (ALPFA). "It can definitely be perceived as rude, so it is better to err on the side of common courtesy."

Lizz Carroll, *Should You Speak Spanish at Work?*, DiversityInc (October 9, 2009) available at <http://www.diversityinc.com/article/6233/Should-You-Speak-Spanish-at-Work/>. Espinoza's answer was typical. Another example from the same article is the following:

"Jim Huerta, president emeritus of the National Society of Hispanic MBAs (NSHMBA), advises you to mind your manners. 'I think that what prevails is be courteous in a public setting, whether it's professional or social,' he says. '[So] if you're going to speak a foreign language, you should know who's in attendance, who's in your surroundings and what environment you're in.'"

See also, Zayda Rivera, *Is It Okay to Speak Spanish in the Workplace?*, DiversityInc (October 13, 2008), <http://www.diversityinc.com/article/4580/Is-It-OK-to-Speak-Spanish-in-the-Workplace/>. In that article, Rivera quotes Rene Rodriguez, president and founder of Babbalu.com, a predominately Latino organization, who believes that it is "common workplace courtesy" to respect the feelings of non-Spanish speaking colleagues:

"'It's rude to speak [Spanish] if you're in a room with five people and three are Latino or two are Latino and three are not,' he says. 'Whatever the case may be, it's rude for those two people to be speaking in a manner that the other people do not understand.'"

ten-year-old playmates and me. And the language she disapproved of was not a true language that could be associated with a particular nationality. Rather it was a secret code spoken by children language similar to Pig Latin.¹⁶¹

My grandmother was obviously not indulging some bias against immigrants or against members of certain national origin groups. She wasn't even acting out of personal resentment that she could not understand. (Alas, she had broken the code herself all too easily.) She was just trying to prevent me and my code-talking girl friends from hurting the feelings of the other children in the neighborhood who had not yet figured it out. How can it be so obvious to the dissenting commissioners that employers who impose English only rules are not similarly motivated?

The dissenting commissioners are very inclined to find anti-immigrant hostility—despite the fact that they have pointed to no cases in which the employer's decision appears to be so motivated. Indeed, the employers who adopt English only rules are ordinarily the employers who have hired a large number of immigrant employees. Such hiring decisions would seem to me to be a good indicator, even if not a perfect indicator that the employer does not harbor anti-immigrant hostility.

A useful way to look at this debate is as a disagreement about the EEOC's authority to prescribe presumptions. The EEOC implicitly takes the position that it can designate certain conduct as presumptively in violation of Title VII, and that once it does, it is up to the defendant employer to demonstrate it did not discriminate rather than up to the EEOC or to a Title VII plaintiff to demonstrate that it did. In the case of English only rules that apply at all times, the EEOC makes it clear that the presumption is all but irrebuttable. In the case of English only rules that apply only sometimes, the presumption is stringent, but in theory may be rebutted by proof of business necessity.

Title VII, however, confers no such power. And the Supreme Court has made it clear that Title VII follows the ordinary model in civil cases, which places the burden of proof on the plaintiff to show a violation of the law. The defendant is not obligated to prove it is not a wrongdoer. Although the burden in a civil case is fairly light—plaintiff need only prove by a preponderance of the evidence that the defendant is liable for his actions—it is nevertheless the plaintiff's burden, not the defendant's. As the Supreme Court put it in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), a case that held that the burden of proof in Title VII cases is on the plaintiff:

“The question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be ‘eyewitness’ testimony as to the employer’s mental processes. But none of

¹⁶¹ See Wikipedia Entry for “Gibberish (Language Game), available at [http://en.wikipedia.org/wiki/Gibberish_\(language_game\)](http://en.wikipedia.org/wiki/Gibberish_(language_game)).

this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact.”¹⁶²

The dissenting commissioners also try to defend the EEOC’s policy against English only rules on the ground that such rules have disparate impact on national origin minorities.¹⁶³

¹⁶² *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 524 (1993)(quoting *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983). See also *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)(“The plaintiff retains the burden of persuasion” in a Title VII case).

¹⁶³ The Supreme Court has never directly addressed the constitutionality of disparate impact analysis. In his concurrence in *Ricci v. DeStefano*, 129 Sup. Ct. 2658 (2009), a case that avoided the question, Justice Scalia begins with this statement: “I ... write separately to observe [this decision] merely postpones the evil day on which this Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII ... consistent with the Constitution’s guarantee of equal protection.”

In any event, Title VII has been seriously altered by the rise of “disparate impact” theory, which since *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), has come to be an accepted tool for analyzing job qualifications. Since the Civil Rights Act of 1991, disparate impact theory has been backhandedly acknowledged in the text of the statute. See 42 U.S.C. 2000e-2(k).

Under it, employers must constantly be on guard lest some facially neutral job qualification or requirement be challenged on the ground that it has disparate impact on women or men or on some racial, religious or national group—regardless of whether the employers consciously or unconsciously adopted the qualification or requirement on account of its discriminatory effect. Intent to treat members of one group differently from members of another is deemed irrelevant to liability.

The problem is that very nearly all qualifications have a substantial disparate impact on some group. As a group, men are physically stronger than women. Unitarians score higher on mathematics aptitude tests than Lutherans. Hispanics are more likely to meet the height and weight requirements to be jockeys than are Swedish Americans. Asian Americans are more likely to have a college degree in engineering than American Indians. Subcontinental Indian Americans are more likely to have management experience in the hotel/restaurant industry than Polish Americans. Women are more likely to qualify for jobs requiring experience caring for small children. Some group is always advantaged or disadvantaged by a particular job requirement

Consequently, if the disparate impact of a job qualification can form the basis of liability, every job qualification is presumptively a violation of the law. Employers must be vigilant to avoid any action that will encourage the EEOC or a disgruntled employee to go to the trouble of taking legal action. See also Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. part 1607 (attempting to limit the use of disparate impact analysis with arbitrary numerical limits).

In theory, employers can escape liability by proving that “business necessity” required them to act as they did. But such a defense is often of little practical use. Most employers are not in a position to risk litigation in the hopes that once the lawsuit is filed they will be able to persuade the trier of fact that they are responding to a “business necessity.” They must avoid trouble before it starts. Consequently, they will avoid a perfectly sound objective employment qualification—like an examination that requires the job applicant to prove his mastery of basic bookkeeping/accounting procedures-- if its disparate impact is easily provable, and instead adopt some second-best subjective standard.

The irony, of course, is that the subjective standard they adopt—e.g. “passing” a personal interview with the personnel manager about basic bookkeeping/accounting procedures--may indeed require judgment calls by a manager that allow him to disguise his conscious or unconscious discrimination. But because the standards are subjective, it will be almost impossible to prove. Legal action is thus significantly less likely.

But regardless of one's view of disparate impact analysis as a whole, any disparate impact argument is dubious here. At issue are workplace regulations that can be easily complied with if the employee is only willing to do so (as opposed to employment qualifications that work to screen out some applicants for employment entirely.) Three courts have already held that disparate impact analysis for English-only rules is inappropriate.¹⁶⁴

The argument is not that members of national origin minorities made subject to the English only rules cannot speak English in the workplace; the argument is that they may prefer not to. The cases we are looking at all involve employees who are bilingual.¹⁶⁵ Lack of desire is insufficient to give rise to a claim for disparate impact. The disparate impact approach was developed as an extreme remedy to deal with true obstacles to employment, not to regulate the everyday working environment.

There are many things employees prefer not to do. They can't all give rise to Title VII lawsuits just because their preferences will have a disproportionate impact on one race, color, sex, religion or national origin. Some of these preferences will be strongly held, others less so. More Catholics than atheists may prefer not to work at a hospital that performs abortions. More women than men may be disappointed by a rule that requires them to wear what they regard as unfeminine work clothes. Some of these preferences are not obvious until they are given some thought. More Mexican Americans than Danish Americans may be disappointed that an employer does not allow its employees to use sick leave to take their well children to routine doctor's appointments (since on average Mexican American families have more children than Japanese American families). The list could go on. The problem is that there is no method by which these preferences can be classified and prioritized that does not put the federal government in charge of every decision an employer makes.¹⁶⁶

The ultimate beneficiaries of this overwrought legal system are not employees in general or even women and minority employees in particular. When employers feel that their discretion has been hemmed in, they will likely hire fewer, not more, employees. Instead, the beneficiaries are mainly the lawyers and human resources experts who administer the system. These days, no employer can afford to make decisions about job qualifications (or indeed many other workplace practices) without consulting an expert.

¹⁶⁴ *Garcia v. Spun Steak*, 998 F.2d 1480, 1486-7 (9th Cir. 1993); *Kania v. Archdiocese of Philadelphia*, 14 F. Supp. 2d 730 (E.D. Pa. 1998); *Long v. First Union Corp.* 884 F. Supp. 933 (E.D.Va. 1995).

¹⁶⁵ Whether employers can decline to hire employees who do not speak English is a separate issue, not covered by the EEOC's English only guidelines or by this briefing except insofar as witness K.C. McAlpin happened to list cases in his testimony showing that English-language ability is a common job requirement and that such a requirement is ordinarily not a problem under Title VII, since communication skills are basic to most jobs. Language job requirements adopted for the purpose of harassing, embarrassing or excluding applicants for employment on the basis of their national origin are, of course, violations of Title VII, just as English only rules adopted for those purposes would be.

¹⁶⁶ The problem cannot be dealt with by allowing the EEOC the discretion to determine which aspects of a particular culture are "essential" and which are not. Is the right to speak Spanish in the workplace, a language that is not unique to Mexico and not spoken by all Mexicans, "of the essence" of Mexican culture (and if so, why isn't it essential to American culture that Americans speak English)? Is it "essential" to second-generation Mexican-American culture? Or is it a more important aspect of Mexican- and Mexican-American culture to be able to honor the pro-life tenets of the majority religion among Mexicans—Roman Catholicism?

It is the rule rather than the exception for men and women or for different racial, religious and national origin groups to have, on average, slightly and sometimes not-so-slightly different tastes and sensibilities. Indeed, that is the very point of the popular adage “diversity is our strength”: Broad groups are all different in some ways and it takes all kinds to run a successful business. Imposing a disparate impact theory on matters of employee preference will transform the decision on what radio station to listen to—salsa, rap, classical or bluegrass—into a legal issue.

For disparate impact analysis to work even tolerably well, it must be limited to cases where employee selection and promotion practices screen out a disproportionate number of a protected group for reasons the members cannot immediately control. It cannot be applied to everything.

Moreover, insofar as English only rules have a disparate impact on bilingual speakers, the failure to adopt English only rules has at least as great and arguably greater disparate impact on monolingual speakers. It is no doubt true that many bilingual speakers would prefer to speak a language other than English in the workplace. But it is also true that monolingual speakers (or bilingual speakers whose other language is not the language that is being spoken) would like to work where they can understand what the people around them are saying? Whose preferences must be indulged by Title VII?

Note that indulging the preferences of bilingual employees can also have a disparate impact on the likelihood that African Americans, Irish Americans and members of others groups that tend to be monolingual will be hired in the first place. In *Gutierrez v. Municipal Court of the Southeast Judicial District*, Judge Reinhardt, in arguing against the necessity of English only rules insisted that “the best way to ensure that supervisors are apprised of how well the bilingual employees are performing ... their assigned tasks would be to employ Spanish-speaking supervisors.”¹⁶⁷

Obviously, wise men and women will want to avoid these impossible questions. But even assuming that the EEOC staff members are so culturally sensitive that they can answer questions that would confound any reasonable anthropologist, it could not limit the application of these “rights” to members of that particular racial, religious, or national group without making a mockery of Title VII. Can Title VII give Mexican Americans and not African Americans a “right” to speak Spanish in the workplace? Can it give Roman Catholics and not Presbyterians a “right” not to have to work on a project that will confer benefits on an abortion clinic? Can it give Scotsmen and not Swedes the “right” to wear a kilt? As the ancient maps used to put it, “Thar be dragons.” When the direction the EEOC is headed in requires employers to discriminate rather than forbids them to do so, it is time to reverse course.

Employers often can, should, and do accommodate the particular tastes and desires of their workers, included some that are rooted in the workers’ race, color, gender, religion or national origin. They do so in large part because they correctly understand that this is often in their own self-interest: Employers want to attract and retain good employees. Interpreting Title VII as the EEOC and the dissenting commissioners urge makes this harder, not easier.

¹⁶⁷ 838 F.2d 1031 (9th Cir. 1988), vacated, 490 U.S. 1016, 1043 (1989)(Reinhardt, J.), vacated, 490 U.S. 1016 (1989).

This solution is worse than the problem. In *Gutierrez*, bilingual employees had been ridiculing and insulting fellow employees, including at least one African-American employee. Judge Reinhardt wanted to deal with this not by requiring the bilingual employees to speak in a language understood by their supervisor, so that he or she could ensure that they were observing proper workplace decorum, but by requiring the employer to hire supervisors who speak the language (or languages in the case of multi-ethnic workplaces) of the offending employees. This effectively shuts out monolingual employees (who will be disproportionately African American, Irish American and other racial or ethnic groups who tended to arrive in this country at an earlier time) from supervisory positions.

In dissenting from the decision not to rehear the case en banc, Judge Alex Kozinski wrote:

The opinion gives an important insight into the types of problems we are creating for ourselves by failing to repudiate the rule the panel adopts. In response to the defendants' argument that non-Spanish speaking supervisors will be unable to supervise employees who speak Spanish during working hours, the panel offers a facile solution: "employ Spanish-speaking supervisors." This "let them eat cake" attitude masks a very serious problem: By deciding to speak another language during working hours, employees can limit who may qualify for supervisory positions. If fluency in a second language is the sine qua non of supervisory status, employees who are not bilingual, including other people of color, will be effectively eliminated from consideration for these coveted positions. Given the natural competition for supervisory posts, *Gutierrez* may well exacerbate racial tensions. It is incomprehensible to me that this result is being reached in the name of a law designed to promote ethnic and racial harmony in the workplace.¹⁶⁸

And it gets worse. Even bilingual employees as a group are eventually disadvantaged under the EEOC's approach. One of the most unfortunate aspects of its policy is that it increases rather than decreases the incentive for employers to discriminate on the basis of national origin. Suppose an employer believes in good faith that it must closely supervise its employees (bilingual or otherwise) out of concern that customers or other employees are being harassed. It knows, however, that the adoption of an English-only policy, which it needs in order for its supervisors to keep tabs on its employees, is a legally risky move, so it tries to come up with an alternative. The most obvious alternative may be to avoid hiring bilingual employees in the first place. Unlike an English Only rule, which must be explicitly disclosed to the affected employees in order to be effective, a policy of discrimination against immigrants from non-English-speaking countries can fly under the radar screen. This hardly seems like an incentive the EEOC should wish to create.

¹⁶⁸ *Gutierrez v. Municipal Court of the Southeast Judicial District*, 861 F.2d 1187, 1194 (9th Cir. 1988)(Kozinski, J., dissenting from a denial of rehearing en banc)(citations omitted).

This is an area that could benefit from attention by Congress.¹⁶⁹ My greatest concern is that Congressional action limited to the area of English only rules might suggest to some that

¹⁶⁹ In their statement, the dissenting commissioners also attempt to critique the Commission's findings point-by-point. My responses are as follows:

(1) The dissenting commissioners do not appear to have any specific grievance with Finding 1 except that they would have preferred the Commission to expand on it. Specifically, they seem to want an acknowledgement that the EEOC, in their words, "recognizes both the need to prohibit employers from engaging in discriminatory practices as well as the right of employers to establish non-discriminatory workplace practices." (Draft Dissent at 5.) The whole point of the report, however, is that the EEOC does not in fact sufficiently recognize these competing considerations. The dissenting commissioners' point, insofar as they have one, really goes to the report as a whole rather than to Finding 1. For its rebuttal, please see this statement's text.

(2) The dissenting commissioners purport to take issue with the Commission's finding that "[a]lthough Congress consciously withheld the power to issue substantive regulations in connection with Title VII when it created the EEOC, the EEOC has for decades nevertheless issued 'Guidelines'" (Finding 2.) They state that this finding "inaccurately characterizes the legal status of the EEOC's Guidelines." I very much stand behind the Commission's characterization. They are not statutes, not regulations, and not law of any kind. The dissenting commissioners cite a case in which the Supreme Court accords them "consideration in determining legislative intent." *General Electric v. Gilbert*, 429 U.S. 125, 141 (1976) (ultimately rejecting the EEOC guidelines as a persuasive source for the meaning of Title VII). (Draft Dissent at 5.) But the fact that something may be considered in determining legislative intent does not make it law. Courts may consider a wide range of things in determining legislative intent—committee reports, debates on the floor of Congress, reports of the U.S. Commission on Civil Rights, legal treatises, law review articles, and even non-legal sources like dictionaries and newspapers. Any source may be considered "for what it is worth." But for the EEOC Guidelines to be treated as regulations would be a usurpation of power given Congress's clear intent that it should not have that power.

(3) In arguing against Finding 3, the dissenting commissioners take exception to the Commission's conclusion that "Section 1606.7 does not apply to 'Spanish Only,' 'Japanese Only,' or other exclusive language rules." (Finding 3.) They point to the testimony of EEOC counsel Reed Russell, who admitted that the logic of the EEOC's analysis ought to other languages also. Russell was, of course, conceding the implication of the Commission's point, not denying it: There is no reason under Title VII to treat English only rules differently from workplace rules establishing any other language as the language of the workplace. Yet that is what the English only guidelines do. As Mr. Russell himself put it, "[W]e have not seen fit to issue a later guideline that says and also fill in the blank only" (Tr. at 97). Mr. Russell attempted to assure that "assuming a charge was filed," the EEOC would take it seriously as a potential Title VII violation. But such an assurance is beside the point. Given that the published guidelines expressly prohibit "English only" rules and no other, the agency is less likely to receive a complaint about a different language rule and employers are less to be deterred from instituting "other language only" rules. The dissenting commissioners' decision to challenge Finding 3 is puzzling; it is simply a fact that Section 1606.7 applies to English only policies and makes no mention of any other kinds of exclusive language policies. It bears emphasis that the Commission has not taken the position that the guidelines should be amended to prohibit other exclusive language policies. Rather, it is our position that Section 1606.7 should be withdrawn.

(4) The dissenting commissioners do not appear to have a problem with Finding 4, which points out that more courts have rejected the EEOC's English Only policy than accepted it and cites the specific cases. Instead they take issue with one of the witnesses, K.C. McAlpin, who drew the Commission's attention to a large number of cases that deal with the relationship of language and national origin—usually in the context of employment discrimination. Their point appears to be that not all of these cases bear specifically on the EEOC's English Only policy. This is true enough, though it is my understanding that when Mr. McAlpin stated at the briefing that there are "over 20 decisions that have explicitly rejected the EEOC formulation" (Tr. at 39), he meant the EEOC's general formulation of the link between language and national origin. That formulation does indeed

Congress generally approves of the EEOC's other guidelines. This is not an impression that should be created.

Ordinarily I would treat criticisms of the briefing process itself in the footnotes. But I am troubled by the use of footnotes in the dissenting commissioners' statement, and I think the issue merits treatment in the text of this statement.

The dissenting commissioners complain that the "briefing relied on a set of witnesses that were not able to provide a sufficiently diverse and thorough treatment of the briefing's topic." "Two of the English-only supporters, Mr. Riordan and Mr. Kidman, were on the defendants' side of employment lawsuits and a third, Mr. McAlpin, was also involved with

underlie the EEOC's English only policy. In any event, the dissenting commissioners are dissenting from the Commission's report, not from the testimony of one of the witnesses. As they apparently concede, the Commission's Finding 4 accurately lists cases that bear directly on English only policy in particular.

(5)The dissenting commissioners object to Finding 5, which catalogues commonly-articulated reasons for adopting an English only policy. They argue, among other things, that "[n]o recognition is given "to the possibility that pretextual use of these 'good reasons' could lead to employee discrimination." (Draft Dissent at 6). To the contrary, this report fully recognizes the possibility of pretext. It repeatedly states that English only policies that are adopted for the purpose of harassing, embarrassing or excluding employees or applicants for employment on account of their national origin are prohibited. For responses to the dissenting commissioners' other objections to this finding, see the text of this statement.

(6) The dissenting commissioners chastise the Commission for a finding that, in their words, "English only policies are rarely adopted for the purpose of 'harassing, embarrassing, or excluding' people." (Draft Dissent at 7.) The actual finding states that employers who wish to adopt English only policies just for the purpose of harassing, embarrassing or excluding employees or applicants for employment on account of their national origin are "few." In context, this is meant to be in contrast to "most employers" referred to in Finding 5, who are described as having "no need for [an English only policy]." This is a true statement. In my view, there is no need to determine precisely what proportion of employers who adopt these policies is well-motivated and what proportion is ill-motivated. It is more than sufficient to show that a significant number are well-motivated. In our system of civil liability, it is up to the plaintiff to prove by a preponderance of the evidence that the defendant has wronged him, and there is no good reason to reverse that presumption in the case of English only policies. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993)(Title VII case placing burden of proof on plaintiff). Finding 6 goes on to state, "Withdrawing section 1606.7 and instead advising employers and employees that 'English-only' policies are prohibited only when the employer adopted the policy for the purpose of harassing, embarrassing or excluding employees or applicants for employment on account of their national origin would improve the guidelines and make them more consistent with the intent of Congress." The dissenting commissioners argue that this "create[s] a safe harbor" for wrongdoing employers. (Draft Dissent at 7.) To the contrary, such an approach merely establishes that cases involving English only rules should be governed by the same presumption in favor of the civil defendant as is ordinarily found in American law. The burden on the defendant is not heavy. In a case involving English only rules, it would be sufficient if the EEOC (or other Title VII plaintiff) could show that the defendant employer is "more likely than not" motivated by a purpose to harass, embarrass or exclude an employee or applicant for employment on account of his national origin. But it is the EEOC's (or other Title VII plaintiff's) burden, not the defendant employer's. Defendants are not presumed to be wrongdoers. The dissenting commissioners argue that applying ordinary burden of proof rules to English only rules "would greatly undermine civil rights enforcement." By the same token, placing the burden of proof on plaintiff in ordinary torts actions, from medical malpractice to nuisance to automobile accident cases, must "greatly undermine [tort] enforcement." And the much greater burden of proof beyond a reasonable doubt in criminal case must "greatly undermine [criminal law] enforcement."

Mr. Kidman's lawsuit."¹⁷⁰ This statement might suggest to some that the Commission received as witnesses only litigants on one side of the litigation. This is not the case. Both lawsuits were, of course, brought by the EEOC, and Reed Russell, Legal Counsel to the EEOC, testified on behalf of that agency.

Moreover, the dissenting commissioners suggest that the Commission "invited ... a narrow and overlapping set of English-only proponents." This is untrue. Buried in the footnote is an admission that the Commission in fact attempted to secure the testimony of a large number of other persons and organizations all of which it expected would have a positive view of the EEOC's English only guidelines. The included the CASA de Maryland, the D.C. Employment Center, the Mexican American Legal Defense Fund, the Asian American Legal Defense and Education Fund, the League of United Latin American Citizens, the Lawyers Committee for Civil Rights Under Law, the National Council of La Raza, the ACLU Immigrants Rights Project and former mayor of Nashville William Purcell (then with the Institute of Politics at Harvard University's John F. Kennedy School of Government).

The dissenting commissioners' notion that these organizations declined to participate because the Commission's witness list was unfairly tilted against them is off-base. Kerry O'Brien, Director of Services at CASA de Maryland *did* agree to testify, and so did Laura Brown, an attorney with the D.C. Employment Justice Center. Both withdrew, however, the evening before the testimony. Nevertheless, to suggest that they withdrew on account of an unbalanced witness list is to engage in circular logic. The only reason that the witness list can be considered unbalanced is that they withdrew; their decision made a well-balanced list unbalanced. Fortunately, they had submitted statements, so all was not lost.

Unfortunately, this leads to a sensitive subject. Over the last few years, it has been noted on more than one occasion that when witnesses whose views were in general sympathy with the Democratic appointees to the Commission have agreed to testify, they sometimes mysteriously withdraw shortly after their names were made available to all commissioners. Commissioner Michael Yaki would then berate the staff for failing to balance the witness list and argue that the report was somehow tainted.¹⁷¹

¹⁷⁰ Mr. Riordan and Mr. Kidman provided different perspectives. Mr. Riordan is a lawyer who represented a Chicago area manufacturer in connection with EEOC-instituted litigation over the manufacturer's English only rule. He testified as to the EEOC's strong-arm tactics in that litigation. Mr. Kidman is a restaurant owner in Arizona. He testified from a businessman's standpoint. I am surprised by the dissenting commissioners' suggestion that this is somehow an overabundance of testimony from employers. Perhaps if the EEOC and other federal bodies took the time to hear from employers more often, unemployment would not be where it is.

¹⁷¹ Commissioner Yaki's term ended in December 2010. Although I am told he is set to be re-appointed to that seat, when that happens, he will no longer be in the Commission's minority, since the Commission's membership has changed in the last few months. I therefore do not expect to have to deal with this problem again.

Commissioner Yaki was evidently of the opinion that witnesses whose views he agreed with were somehow being taken advantage of by being asked to present their views to the Commission. See Rebuttal of Commissioner Gail Heriot to Encouraging Minorities to Pursue Science, Technology, Engineering and Math Careers (October 2010).

The dissenting commissioner appear to be unaware that the rules requiring the Commission staff to assemble a panel of experts representing the broad spectrum of viewpoints were part of a series of reforms put into place beginning in 2005 under the chairmanship of Gerald Reynolds.¹⁷² The previous chairman, Mary Frances Berry, had been uninterested in ensuring such balance, and the Commission frequently held events at which only views congenial to Chairman Berry were entertained.

Since the departure of Chairman Reynolds, the dissenting commissioners have terminated a number of highly beneficial programs and procedures he had put into place. I hope the policies favoring balanced presentations will not be among them. Instead, I believe these policies can be greatly improved upon by requiring individual commissioners to shoulder at least some of the responsibility for panel balance. I believe this will go a long way toward controlling the most recent abuses mentioned alluded to above as well as other real and potential problems the Commission has faced or will likely face in the future.

Rebuttals

Abigail Thernstrom

REBUTTAL STATEMENT OF VICE CHAIR THERNSTROM

English Only Policies In the Workplace

I hope all commissioners could agree that American students would benefit from knowing languages other than English, and that cultural ignorance and isolation is dangerous. When public school districts cut foreign languages out of their curriculum, they are saving money at the expense of quality education.

I would make a sharp distinction, however, between a failure to expose children to foreign languages and cultures and the assumption on the part of schools that, in America, English is the primary language. American students who do not master English will end up flipping hamburgers and pumping gas, as the Democratic commissioners implicitly acknowledge in their dissent.

English-only workplace rules are an entirely separate issue. In their dissent the Democratic commissioners essentially assert that more often than not English-only rules amount to national origin discrimination. It is too sweeping a condemnation for me. Attorney General Eric Holder has called America “a nation of cowards” when it comes to talking about race. I would put the point differently: We are a nation in which too many have been cowed into biting their tongues. Those who try to talk about the subject with a modicum of honesty – raising the problem of single-parent households in the black community, for instance -- risk

¹⁷² See, e.g., Administrative Instruction 1-6. See also Letter of May 11, 2007 from Staff Director Kenneth Marcus to the Honorable Alan B. Mollohan and the Honorable Rodney P. Frelinghuysen (outlining reforms undertaken by the Reynolds administration).

being called “racist.” If we want an intellectually honest discussion about the complexities of enforcing Title VII properly, it would seem best if we hesitate before charging people with condoning national origin discrimination. Stifling conversations, encouraging people to censor themselves lest they risk condemnation, is not in the public interest.

In addition, where is the evidence that national origin discrimination is a big problem? The most obvious indicator of whether certain groups are deprived of jobs on the basis of their race or ethnicity is the employment/population ratio. Bureau of Labor Statistics data show that Hispanics consistently have *higher* employment/population than non-Hispanic whites in recent years. The ratio reversed -- but by only a tiny amount -- as a result of the current recession. The industries and skill levels in which Hispanics are concentrated have been particularly hard hit, but this presumably will reverse again when the economy recovers. The rates for Asians are also consistently as high or higher than those for whites, and remained so despite the recession. [U.S. Department of Labor, *Labor Force Characteristics by Race and Ethnicity*, 2009, Report 1026, Table 3, at <http://www.bls.gov/cps/cpsrace2009.pdf>.].

I agree that at the fringes of the English-only movement racist or xenophobic motives can be found, as in any political movement. But let us not take the extremists as representative of American sentiments in general, and let us keep the focus on workplace rules rather than the larger and complicated issue of immigration policy, which is another separate matter. If we tread carefully, we may find more agreement than disagreement on the commission.

Peter Kirsanow

Rebuttal of Commissioner Peter Kirsanow

Rather than undertaking a detached, critical analysis of the Equal Employment Opportunity Commission’s (“EEOC”) Guidelines on “Speak English in the Workplace Rules” (“Guidelines”) my Democratic colleagues, writing in dissent,¹⁷³ embrace the policy as a means of effectuating their vision, implicitly shared by the EEOC, of the modern multilingual, multicultural workplace. Their support for the Guidelines appears to stem from the same flawed premise that underlies the EEOC’s policy—that an employer’s adoption of a uniform workplace language requirement is more likely a reflection of national origin discrimination (which the dissent believes is a systemic national problem) than the result of some legitimate, non-discriminatory business necessity of the employer.

The dissent fails to seriously credit or even adequately consider the wide spectrum of possible legitimate, non-discriminatory business purposes for which an employer might adopt a uniform workplace language requirement. At the same time, it countenances the

¹⁷³ Chairman Castro and Commissioners Achtenberg and Titus were not members of the Commission on Civil Rights either at the time of the English-in-the-workplace briefing or during the preparation and vote on the final report and findings and recommendations. At the Commission’s March 11, 2011 business meeting, a Commission majority approved a request by Chairman Castro to break with agency precedent and permit the new Commissioners to file a dissenting statement. I voted against that motion.

Guidelines' seeming reversal of the traditional burden of proof from the plaintiff to make a showing that the employer's language rule has a discriminatory purpose or effect to the defendant to prove that its policy is driven by a legitimate business necessity. The practical effect of the Guidelines is to make it exceedingly difficult for employers to defend English-language workplace policies. When faced with the likelihood of high litigation costs and external pressure in the form of negative publicity generated by the EEOC, many employers are forced to simply abandon these policies, however necessary to the safe, orderly and efficient running of the workplace they may be.

By uncritically embracing the EEOC's position with respect to English language workplace rules, the dissenting Commissioners abandon this Commission's obligation to independently appraise the EEOC's enforcement policies and make recommendations that might help those policies reflect a more reasonable balance between the federal government's interest in ensuring nondiscrimination in employment and an employer's prerogative to adopt policies that contribute to the safety, efficiency and harmony of its workplace. Worse still, by professing to know the "real underlying reasons for most of these English-only policies"¹⁷⁴ without citing any actual data, evidence or other substantiation for their beliefs,¹⁷⁵ the

¹⁷⁴ Dissenting Statement of Chairman Martin R. Castro, Commissioner Roberta Achtenberg and Commissioner Dina Titus ("Dissent") at 83-84 (uncritically crediting the unsubstantiated assertion of one witness that anti-immigrant animus was at the heart of such rules).

¹⁷⁵ As evidence for this the proposition, the dissent cites the assertion of CASA de Maryland's Kerry O'Brien in her written statement to the Commission. In that statement, O'Brien claimed that "[t]here is no doubt that employers are using these policies to enforce an anti-immigrant point of view, and therefore systematically violating the federal laws of the United States." Dissent at 83-84.

But O'Brien's perspective is simply not borne out by the facts—far from being anti-immigrant or harboring anti-immigrant bias, many of the nation's employers and business interests have been at the forefront of opposition to state, local and federal efforts to control illegal immigration and have argued strenuously for comprehensive immigration reform. *See, e.g.* Julia Preston, "Employers Fight Tough Measures on Immigration," N.Y. TIMES (Jul. 6, 2008), <http://www.nytimes.com/2008/07/06/us/06employer.html>; Bill Kaczor, "Business Groups Can't Stop Fla. Immigration bills, AP (Apr. 15, 2011), <http://www.businessweek.com/ap/financialnews/D9MK3T6O0.htm>.

In fact, in her testimony before the Commission on English language workplace policies, Linda Chavez—a strong proponent of comprehensive immigration reform and a legal pathway to citizenship for those already here illegally—observed the same, taking issue with O'Brien's characterization that employers are motivated by a desire to drive immigrant workers out of the workplace. Testimony of Linda Chavez, Briefing Trans. at 95. To the contrary, Ms. Chavez observed:

And I would say that quite to the contrary, that certainly in large sectors, which I am familiar with, because I happen to sit on some corporate boards that employ large numbers of foreign-born persons, that there is a frustration on the part of many employers that Congress has not moved to, in fact, enact comprehensive immigration reform, because they are desperate for workers, many of whom don't speak English, and many of whom were born outside the United States. So this idea that there is this large scale move, I don't think is accurate.

Id. at 94.

I would have very much liked to have asked Ms. O'Brien about this assertion, which the dissent now relies upon as evidence, but she was one of two witnesses who was scheduled to speak in favor of the EEOC's position on English in the workplace language policies who cancelled her scheduled appearance before the

dissenting Commissioners ignore common sense¹⁷⁶ and do little to elevate the discussion above the usual ideological divisions to search for consensus. Their views are unsupported by the briefing record, witness testimony or available EEOC data.¹⁷⁷ Accordingly, it would be a mistake to view English-in-the-workplace policies through the dissent's (and the EEOC's) distorted lens.

While language bears some relationship to national origin, neither Congress nor the Supreme Court has deemed it a sufficient proxy for national origin such that language is automatically considered a "protected class" under Title VII. Under Title VII of the Civil Rights Act (and its subsequent amendments), Congress prohibited discrimination in employment on the basis of race, color, religion, sex and national origin. Though "national origin" is not specifically defined in the statute, the legislative history of the Act's adoption indicates that Congress contemplated a very narrow definition of the term.¹⁷⁸ Relevant Supreme Court precedent

Commission at the very last minute the night before the briefing. Ms. O'Brien cited "panel balance concerns" as her rationale for cancellation, despite the fact that the briefing would have been evenly balanced had she and Laura Brown of the D.C. Employment Justice Center appeared as scheduled. In short, her withdrawal (and that of Ms. Brown) provoked the very problem she alleged.

The dissent is critical of the briefing panel's composition. Dissent at 86-87.

It is worth pointing out to some of the newer Commissioners that in both the English Language and STEM briefings, briefing witnesses whose participation would have likely guaranteed the Dissent's dissent's desire for more sufficiently diverse viewpoints accepted staff invitations to participate in the briefings as panelists only to pull back from participating late in the planning process. The circumstances surrounding these often last-minute withdrawals are, at the very least, curious.

I also note that the Commission issued a total of ten invitations to groups who might have more fully discussed the issue of national origin discrimination that the dissent wished had been more fully developed in the record. See Briefing Trans., at 10-12. All told, eight of the those ten invited declined to attend; two committed and then withdrew. *Id.* By contrast, the Commission invited four witnesses that the dissent mischaracterizes as "a narrow and overlapping set of English-only proponents." Those witnesses were simply proponents of an EEOC policy that better reflects the delicate balance struck in Title VII between an employer's control over its workplace and the federal government's efforts to ensure nondiscrimination.

¹⁷⁶ For example, it makes little sense to presume that an employer who hires immigrants would then adopt an English language policy out of anti-immigrant animus.

¹⁷⁷ For example, as a percentage of total national origin discrimination charges received, charges implicating English-only rules are actually few and have remained relatively constant in terms of real numbers over the past ten years. Then General Counsel of the EEOC, Reed Russell, revealed during the Commission's 2008 briefing that "during the past 10 years, EEOC received an average of about 180 charges per year challenging English-only policies. This constitutes only about two-tenths of 1 percent of total charges filed with EEOC during the same time period." USCCR, Briefing on Specifying English as the Common Language of the Workplace (Dec. 12, 2008), Testimony of Reed Russell, General Counsel, EEOC. Briefing Trans. at 60-61, 99. See also Email of Ernest Haffner, Senior Attorney Advisor, EEOC, to David Blackwood, Attachment: Charges Accountable to EEOC Filed 01/01/97 through 12/10/08, Disposition as of 12/10/08 (Dec. 10, 2008) and Equal Employment Opportunity Commission, National Origin Charge Statistics FY1997-FY 2010, <http://www.eeoc.gov/eeoc/statistics/enforcement/origin.cfm> (last visited Apr. 15, 2011).

¹⁷⁸ See 110 Cong. Rec. 2549, 2550 (1964) (Statement of Rep. Roosevelt) (emphasizing a narrow definition of national origin as "the country from which you or your forebears came from"). See also James Leonard, *Bilingualism and Equality: Title VII Claims for Language Discrimination in the Workplace*, 38 U. MICH. J.L. REFORM 57, 101 (2004) ("Language is not mentioned in the text of Title VII. . . . One can fashion arguments in the abstract that there is a relationship between an immigrant's country of origin and his primary language. There is scant evidence, however, that the enacting Congress entertained them.").

further supports a narrow construction of “national origin,” which the Court held refers to “the country where a person was born, or, more broadly, the country from which his or her ancestors came.”¹⁷⁹ Subsequent amendments to the statute have not resulted in the addition of “language” or “language choice” to the list of classes protected under Title VII.

Thus, while I grant the dissent’s assertion that there is some “relationship”¹⁸⁰ between language and national origin, that connection is not sufficient in and of itself to render the terms interchangeable for purposes of Title VII. Nonetheless, the EEOC, which the dissent concedes has no rulemaking authority under Title VII by deliberate design of Congress,¹⁸¹ promulgates Guidelines that treats the terms as if they are synonymous, thereby binding employers who are not in a position to risk litigation. At best, the equation of English-usage with national origin discrimination is highly problematic. As others have cogently argued, one’s national origin and his or her ability to speak English are two separate and distinct qualities.¹⁸² For example, “some people of a particular national origin will not be able to speak English well, but others will. Conversely, some people *not* of that particular national origin will *also* not be able to speak English very well.”¹⁸³ It is on this basis that the vast majority of federal courts to consider the question have either rejected the EEOC’s Guidelines outright or rejected their underlying presumption of national origin discrimination.¹⁸⁴

Another critical feature distinguishing language from national origin is that while the latter is immutable, the former is something that can be acquired or improved over time with a bit of effort. The fact that language is not fixed at birth like race, gender or national origin renders it even less likely that Congress intended for language to be automatically treated as a proxy for national origin discrimination under Title VII.

Consider the Supreme Court’s decision in *Espinoza v. Farah Manufacturing Co.*,¹⁸⁵ in which Justice Marshall, writing for an 8-1 Court majority, held that an employer did not engage in national origin discrimination where it refused to hire a non-citizen. In that decision, the Court rejected the EEOC’s equation of “national origin” with United States citizenship.¹⁸⁶ In so doing, it flatly rebuffed the agency’s attempt to ban U.S. citizenship preferences in employment on the grounds that such preferences would have a disparate impact on the basis of national origin.¹⁸⁷ It stands to reason, then, that an employer’s specification of English as the language of the workplace (which in effect “discriminates” against all foreign languages,

¹⁷⁹ *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 88 (1973).

¹⁸⁰ Dissent at 85.

¹⁸¹ Dissent at 87, n.132.

¹⁸² Letter from Roger Clegg & Edward Blum to Merrily Friedlander, U.S. Department of Justice, Regarding DOJ’s Guidance on Title VI and Its Prohibition Against National Origin Discrimination at 3 (Feb. 14, 2002), available at www.ceousa.org/content/view/338/96/ (hereinafter “Clegg & Blum Letter”).

¹⁸³ *Id.*

¹⁸⁴ The dissent is critical of the Commission’s Finding #2, alleging that it mischaracterizes the extent to which the EEOC Guidelines carry weight in courts of law. But the fact that a Court may credit the Guidelines in determining legislative intent under Title VII does not confer upon those Guidelines the force of law, especially where Congress explicitly restricted the EEOC’s ability to promulgate regulations.

¹⁸⁵ 414 U.S. 86 (1973).

¹⁸⁶ *Id.* at 94.

¹⁸⁷ *Id.* at 92-95.

just as the citizenship preference in *Espinoza* “discriminated” against all foreigners) is not properly considered national origin discrimination.¹⁸⁸ “It would seem to follow that discrimination against all foreign languages doesn’t violate the law; only discrimination against a language associated with a particular national origin.”¹⁸⁹

The dissent’s reliance on *Lau v. Nichols*¹⁹⁰ is thus largely beside the point. There, the Court held that a school district’s failure to provide language assistance to non-English speaking children violated the nondiscrimination requirements imposed by the Department of Health, Education and Welfare through regulations promulgated under Title VI. Justice Blackmun’s concurrence specifically limited the holding to the narrow facts of the case.¹⁹¹ So as a preliminary matter, it is not at all clear that *Lau* would apply to cases outside of the educational context or to circumstances outside of the receipt of federal financial assistance governed by Title VI; in fact, it seems most unlikely that it would. Perhaps most importantly, the dissent’s reliance on *Lau* obscures the actual circumstances under which most workplace English language policies operate. The vast majority of English workplace policies challenged by the EEOC do not apply as in situations like in *Lau* (where the children spoke no English at all), but to circumstances where employees are bilingual and their ability to speak the preferred language of their choice in the workplace (equally applied to all bilingual employees, regardless of national origin) is actually what is governed by the employer’s language policy.¹⁹²

The Commission’s findings and recommendations do not at all discount the possibility that an ill-intentioned employer might use English-language rules to harass, embarrass or exclude employees or applicants on account of their national origin. Such conduct, if shown by a preponderance of the evidence, would be prohibited under Title VII. Our disagreement with the EEOC Guidelines, and by extension with the dissent’s uncritical embrace of those Guidelines, is with their treatment of English-language rules as presumptively invalid. In so doing, the EEOC’s Guidelines adopt a burden-shifting scheme that differs in significant respects from that which Congress adopted in the Civil Rights Act of 1991, which codified the four-part disparate impact burden-shifting analysis enunciated in *Griggs v. Duke Power Co.*¹⁹³

Under Title VII, employment practices that have a disparate impact are unlawful only if “*a complaining party demonstrates* that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. . . .” 42 U.S.C. § 2000e-2(k) (emphasis added).

¹⁸⁸ See Clegg & Blum Letter, *supra* note 8 at 4.

¹⁸⁹ *Id.*

¹⁹⁰ 414 U.S. 563 (1974).

¹⁹¹ *Id.* at 571-72.

¹⁹² See Transcript, USCCR Briefing on Specifying English as the Common Language of the Workplace (Dec. 12, 2008), Oral Testimony of Reed Russell, General Counsel, EEOC, at 18 *available at* <http://www.usccr.gov/calendar/trnsrpt/121208ccr2.pdf>.

¹⁹³ 401 U.S. 424 (1971).

Utilizing the standard set forth in *Griggs*, to establish a prima facie case of discrimination, a plaintiff must demonstrate that the employer maintains an English-only policy that has the purpose or effect of discriminating in the terms, conditions or privileges of employment against members of a protected class, regardless of the employer's intent. The harm must be sufficiently severe to alter the plaintiff's terms and conditions of employment or those of members of plaintiff's protected class. Once this evidentiary burden is met, an employer can offer as an affirmative defense a valid business necessity for its policy. If the employer can prove business necessity, the burden of proving a Title VII violation then shifts back to the plaintiff to show that the employer can fulfill the business necessity with more narrowly tailored alternatives than its English-language policy.

Ignoring the unequivocal intent of Congress to codify the disparate impact analysis set forth in *Griggs* in the 1991 Civil Rights Act,¹⁹⁴ the EEOC Guidelines turn *Griggs*' carefully crafted burden-shifting scheme on its head. Under the EEOC's formulation, an employment policy that requires employees to speak English at all times is treated, without any further analysis, as a "burdensome term and condition of employment" and is thereby treated as a presumptive violation of Title VII.¹⁹⁵ In practical effect, the EEOC relieves the plaintiff of the burden of demonstrating that he or she is part of a protected class and that the employer's English policy caused actual, severe harm sufficient to alter the terms and conditions of employment of members of the plaintiff's protected class and not just employees more broadly. Then, the EEOC essentially tells employers that no business necessities exist that can justify blanket workplace English-only rules. Employers may only adopt more limited English-only language policies (i.e. those that apply while on the assembly line, but not in the break room) if they can show that their policy is justified by a valid business necessity and they provide their employees with adequate notice of their adoption of such a policy.¹⁹⁶

But as Commissioners Gaziano and Heriot adequately chronicle, there are numerous, legitimate, non-discriminatory business reasons that might necessitate an employer's adoption of even blanket English-language workplace policies of the type that are basically forbidden outright by the EEOC.¹⁹⁷ One such reason is so that an employer might comply with Section 5(a)(1) of the Occupational Safety and Health Act, also known as the General Duty Clause, which speaks to workplace safety. Under the General Duty Clause, an employer has an affirmative duty to furnish its employees with a workplace free from recognized hazards that cause or are likely to cause death or serious physical harm.¹⁹⁸

¹⁹⁴ For a fuller discussion of this issue, and of the careful balance that Congress intended to strike under Title VII between preventing discrimination and preserving the independence of the employer, see Melissa Meitus, *English Only Policies in the Workplace: Disparate Impact Compared to the EEOC Guidelines*, DEN. UNIV. L. REV. 901, 919-21 (Sept. 2005-2006).

¹⁹⁵ 29 C.F.R. § 1606.7(a)

¹⁹⁶ *Id.* at 1606.7(b)-(c).

¹⁹⁷ For example, Commissioner Gaziano envisions a circumstance in which an employer might institute a blanket English language workplace policy to remedy racial and sexual harassment that has created a hostile work environment. See Concurring Statement of Commissioner Gaziano at 1-2 (arguing that if an employer becomes aware of harassing conduct, but does nothing to remedy it, the employer could be liable for such conduct). Indeed, Mr. Kidman of RD's Drive In testified before the Commission to exactly this situation. Briefing Trns. at 45-49

¹⁹⁸ Section 5(a)(1) of the General Duty Standard reads: "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to

Section 5(a)(1) is broad and all-encompassing. It covers the workplace generally, not solely when workers are on duty. If applied as the EEOC intends, the Guidelines would have the perverse effect of rendering English-language workplace requirements adopted for the purposes of complying with the General Duty Standards invalid.

Accordingly, one negative unintended consequence of the Guidelines is that they have the effect of discouraging employers from proactively assessing workplace safety (or other) challenges and adopting policies directed at avoiding those challenges for the benefit of all their employees. The Guidelines' rigidity do not permit appropriate distinctions to be drawn between circumstances where an employer adopts an English language policy to harass, embarrass or exclude employees or applicants and when that employer is simply acting in the best interests of all its employees. The EEOC's position makes it exceedingly difficult for small and medium-sized employers to defend their discretion over the workplace because they cannot afford the litigation or negative publicity that often accompanies it. Regardless of the merits of their case, the costs of litigation drive many employers to simply settle with the EEOC rather than undergo the burdens of protracted litigation and the danger of the EEOC launching a public relations war.¹⁹⁹

It is also not difficult to imagine how the existence of two separate standards (the EEOC's and Title VII's) might create confusion for an employer earnestly wishing to ensure that it is complying with Title VII. This is all the more true for small businesses that typically lack the resources to hire attorneys and human resource specialists to ensure proper compliance with Title VII. The dissent sidesteps this EEOC-generated confusion all together.

The preceding discussion amply illustrates how both the fact of the EEOC's promulgation of "Speak English Only" Guidelines and the substance of the Guidelines, themselves, exceed the bounds of the text and Congressional intent behind Title VII (including its subsequent modifications), as well as applicable case law. The dissent admonishes us to uncritically accept such guidance, preferring to rely instead on the faulty, if consistent position of the EEOC through three successive administrations.²⁰⁰ *Espinoza* is again instructive. There, the Court held that where the EEOC's interpretation of "national origin" exceeded Congress' actual intent to address the employment practice in question, its guidance was wrong and the courts need not be bound by it.²⁰¹

Although the *Chevron* doctrine entitles an agency's administrative guidelines to considerable weight, "the Court has also 'consistently held that there are limits on an agency's power to issue regulations' and 'that this power is extremely limited when an agency tries to modify or

cause death or serious physical harm to his employees." Occupational Health and Safety Act, 29 U.S.C. § 654(a)(1) (2010).

¹⁹⁹ See Testimony of K.C. McAlpin, Briefing Trns. at 43 (discussing the Kidmans' experience upon having been sued by the EEOC) ("The Kidmans' case is, unfortunately, typical of the way the EEOC operates. Even when an employer goes to court and wins, they can't recover their legal costs in most circumstances, so the EEOC uses its superior resources to intimidate employers, exhaust their resources, and force them to accept a settlement that allows them to accept a settlement that allows the EEOC to claim a public relations victory.").

²⁰⁰ Dissent at 86.

²⁰¹ 414 U.S. at 94-95 ("Courts need not defer to an administrative construction of a statute where there are compelling indications that it is wrong.").

change the meaning of the statute.’”²⁰² Thus, if courts are not bound to give substantial weight to the EEOC Guidelines when it attempts to graft onto Title VII standards or legal theories the statute does not contain, then this Commission, which is independently charged with assessing federal agencies’ civil rights enforcement efforts and policies and making recommendations regarding same, can afford the Guidelines even less weight. In fact, we need not afford the Guidelines any weight at all.

²⁰² Natalie Prescott, *English Only At Work, Por Favor*, 9 U. PENN. J. LAB. & EMP. L. 445, 461 (2007) (citations omitted).