
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.

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- 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.

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.”)

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

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.”)

THOMAS G. TANCREDO
6TH DISTRICT, COLORADO

Exhibit B

COMMITTEE ON EDUCATION
AND THE WORKFORCE
SUBCOMMITTEES:
EARLY CHILDHOOD, YOUTH AND FAMILIES
OVERSIGHT AND INVESTIGATIONS
COMMITTEE ON RESOURCES
SUBCOMMITTEE:
ENERGY AND MINERALS
COMMITTEE ON
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Congress of the United States House of Representatives

Washington, DC 20515-0606

December 14, 1999

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. Synchrono-Start Products*, 29 F.Supp.2d 911 (N.D. Illinois, 1999). In *Synchrono-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 *Synchrono-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 Synchrono-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 *Synchrono-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 *Synchrono-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.

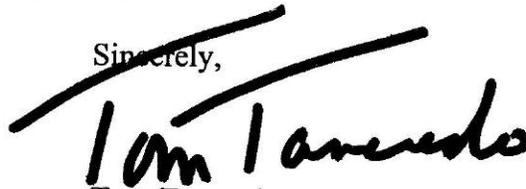
3) A complete explanation of whether, and if so, how the Commission intends to revise its materials relating to English-on-the-job rules, including employee training and interpretation manuals, to reflect the current state of judicial decisions in this area.

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 written in a cursive, slightly slanted style. Above the signature, there are two horizontal lines that appear to be part of a signature or a mark.

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.

(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, 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. Synchro-Start 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).

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

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...)

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).

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.

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.

The Honorable Thomas G. Tancredo
Page 8

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

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.

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[Return to Home Page](#)