
TESTIMONY OF
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REGARDING
“SPECIFYING ENGLISH AS THE COMMON LANGUAGE OF THE WORKPLACE:
EVERY EMPLOYER’S RIGHT OR VIOLATION OF FEDERAL LAW?”

BEFORE
THE UNITED STATES COMMISSION ON CIVIL RIGHTS

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/.](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

Barnaby Zall, *English in the Workplace: The EEOC's Abuse of Its Authority* (November 2000) (Center for Equal Opportunity "Policy Brief").

[text to be added]

Appendix B

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

(Federalist Society newsletter). [link:

<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

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- 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.

APPENDIX A

To Statement of Linda Chavez



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).
- *Gofryd 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

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).

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