U.S. COMMISSION ON CIVIL RIGHTS

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COMMISSION BRIEFING

SPECIFYING ENGLISH AS THE COMMON LANGUAGE IN THE WORKPLACE: EVERY EMPLOYER'S RIGHT OR A VIOLATION OF FEDERAL LAW?

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FRIDAY, DECEMBER 12, 2008

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The briefing convened in Room 540 at 624 Ninth Street, N.W., Washington, D.C., at 9:30 a.m., Abigail Thernstrom, Vice Chair, presiding.

PRESENT:

ABIGAIL THERNSTROM, Vice Chairman
TODD F. GAZIANO, Commissioner
GAIL L. HERIOT, Commissioner
PETER N. KIRSANOW, Commissioner
ARLAN D. MELENDEZ, Commissioner
ASHLEY L. TAYLOR, JR., Commissioner
MICHAEL YAKI, Commissioner

MARTIN DANNENFELSER, Staff Director

STAFF PRESENT:

DAVID BLACKWOOD, General Counsel
TERESA BROOKS
MARGARET BUTLER
CHRISTOPHER BYRNES, Chief, Programs Coordination Unit
DEBRA CARR, Associate Director
DEMITRIA DEAS
LATRICE FOSHEE
MAHA JWEIED
EMMA MONROIG, Solicitor
LENORE OSTROWSKY
KIMBERLY TOLHURST
AUDREY WRIGHT
MICHELLE YORKMAN

COMMISSIONER ASSISTANTS PRESENT:

TIM FAY
DOMINIQUE LUDVIGSON
RICHARD SCHMECKEL

PANELISTS:

RICHARD KIDMAN
TIMOTHY J. RIORDAN
K.C. McALPIN
REED RUSSELL
LINDA CHAVEZ

A-G-E-N-D-A

P-R-O-C-E-E-D-I-N-G-S

(9:39 a.m.)

INTRODUCTORY REMARKS BY THE VICE CHAIRMAN

VICE CHAIR THERNSTROM: Good morning. I am the Vice Chair, Abigail Thernstrom, and I welcome everybody here to this briefing on Specifying English As The Common Language in the Workplace: Every Employer's Right or a Violation of Federal Law?

This briefing will examine whether employers have the legal authority to specify English as the language of the workplace. Currently, businesses adopting such policies risk potential claims alleging discrimination based on national origin, a position often taken by the Equal Employment Opportunity Commission, that is the EEOC. And this briefing seeks to address competing viewpoints on the issue.

The record of this briefing will be open until January 12th, 2009, and public comments may be mailed to the U.S. Commission on Civil Rights, Office of Civil Rights Evaluation, 624 9th Street, N.W., Washington, D.C. 20425.

And before we begin, I would like to extend a sincere thank you to all of our panelists for taking their time today to help inform our discussion.

These briefings are extremely important, usually very informative, and part of a public record that I think -- I, at least, have used the public records of the Commission, made good use of them as a scholar myself, and I know others have, and so again I thank you.

I would like to note for the record that the Commission has made every effort to obtain a wide variety of points of view on this topic. Besides the individuals and organizations who have graciously agreed to be with us today, we have also contacted a wide range of other groups which were unavailable or otherwise not able to participate. These include the Mexican American Legal Defense Fund, MALDF. It has expressed an interest in submitting a written statement at a later date, and we welcome that statement. The Asian American Legal Defense and Education Fund, the League of United Latin American Citizens, LULAC; the Lawyers Committee for Civil Rights under Law, La Raza, the ACLU Immigrants Rights Project, and Bill Purcell, the former mayor of Nashville, Tennessee, and the current director of Harvard's Institute of Politics of the John F. Kennedy School of Government. Sir?

COMMISSIONER TAYLOR: Madam Vice Chair, I wanted to ask the Staff Director if he could shed any

additional light on the efforts that were made to put the panel together?

STAFF DIRECTOR DANNENFELSER: Thank you very much. Yes, there was outreach to people of different points of view that, as well as we could identify them, a great deal of searches to identify people who have spoken out on this subject. And the Vice Chair, I think, delineated the different groups that we did reach out to, and we are hopeful of receiving some written testimony. And then we have two organizations, representatives withdrew last evening, but they had submitted written statements, as well, so we welcome those statements, and look forward to all of the input we'll receive from the witnesses who are here today.

COMMISSIONER TAYLOR: One more follow-up. Since they aren't here today, do we have extra copies of their statements?

STAFF DIRECTOR DANNENFELSER: Yes, we do. I have some extra copies for the press or any members of the public who are interested.

COMMISSIONER TAYLOR: Thank you.

COMMISSIONER YAKI: Point of information. Who has withdrawn?

STAFF DIRECTOR DANNENFELSER: Kerry

O'Brien from CASA de Maryland has withdrawn, and Laura Brown, who's a managing attorney of the Legal Services program at the D.C. Employment Justice Center.

VICE CHAIR THERNSTROM: And when did we hear from -

STAFF DIRECTOR DANNENFELSER: They both withdrew last evening.

COMMISSIONER YAKI: Did they give any reasons for the withdrawal?

STAFF DIRECTOR DANNENFELSER: Laura Brown just said she had to withdraw, but she wanted to have her statement included in the record. Kerry O'Brien indicated that she thought there were going to be more viewpoints among the witnesses than she perceived on the agenda, so she decided that she would withdraw.

VICE CHAIR THERNSTROM: Any other questions about this? I mean, I must say, it would have been more diversity of viewpoints had the two absent people we expected shown up, of course. And I very much regret that they didn't, because I'm a great believer in diversity of viewpoints.

COMMISSIONER YAKI: Point of information. If they had shown up, wasn't the ratio approximately four witnesses, I guess one would say in favor of the position of English-only rules being constitutional or

legal, versus two who had issues with it. Would that pretty much be how it broke down? You don't include the EESE witness? I'm just talking about the non-governmental -

COMMISSIONER GAZIANO: Why just talk about that? That seems to me like there would be four on one side, and three on another?

COMMISSIONER YAKI: Because I was asking about the non-governmental witnesses. If we have an issue with --

COMMISSIONER GAZIANO: I'm just asking you why --

COMMISSIONER YAKI: Commissioner Gaziano, we can get into this --

COMMISSIONER GAZIANO: We don't need to. I'm just asking for clarification.

COMMISSIONER YAKI: But now that you have, I think I will. I think one of the -- I would like the question answered first by the Staff Director without the -- and then if Commissioner Gaziano wishes to put his own gloss on what the breakdown is, he can. But in terms of the non-governmental witnesses, was it -- is it accurate to say that it was apparently broken down sort of four to two?

STAFF DIRECTOR DANNENFELSER: In terms of

the people who accepted and agreed to come, it was four to two. As the Vice Chair just pointed out, there were eight other organizations or individuals who were invited, all of whom were identified as opponents of the idea of English in the workplace. And we also reached out to all the Commissioners and asked the Commissioners to recommend witnesses. And then I believe the General Counsel made some other individual outreaches to yourself and Commissioner Melendez to once again request that you make suggestions of witnesses.

COMMISSIONER YAKI: Well, the thing -- in response to that, I was going to bring that up myself, that I actually had some discussions with some of the groups, and I think that the best way to describe it was that they had no interest in appearing. Now, you could take from that whatever you will, but I think that one of the things that we have to face, and I think if we track some of our briefings over the past six months, it's becoming more and more apparent that there are a number of organizations who used to, and no longer wish to participate before our proceedings. And I think that at some point we need to ask ourselves a question why? What is it about we are doing that is casting this chill on participation upon

some groups who freely testified before Congress, the Administration, and other legislative and judicial bodies across this country, but not for the U.S. Commission on Civil Rights? And I think it's something that we need to look into. I'm not going to cast any blame or aspersion as to why it is. But I think that as we go forward, especially in the New Year, and with the new administration, we need to take a hard look at what it is that we're doing that is causing a dearth of balance on some of these panels; notwithstanding the fact that even if the two had shown up, they still would have been outnumbered in terms of interest or advocacy, or non-profit organizations that would have appeared.

VICE CHAIR THERNSTROM: I have one thing to say, and then Commissioner Kirsanow has -- I mean, I can't think, Commissioner Yaki, of a single instance in which we have been less than gracious, less than completely engaged, interested in what witnesses across the political spectrum have to say, so that if there is, as you suggest, a kind of boycott going on here, I do not think it is because any witness should have felt unwelcome here. Commissioner Kirsanow?

COMMISSIONER KIRSANOW: I have a question for the Staff Director. What is the ratio in terms of

outreach to organizations that were either perceived as being in favor of English-only policies and those who would be opposed or skeptical of English-only policies?

VICE CHAIR THERNSTROM: And if you want to say that a lot of policies don't break down into this bifurcated picture, it seems to me, that would be legitimate, as well.

STAFF DIRECTOR DANNENFELSER: I believe the ratio, as Commissioner Kirsanow asked, would be 10 individuals or organizations who were opposed to English in the workplace, and four who were in favor. The four that were invited who were in favor agreed to participate; and, in fact, are participating. Eight who were invited declined to participate, two agreed to participate and then withdrew.

COMMISSIONER KIRSANOW: This outreach was done by phone, or mail, or email, or how was it done?

STAFF DIRECTOR DANNENFELSER: It was a combination of phone and email, primarily.

COMMISSIONER KIRSANOW: To your knowledge, were there any statements made by the individuals charged with making the outreach to these individuals that would have chilled their desire to come here? Was there any attempt to discourage their

participation?

STAFF DIRECTOR DANNENFELSER: Not at all, no. The Staff was very much trying to encourage their participation.

VICE CHAIR THERNSTROM: Yes, Commissioner Melendez.

COMMISSIONER MELENDEZ: Yes. I would suggest in our business meeting that we address this issue, and talk about ways we can enhance participation, look at what we might think are impediments to participation. There ought to be a discussion since we're having a business meeting.

VICE CHAIR THERNSTROM: Well, why don't you bring it up at business meeting as a possible item for discussion? Commissioner Yaki?

COMMISSIONER YAKI: Yes. I just want to follow-up a little bit about what Commissioner Kirsanow said. And certainly in no way was I implying that there's any discouragement of these people from appearing. I think quite to the contrary. I think that the staff was very diligent in trying to ask, and earnestly so, these organizations to appear.

What I'm simply commenting on is the fact that the willingness of these organizations to appear empirically, and I don't know this for a fact. I'm

always hesitant to use the word "boycott", but I would simply say that empirically it appears that a number of organizations who normally would appear and do so in other proceedings have chosen not to do so here. I suspect it has nothing to do, Madam Chair, with us being anything less than gracious. I think that all of us are respectful and open-minded during these discussions. I think that at least from what I can gather, is that it goes to one of the core questions of these briefings to begin with; which is, what were they intended to do, and what kind of product comes out of them? And I think that -- I go back to my original statement of about three years ago with then-Commissioner Braceras, that briefings in many ways are meant to raise issues, raise questions, and point the way toward additional or further research or hearings, because simply we don't have the time or the authority in some instances to really get to all parts of the issue in a very short period of time as we do here at these briefings. And I think that's at least my concern about the product of these meetings, may be, and I cannot speak for any group, but my suspicion may be that the product of these briefings having strayed from that model into one more of drawing hard and fast conclusions based on the limited amount of information

that we do get from these hearings, is causing some people -- may be causing some people to not be willing to participate. But that's just speculation, and I would second Commissioner Melendez' call that we, at some point, delve into this a little bit deeper.

VICE CHAIR THERNSTROM: Commissioner Kirsanow has something to say, but let me say, I do think we shouldn't spend a lot more time on this at this point. And we should bring it up this afternoon at the business meeting. Yes?

COMMISSIONER KIRSANOW: Just a brief comment, not based on speculation, but other than the Vice Chair, I think I've got the longest tenure here. During my tenure here, there was a time when we did not have an avert rule that mandated balance. And, in fact, many of the panels were imbalanced in favor of one particular side. There were occasions in which we even have another viewpoint to a particular side. And I know the individuals from a certain perspective very often voiced frustration that, in fact, the end product veered in a certain direction. Nonetheless, those organizations, some might consider them conservative, appeared, and they testified.

We have gone out of our way and got the record in several instances now, efforts by the

Commission to reach out to organizations on a ratio far greater sometimes than two to one in favor of a particular viewpoint to make sure individuals participated; and yet, on occasion, those individuals chose not to participate, not on a lack of effort on the part of Commission staff who typically do a splendid job in bringing very erudite and qualified people to come to testify, so the Commission has changed. It has recognized need for balance. We incorporated within our rules the need for balance, and we've tried to discharge those rules, it appears to me, in good faith.

VICE CHAIR THERNSTROM: Yes. Let me just close this by saying I do not personally, and I speak here just for myself, I do not personally want any voices on a subject shortchanged. Moreover, I want a recognition in our reports of the complexity of the issues we deal with. I can't think of a single issue that has come before us that is not complicated, and we are not doing our job if that is not recognized in the briefing reports. And I look forward to a discussion of what we can do to convince people that that is our commitment.

In any case, let us now move on to the very patient Mr. Russell, who is our -- who occupies

the first panel, has it to himself. He is the Legal Counsel of the U.S. Equal Employment Opportunity Commission. The Office of Legal Counsel serves as the principal advisor to the EEOC on enforcement matters. OLC represents the EEOC in defensive litigation, and administrative hearings. It is involved in analyzing and shaping policy on EEOC issues that affect employers and employees across the country every day. Mr. Russell, please swear or affirm that the information you provide, or you have provided is true and accurate to the best of your knowledge and belief.

(Mr. Russell sworn.)

VICE CHAIR THERNSTROM: Okay. So, again, I welcome you on behalf of the Commission. You will speak for ten minutes, and the clock starts.

SPEAKERS' PRESENTATIONS

MR. RUSSELL: Good morning, Madam Vice Chair and Commissioners. Thank you for this opportunity to explain EEOC Commission, our views on English-only policies.

EEOC has a longstanding position that employers adoption of English-only policies can implicate the prohibition against national origin discrimination under Title VII of the Civil Rights Act of 1964.

COMMISSIONER GAZIANO: Point of order. Is your statement being picked up by the microphone? Can people in the back of the room hear the testimony?

VICE CHAIR THERNSTROM: Wait a minute. Did I see some no voices? If you cannot hear, raise your hand.

COMMISSIONER GAZIANO: It looks like they can.

VICE CHAIR THERNSTROM: Okay.

COMMISSIONER GAZIANO: I'm sorry. I didn't hear your voice reverberate. I'm sorry to interrupt.

COMMISSIONER YAKI: I think that might be the C-SPAN mic you just took off, which shouldn't be --

(Off the record comments.)

VICE CHAIR THERNSTROM: Okay. But that works for C-SPAN, as well.

MR. RUSSELL: EEOC has a longstanding position that employers' adoption of English-only policies can implicate prohibition against national origin discrimination under Title VII of the Civil Rights Act of 1964. EEOC's position dates back to at least the early 1970s, and was promulgated in guidelines published in the Federal Register in 1980.

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

As with any other employment practice, an English-only policy violates Title VII if it was adopted for the purpose of discriminating against employees based on national origin or another protected category. For example, in a 10th Circuit case, plaintiffs who worked for the City of Altus, Oklahoma presented evidence that the city had adopted an English-only policy in order to discriminate based on national origin. The evidence presented by plaintiffs showed that management was aware that the policy would result in the taunting of Hispanic city

employees, and that there were no substantial work-related reasons for the policy, and that the mayor referred to the Spanish language as garbage while he was giving a news interview.

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

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

If an employment practice challenged under Title VII has been shown to cause a disparate impact on the basis of national origin, or another protected status, the practice in unlawful, unless the employer

can demonstrate that the practice is job-related to the position in question, and consistent with business necessity.

EEOC takes the position that an English-only policy is job-related and consistent with business necessity if it is needed for the safe or efficient operation of the employer's business. Thus, employers with legitimate business needs for requiring English-only policies are free to adopt them in a variety of circumstances.

Similarly, if English fluency is required for effective job performance, an employer is free to reject job applicants who are not fluent in English, even if workers of some national origin groups are adversely impacted.

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

English-only policies also can be imposed

for cooperative work assignments, where English is needed to promote efficiency. Thus, for example, a taxi cab company might require English when communicating to the dispatcher's office. English-only policies also might be required to enable a supervisor to monitor work-related communications between co-workers, or between an employee and a customer. For example, at a coffee shop or a restaurant, an English-only policy may be needed to allow a supervisor to monitor the relaying of orders. And, as mentioned, employers may impose an English-only policy where it's needed for safety.

In one of EEOC's own Commission decisions from the early 1980s, the Commission upheld a policy in an oil refinery which required employees to speak only English during emergencies, or while performing work duties in the laboratory or processing areas where there was risk of fires or explosions.

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

As can be seen by these examples, English-

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

English-only policies should not be imposed merely because of co-worker or customer preference. For example, English-only policies should not be imposed merely because some non-Spanish-speaking employees dislike eating lunch in the same room with co-workers who engage in private conversations in Spanish. However, employers may have a duty to take appropriate corrective measures to address workplace misconduct that involves a foreign language, such as race or sex-based comments in Spanish. Such misconduct often can be addressed under the employer's standard disciplinary procedures, and, therefore, will not justify broad English-only policies.

For example, if employees are making

derogatory remarks about co-workers in Spanish, they can be individually disciplined. And if they are repeat offenders, can be required to speak only in English so that non-Spanish-speaking supervisors could monitor their behavior.

Similarly, if there are isolated instances of employees using foreign languages to insult or intimidate English-speaking workers, the employer probably could adequately address the misconduct under an existing discipline policy.

However, as pointed out in the EEOC's compliance manual section on national origin discrimination, some courts have concluded that if such misconduct is more widespread, that an employer is justified in adopting an English-only policy.

To be effective in promoting the employer's business needs, an English-only policy must be clearly communicated to effected employees. Employees are free to use any reasonable means of providing notice, such as a meeting, email, or posting. In some cases it may be necessary for an employer to provide notice in English and in the other native languages spoken by its workers. If an employer does not provide adequate notice of an English-only policy, it may face difficulty in

justifying discipline taken for violations of the policy. Pursuant to EEOC's English-only guidelines, EEOC will consider the application of the policy in such circumstances as evidence of national origin discrimination.

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

EEOC enforces Title VII's limits on English-only policies primarily through the administrative process in charges. During the past 10 years, EEOC received an average of about 180 charges per year challenging English-only policies. This constitutes only about two-tenths of 1 percent of the

total charges filed with EEOC during the same time period. EEOC also filed about two to three lawsuits per year challenging English-only policies. I will tell you that is a roughly similar percentage. There are several hundred lawsuits filed each year, so two to three is a very small percentage.

As with other employment practices, the EEOC takes proactive measures to educate employers about their obligations, and employees about their rights. EEOC has applied the same legal analysis to English-only policies for nearly 40 years, and I think it's fair to presume at this point that most larger employers are aware of their legal obligations under Title VII.

Nevertheless, the issue does arise relatively infrequently compared to other issues under Title VII, and smaller employers may still be unaware of their potential liability in adopting English-only policies. However, under Title VII, employers of any size that are covered cannot be liable for compensatory and punitive damages for disparate impact violations, and disparate impact is generally the theory of law under which English-only policies are challenged.

So, in summary, the EEOC's position on

English-only policies reasonably balances the interest of employers and employees by permitting those policies that are consistent with business necessity, while preserving Title VII's mandate of insuring equal opportunities for non-native English-speaking individuals who are able to effectively perform the job functions. That's the end of my statement.

VICE CHAIR THERNSTROM: Well, you have set a model for the rest of the panelists. You are slightly under your ten minutes. Yes?

COMMISSIONER KIRSANOW: Questions?

VICE CHAIR THERNSTROM: No. We evidently are not -- I didn't realize this, but I was just told that we are leaving all questions until the end of all panelists.

COMMISSIONER YAKI: Well, then we won't have enough chairs.

STAFF DIRECTOR DANNENFELSER: We will.

COMMISSIONER YAKI: Okay.

MR. RUSSELL: However you prefer. I don't care.

COMMISSIONER YAKI: Okay. That's cool.

VICE CHAIR THERNSTROM: I was informed that we were doing this. This was not my decision.

COMMISSIONER KIRSANOW: It's not your

decision? You've got the gavel.

VICE CHAIR THERNSTROM: I've got the gavel.

COMMISSIONER KIRSANOW: Just go like this and say it's my decision that this guy is going to testify right now, and answer questions.

COMMISSIONER GAZIANO: I would prefer to have the EEOC respond to some of the actual cases we might hear, so I think that might be more productive for all the witnesses.

VICE CHAIR THERNSTROM: Mr. Russell, it's my understanding from the Staff is that you are available to stay?

MR. RUSSELL: I made adjustments to my calendar so I can be available for you today, so I'm available.

VICE CHAIR THERNSTROM: Well, I thank you very much, and can we just then go ahead with the other panelists, unless somebody else has an objection. Commissioner Yaki, you're not feeling restless because you have an objection.

Okay. Thank you, Mr. Russell. And we will go on to the panelists, and then have questions afterwards. And I urge all panelists for the second panel to follow his model in terms of his keeping to

the time. I very much appreciated that. And then we'll get to the questions faster. And I think there will be probably a lot of questions.

The panelists on the second panel please step forward. We have the following panelists, the second panel of the morning. Timothy Riordan, who is an attorney, primary focus has been litigation. He has handled numerous matters before various administrative agencies, including the EEOC and the Illinois Department of Human Rights. Richard Kidman of R.D.'s Drive-In in Page, Arizona is the defendant in EEOC v. Kidman, in which the EEOC brought suit under Title VII over an English-only policy governing employees of the restaurant. Kerry O'Brien is obviously not with us. I was about to introduce her. K.C. McAlpin. Have I pronounced your name correctly? I hope so. Has been the executive director of Pro-English since 2000. Pro-English is a national non-profit organization dedicated to preserving English as the common language of the United States, and making it the official language, indeed. And Linda Chavez is the chair of the Center for Equal Opportunity, a non-profit public research organization. She also writes a weekly syndicated column that appears in newspaper across the country, and is a political analyst for Fox

News Channel. She is currently the chair of the Commission's Virginia State Advisory Commission, and in the early 1980s she was the staff director here at the Commission, a time I remember well. And, obviously, the last person on my list, Laura Brown, has not been able to make it.

Please, all of you, swear or affirm that the information you have provided is true and accurate to the best of your knowledge and belief.

(Panel sworn.)

VICE CHAIR THERNSTROM: Again, I welcome you, and I call on you in the order you've been given for the record, so we start with Mr. Riordan, who will speak for ten minutes.

MR. RIORDAN: Good morning. Thank you for the invitation. I believe I've been invited to make a presentation because of my involvement in one of the cases that's cited in the EEOC compliance manual.

I'm an attorney primarily responsible for counseling and defending Synchro-Start Products, Inc., a Chicago area company, in litigation which was initiated by the EEOC. And, as I said, a case cited in the EEOC's compliance manual. I might point out that that case never went beyond the motion to dismiss stage, and some discovery. I'll describe a little

further our experience with the matter.

In that case, the EEOC filed suit on behalf of a number of Synchro-Start employees whose primary language was not English, alleging that Synchro-Start intentionally violated Title VII by requiring the employees to speak only English during working hours. In 1997, Synchro-Start promulgated a policy to its employees to speak only English while working on the factory floor. The policy was a result of complaints from a number of employees that other employees were perceived to be harassing and insulting them while speaking in their native language, which could not be understood by the complaining employees.

The policy had been implemented to diffuse what was developing into a serious morale problem, and to avoid potential claims of harassment or discrimination. The company was also concerned that safety on the production line could be compromised if the employees were not all speaking a common language.

Shortly after the policy was promulgated, an employee filed a claim with the EEOC, and after an investigation, the EEOC made a determination that there was reasonable cause to believe that the English-only policy discriminated against a complaining employee and other employees whose native

language was not English.

Thereafter, in response to the EEO's invitation, the company, including myself, represented by myself, engaged in good faith negotiations for conciliation, and in April of 1998, the company and the EEOC had basically agreed upon terms of a settlement, including the posting of a notice to all employees advising of the recision of the English-only policy, and execution of a conciliation agreement by the company, the EEOC, and the original complaining employee.

However, after the forms had been negotiated, the complaining employee refused to sign the documents. I was told by the EEOC investigator that the employee had stated that he had no personal interest in the matter, that he had not been damaged in any way, that he simply wanted to bring the matter to the EEOC's attention for investigation. And, therefore, he refused to participate in the settlement of the case by way of executing any of the documents.

Although we were frustrated by the employee's refusal to participate in the settlement, the company did offer to enter the settlement as negotiated. And, in fact, the company rescinded the policy in July of 1998. The EEOC then refused to

enter into any agreement based on any of the prior discussions. That was in July of 1998.

In October of 1998, the EEOC contacted our office advising that the EEOC was going to file on behalf of the employees if the matter was not settled pursuant to an enclosed consent decree. The consent decree was generally consistent with the settlement terms that had been negotiated earlier; however, it contained an additional requirement for payment of $50,000 to the complaining employee.

The company responded by indicating a willingness to enter into the settlement agreement with minor modifications, but refused to make any monetary settlement. They were concerned, of course, about a precedent, and money hadn't been mentioned earlier, so the matter was not settled at that point.

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

Synchro-Start filed a motion to dismiss the lawsuit, contending that its policy, which simply required employees who were bilingual to speak English while working did not constitute an unlawful employment practice, and that the discrimination

guidelines shifted the burden to the employer to provide a business justification was invalid.

The District Court upheld the validity of the challenged EEOC discrimination guidelines, and denied the company's motion to dismiss based on a finding that the EEOC's complaint comported with the requirement for a viable Title VII claim.

The parties then engaged in extensive discovery. That discovery disclosed generally the following background. Synchro-Start was a manufacturing company with approximately 200 employees. Substantially all of the company's production personnel were first generation immigrants of Polish, Hispanic, and Asian descent. They also had numerous African American employees. Most of them were women who worked at tables putting together electronic pieces for various electronic products.

Although in most instances the employees' native language was their primary language, all employees, and the discovery showed this, spoke English well enough to understand and follow directions and instructions, and to perform their job requirements safely and productively. Some of the production supervisors, however, spoke only English, and were not able to speak in all of the other

languages.

On numerous occasions, individual employees complained that other employees were speaking in their native foreign languages, and using their bilingual capabilities to harass and insult other workers in a language they could not understand. For example, one employee stated that Hispanic employees had spoken in their native language, which she could not understand. Then they looked at her, laughed, rolled their eyes making her feel very uncomfortable and intimidated. And this was a common complaint from various sectors of the employee group.

On each occasion that the complaints were made, the plant manager talked to the supervisor to determine the validity of the complaints, and an appropriate response. Supervisors then attempted to deal with the issue by discussing the matter with the group leaders and affected employees, suggesting that they speak English while in the presence of other employees who did not speak the same language so that feelings would not be hurt, and to improve morale and communications.

The plant manager was also contacted by a representative of a temporary employment agency, which provided the company with employees, who advised that

two of the temporary employees refused to go back to Synchro-Start because the Synchro-Start employees intimidated them, made them feel uncomfortable by speaking in their own language, which the temporary employees could not understand.

In response to the continuing complaints in September of `97, the company instituted a policy that employees should speak only English while working. The policy did not apply where employees were on their own time, such as breaks and lunch. The company believed it had no alterative but to initiate this limited policy to avoid the conflicts, at least while the employees were on the production line. The company was also concerned that the safety on the production line could be compromised, and it might otherwise be exposed to claims by the complaining employees if it failed to protect their rights.

It's also important to note that no employee was ever disciplined in any way for violating the policy while it was in existence.

Synchro-Start's claim that it had a business necessity for adopting the policy was not only factually supported, but consistent with the EEOC's own compliance manual, where in the footnote it was indicated that -- propositions were stated that,

"Business reasons for an English-only rule may include avoiding or lessening inter-personal conflicts, preventing non-foreign language speaking individuals from feeling that they are talked about in a language they do not understand. An English-only policy may be legitimate and necessary for business where adopted to prevent employees from intentionally using their fluency in Spanish to isolate and to intimidate members of other ethnic groups."

During discovery, the EEOC failed to produce any evidence to support its allegation that Synchro-Start had intentionally engaged in discriminatory practices, or that some of the Synchro-Start employees were unable to comply with the policy because they were unable to speak any English. Notwithstanding the EEOC's inability to factually and legally support its claim of discrimination, when it offered Synchro-Start the opportunity to settle the case for an amount less than the expected future costs of defense, the company had no practical alternative but to settle, which it did after almost two years of litigation.

It should be clear from the above that my client and I were frustrated with the EEOC's continued pursuit of this case after the original complaining

employee lost interest, the policy was rescinded, and the facts became clear that there was no discriminatory intent on the part of the company promulgating this rule.

VICE CHAIR THERNSTROM: You are watching the time. You're quite a bit over.

MR. RIORDAN: Oh, I'm sorry. Last sentence.

VICE CHAIR THERNSTROM: Okay.

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

VICE CHAIR THERNSTROM: Thank you very much, Mr. Riordan. And we move on to Mr. McAlpin. You're the next, ten minutes.

MR. McALPIN: Good morning. Thank you for the chance to comment on Language in the Workplace, and the EEOC's policy of prosecuting employers with English-on-the-job rules.

In a nutshell, we believe the EEOC is acting illegally and abusing its statutory authority by pursuing its policy. In doing so, the Agency is

not only violating the rights of employers, it is also violating the civil rights of employees. The view that the EEOC is abusing its authority is not our's alone. It is also the overwhelming view of the courts.

In 1980, the EEOC adopted new guidelines saying they were going to start presuming that 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. They justified their action by saying, in effect, that someone's native language is a proxy for their national origin.

The Agency adopted its guidelines despite a Federal Court decision in 1973 that 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." That definition is clear, and it says nothing about language for very good reasons. Common sense tells us that someone's national origin and a native language are distinct and different characteristics. Someone who speaks Spanish or French as their native language, may have been born in dozens of countries, and someone whose national origin is Nigerian, could speak any one of dozens of different languages as their native language.

The EEOC's definition is so over and under-inclusive that it's meaningless, which is exactly what the courts have said. Almost as soon as it was passed, the Agency's expanded definition of national origin was rejected twice in cases before the Fifth Circuit U.S. Court of Appeals.

In Garcia v. Gloor, in 1980 the Fifth Circuit said, "National origin must not be confused with ethnic or socio-cultural traits, and held that the Equal Employment Opportunity Act does not support the EEOC's interpretation." And in Vasquez v. McAllen, the Fifth Circuit again rejected the EEOC's interpretation in upholding an English-on-the-job rule for truck drivers. The EEOC's assertion that there is "a close connection between language and national origin" is simply false. But despite common sense, and over 20 court decisions that have explicitly rejected the EEOC formulation, the EEOC continues to prosecute employers with English language workplace rules.

The Agency justifies its actions by parsing and twisting the meaning of words, and by creating expansive new definitions of national origin out of thin air. For instance, on its website, the EEOC said that, "It is illegal to discriminate against

an individual because of birth place, ancestry, and then it adds culture, or linguistic characteristics common to a specific ethnic group." So with the stroke of a pen, the EEOC adds the vague and incomprehensible terms "culture", or "linguistic characteristics" to the clear and well-defined meaning of national origin. Now national origin is not what country you came from, it is also culture and linguistic characteristics. That's ridiculous. Is wearing a kilt, having a cockney accent, or not eating pork now protected national origin characteristics simply because the EEOC says they are?

The guidelines say that English-on-the-job rules "when applied at all times are a burdensome condition of employment that constitutes national origin discrimination. But since the definition the EEOC uses is false, it makes no difference whether such a rule is applied at all times, or only at certain times. The EEOC had no basis to assert a Title VII violation where language is concerned, and less right to presume an English-on-the-job rule violates the law.

The EEOC adds that even an English policy is applied only at certain times, the employer must still show that the rule is justified by "business

necessity". That addition allows the Agency to prosecute any English-on-the-job rule, and burdens the employer with having to show business necessity in court.

In 1992, in Garcia v. Spun Steak Company, the Ninth Circuit joined the Fifth Circuit and ruled the EEOC was acting ultra vires, that is outside the scope of its statutory authority, by bringing these lawsuits. But the EEOC appears to think it is co-equal with the courts in interpreting the law.

In a letter to Colorado Congressman Tom Tancredo dated January 21st, 2000, the EEOC said, "It disagrees with the Ninth Circuit decision in Spun Steak," and in effect says that it feels empowered to make its own statutory interpretations.

Here's the bottom line. In 35 years of court cases, there has not been a single ruling supporting the EEOC's interpretation that was ultimately upheld, or which is controlling, not one that supports the EEOC's language equals national origin formula. But there have been over 20 decisions at the state, federal, and circuit court level where courts have specifically rejected the EEOC definition.

I'm glad you're going to hear from Richard Kidman, the owner of R.D.'s Drive-In. Richard and his

wife, Shauna, were prosecuted by the EEOC because they put an English-on-the-job rule in place to stop harassment and cursing, and harassment including the most rude kind of sexual harassment, I might add, in the Navajo language that was driving off their employees and customers, and threatening to destroy their business.

You have to visit Page, Arizona and eat a green chili cheeseburger at R.D.'s Drive-In to get a feel for how over-the-top it was for the EEOC to file a federal lawsuit against this small business owner and his wife. Only lawyers blinded by ideology, or obsessed with an agenda could have looked at the facts and concluded that the Kidmans were discriminating against their Navajo employees. But the EEOC didn't just prosecute the Kidmans, it persecuted the Kidmans by mounting a media campaign against them that attacked their character, and accused them of unlawful discrimination. The EEOC's conduct in dealing with the Kidmans was so unethical that the judge in the case denounced the EEOC in his court order.

What happened to the Kidmans was a travesty. They tried to follow the EEOC guidelines, but not being K Street lawyers, they didn't grasp the significance of the words "when applied at all times".

So when they wrote their policy, they didn't include the specific exceptions for break times, et cetera, that the EEOC presumes is facial evidence of discrimination.

The Kidmans' case is, unfortunately, typical of the way the EEOC operates. Even when an employer goes to court and wins, they can't recover their legal costs in most circumstances, so the EEOC uses its superior resources to intimidate employers, exhaust their resources, and force them to accept a settlement that allows the EEOC to claim a public relation victory. In reality, there are many compelling reasons for an employer to have an English-language workplace policy, including things such as maintaining a safe, non-hostile work environment, deterring theft and substance abuse, and insuring compliance with company policies. But employers like the Kidmans are caught in a Catch-22. If they fail to take effective action to stop things like 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 step of creating an English-on-the-job policy, they risk public attack and prosecution by the EEOC.

In the rare instances where an employer has the resources and will to fight the EEOC in court, they either win their case, or settle it on terms that vindicate the employer's policy. Recently, for example, the EEOC agreed to a settlement of its well-publicized lawsuit against the Salvation Army that left the Army's English-on-the-job policy completely intact. But far more often, thanks to its vastly superior resources, the EEOC prevails, especially in actions against small employers, and imposes burdensome and costly settlements on employers who, in reality, are in full compliance with the Civil Rights laws.

In effect, the EEOC is acting like a multi-cultural police force, writing its own laws, defying the courts, and using coercive tactics to impose its agenda on law-abiding employers. In doing so, it is not only violating the rights of employers, it is also chilling and infringing the right of employees to work in a safe, non-threatening work environment.

In conclusion, we ask the Commissioners to condemn the EEOC's unlawful conduct, which is especially dangerous because it's being committed by the very agency created by Congress to safeguard the

civil rights of all employees. And thank you for the opportunity to present these views.

VICE CHAIR THERNSTROM: Thank you very much. Mr. Kidman, I somehow got this out of order, but in a way, it appears to me, we benefitted from that by your getting a very nice introduction.

MR. KIDMAN: Thank you.

VICE CHAIR THERNSTROM: Please, proceed.

MR. KIDMAN: All right. Yes, my name is Richard Kidman. Since 1977, my wife and I have owned and managed a small independent fast food restaurant called R.D.'s Drive-In. It's located in Page, Arizona.

For 31 years, we struggled to maintain employee morale at our restaurant by requesting that employees be courteous to one another. One issue that kept causing problems was the use of a second language that was understood only by some of our employees. Some of our employees were bilingual, but many, including my wife and myself, speak only English. All of our employees, however, speak and understand English fluently.

Approximately 10 years ago, we began having a very difficult time recruiting new employees and holding on to those we already had. In May 2000,

one of our reliable employees gave me an emotional verbal notice that she would no longer be working for me. She explained that some workers were saying terrible things to her on the job. We discovered that some employees were being subjected to verbal and sexual harassment even in our presence, because we could not understand the language. Some of our bilingual workers were using their ability to speak a second language as a weapon.

We understood that our business was at risk of being sued if we allowed this hostile environment to continue. We knew we had to act. I asked the employee who gave her notice to please stay and give us a chance to fix the problem, and she agreed. In order to stay in business, we had to create a workplace policy that would stop the harassment. My son searched the internet to find out how to deal with language harassment issues, and located the Equal Employment Opportunity Commission's website. There he found guidelines of when an English-on-the-job policy was permitted.

It reads that, "Such a rule is acceptable if", and I quote, "an employer shows that the requirement is necessary for conducting the business. If the employer believes such a rule is necessary,

employees must be informed when English is required, and the consequences for violating that rule."

The guidelines fit our situation perfectly. We followed the EEOC's guidelines, and in June of 2000 we implemented an English-on-the-job policy. We required all employees to read the policy and sign to indicate they understood the policy, and the consequences of violating it. Those individuals who had been harassing other employees signed the policy, and changed their behavior.

The work environment and employee morale began to improve immediately. Four employees, three were bilingual, and one who spoke English exclusively, disagreed with the policy and left their jobs. They applied for state unemployment benefits, but were denied because the judge determined that they quite R.D.'s without good cause, since they spoke English fluently. The four then filed a complaint with the EEOC.

In 2001, the EEOC launched what I consider to be a phony investigation. Some of our employees said they were contacted and encouraged by the EEOC to join the lawsuit against us. Our lead cook turned down such an invitation responding, "Why do I want to sue the Kidmans? They treat me just fine." One

employee felt so intimidated by the EEOC's conduct that she left town and went to live with her parents for over a year. Others were told they could earn a lot of money by joining a lawsuit against us.

The lead investigator, Melanie Allison, contacted me in August of 2001, informing me that she had concluded that they were being racist, and had violated Title VII of the Civil Rights Act, and that fines and compensations would be approximately $30,000. I responded I would not accept that finding, and would be contacting a lawyer.

We retained the service of David Seldon, an employment lawyer in Phoenix. He offered to work with the EEOC to make necessary changes that would be acceptable to the EEOC. The EEOC refused to even respond. A year after the EEOC investigation, we learned from media reports that the EEOC had filed suit against us. It was apparent to me from the very beginning that the EEOC had no intention of going to a jury trial. They wanted to either force us to settle on their terms, or to bankrupt us. Either way, they could declare victory.

The Director of the EEOC's Phoenix office, Charles D. Burtner, sent a letter dated November 25th, 2002 to the Navajo Times, the primary newspaper of our

customers, saying that our case involved, and I quote, "an assault on employees who speak Navajo in the workplace." This type of public relations warfare hurt our business, and some readers called for a boycott of our restaurant.

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

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

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

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

The EEOC was negotiating in bad faith, and they were using deceit, thinly veiled threats, and every under-handed tactic they could to get us to agree to a settlement that would allow them to claim a public relations victory, and continue to attack us in

the media. Due to financial pressure, Mountain States Legal Foundation agreed to take over the task of representing us pro bono.

We could not agree on terms to repair the settlement, so the EEOC filed a new lawsuit against us to compel us to accept their version, claiming that we had agreed to something we had not. We learned it is a big mistake to attend a settlement conference with the EEOC.

Judge McNamee rejected most of the EEOC's demands, but determined that some key items had been agreed to in the conference, and ordered a settlement based on those items. From the last page of his order regarding the EEOC's conduct, he states, and I quote: "The Court must point out that this case does not reach the high water mark of civility among lawyers. The EEOC on more than one occasion attempted to put terms in the agreement that clearly were not agreed to. It is clear from the documents and witnesses before the Court that certain terms were clearly negotiated out of the settlement agreement, only to be reinstated by the EEOC. Finally, the Court notes that if counsel for the parties had not resorted to unreasonable demands and ultimatums, and if counsel for the EEOC had not continually reinserted terms that

were specifically negotiated out of the agreement, the parties would likely have concluded this matter in a manner favorable to both parties."

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

In May 2007, a new policy was created, and sent to the EEOC for review and comment. They acknowledged receipt of the policy, but refused to comment on it within the time frame allowed. To-date, we have heard nothing from them regarding our policy.

After incurring over $700,000 in costs, we were denied our day in court by unethical and under-handed manipulations of the EEOC. Were it not for the generous help of attorneys, Mountain States Legal Foundation, Pro English, and numerous individual contributors, we would be out of business. The EEOC must have spent an enormous amount of money in their

effort to bully us.

We almost lost our family business simply because we wanted to create a safe environment for our employees by instituting an English-on-the-job policy pursuant to the EEOC guidelines.

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

VICE CHAIR THERNSTROM: Thank you very much. And last but not least, Linda Chavez.

MS. CHAVEZ: Thank you very much, Madam Vice Chair. I am Linda Chavez, Chairman of the Center for Equal Opportunity, and I want to thank you for inviting me to attend. This is my first appearance before the Civil Rights Commission since I left here almost 25 years ago.

Before I get into my statement, though, I do want to address some of the discussion that started off this briefing having to do with the composition of the panels. And I want to make it very clear that to characterize me as someone who is in favor of English in the workplace rules is inaccurate. I have never

taken any such position. My organization does not take such a position.

What we do favor is allowing employers to make decisions on how best to run their businesses, so long as that is consistent with our anti-discrimination laws, and we are also in favor of understanding discrimination in a way that is consistent with the statutory language of our Civil Rights laws. So let me just begin.

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. The exceptions, 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 where a collective bargaining agreement exists, ought to be left to the employer and the union to negotiate.

The obvious possible exception to the principle, and the matter we're 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 policy 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 EEOC. 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 co-workers 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 non-discriminatory 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, the Spanish-speaking employee, a Spanish-speaking employee routinely used Spanish to hurl vicious racial insults at 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 insure supervisor's 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 she's 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 the Commission to urge Congress to pass such legislation.

Senator Alexander, as you all know, has played a leading role in supporting a bill like this. I'm not a lawyer, so I don't want to dwell further on the legal analysis here this morning. I'm, instead, attaching two legal analyses that while somewhat dated are, I think, nonetheless, helpful. And I would ask that they be inserted into the record along with my full statement.

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 multi-ethnic society, and it is becoming more so. We have always been a national of immigrants. That is a great strength, but for such a society to work, we must celebrate our unity, as well as our diversity. 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 helps keep us together.

It does immigrants no favor to remove incentives for their mastering English, forcing employers to run their workplaces on a multi-lingual 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.

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 employees when for non-discriminatory reasons they adopt 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, Madam Vice Chair, for the opportunity to testify today, and I look forward to any questions you might have.

VICE CHAIR THERNSTROM: And I thank you, Ms. Chavez, and thank Mr. Russell for waiting. And please do come back up to the table so that we can

address questions to you, as well.

We are ready to start questions, and I see that Commissioner Kirsanow has his hand up.

QUESTIONS BY COMMISSIONERS AND STAFF DIRECTOR

COMMISSIONER KIRSANOW: Yes. First of all, I want to thank again the Staff in putting together, as usual, a splendid panel, and thank all of the witnesses who gave very interesting testimony.

Just a few quick questions, kind of housekeeping questions, for Mr. Russell based on some of the testimony I heard, and also what you said. I think there were approximately 180 English-only based charges brought by the Commission per year on average?

MR. RUSSELL: Not to be picky, the Commission generally doesn't bring charges at all.

COMMISSIONER KIRSANOW: I'm sorry.

MR. RUSSELL: The charge is filed with the Commission.

COMMISSIONER KIRSANOW: Understood. What I meant by that is, how many of those go to complaints?

MR. RUSSELL: Very, very small number. I have the data here somewhere. I can pull it out for you.

COMMISSIONER KIRSANOW: Approximately 180

charges have been filed by alleged discriminatees.

MR. RUSSELL: Right, on average over the last 10 years.

COMMISSIONER KIRSANOW: Do you have any sense for what percentage of those have gone to jury trial?

MR. RUSSELL: Let me just consult my data.

COMMISSIONER KIRSANOW: Sure. Go ahead.

MR. RUSSELL: If you will permit me, because I do have it. I was just looking at it a minute ago. Well, let me just -- let me answer it this way. We, on average, litigate, the EEOC chooses to litigate approximately two or three English-only cases per year. So out of the average 180, roughly two or three will go to -- will be litigated. And they could be dismissed at the motion to dismiss stage, dismissed at summary judgment stage, settled, or go to trial. I don't know of one in recent memory, very recent memory where the case has gone all the way through trial to a judgment, but that could be the case. There are a number, however, sir, that are resolved during the administrative process, so you have the charge filed, an investigation is conducted, many are administratively closed, many are issued a no-cause finding. And in those where a reasonable

cause to believe that discrimination has occurred, has been found, moved to the next phase where the Commission attempts to conciliate those claims. And I was just looking at the data a little while ago. I think that it ranges anywhere from 30 up to 100. It depends on the year, because each claim is different. The conciliation will either result in a settlement, or no conciliation. And then the Commission has to decide, rather the General Counsel, decide whether that case despite conciliation failing is worthy of the time and resources to take to litigation.

COMMISSIONER KIRSANOW: Okay. Second question is, are you aware of any cases in this body of jurisprudence in which there has been a finding by a court that an English-only rule was promulgated with an intent to discriminate?

MR. RUSSELL: I think the Maldonado case that I mentioned in my opening statement in the Tenth Circuit, the decision is a little bit murky, to be perfectly honest. But I think in that case, there was evidence, at least, that the English-only policy was promulgated for the purpose of -- for intentional discrimination. That's the one, and that's a fairly recent case. We filed an Amicus brief, Maldonado v. City of Altus.

COMMISSIONER KIRSANOW: And one more question along these lines. The EEOC guidelines, at least I think it was Mr. Riordan, testified that among the criteria that are set forth in terms of the definition of national origin discrimination is culture or linguistic characteristics common to a specific ethnic group. Generally speaking, agencies under the Chevron decision have got the ability to kind of interpret what their authorizing statute means, but they don't have license to amend or graft onto the statute a meaning different from that legislated by Congress. Do you know whether or not that particular clause, "cultural or linguistic characteristic common to a specific ethnic group" has been litigated in any of the cases related to English-only?

MR. RUSSELL: If I may, what I have in front of me are the guidelines that say "cultural or linguistic characteristics of a national origin group", which ties into a protected category under the statute. What I also know is that a number of a cases either have assumed or found that primary language is tied to national origin, that includes the Gutierrez case. Even the Spun Steak case which ruled against EEOC, accepted the premise an English-only policy

would have a disparate impact on individuals who did not speak English. So, the only way it could have a disparate impact under Tile VII would be if it infringed on a protected category under Title VII.

COMMISSIONER KIRSANOW: Right.

MR. RUSSELL: So they've had to accept that idea.

COMMISSIONER KIRSANOW: What circuit is Gutierrez?

MR. RUSSELL: I'm sorry. One second, I'll get that for you. I think it's the Tenth Circuit.

COMMISSIONER KIRSANOW: And, also, in all of the other categories set forth in Title VII, Ninth Circuit case -- in all the other categories set forth in Title VII, I think Ms. Chavez had alluded to, which I think are race, sex, national origin, color, we're generally talking about, with one exception, that is an exception that is enshrined in the Constitution, religion. All the others are immutable characteristics. In disparate impact cases, it is obviously easier to ascribe a disparate impact where you've got a huge characteristics. Here we've got one that could vanish, frankly vanish over a period of months.

My father didn't speak English, but

learned it quite quickly because he wanted a job, and do it well. How is it, or is there any litigation that you're aware of that sets forth a corollary or shows a correspondence between language and national origin? Because I think as one of the witnesses testified, there are a number of languages, for example, if you speak Portugese, your national origin might be Brazil, or could be Portugal. If you speak Russian, it could be dozens of countries that may have been part of the former Soviet Union. And Spanish, scores of countries. Do you know of any litigation that says that national origin - I'm sorry - that language has a correspondence to national origin in a way that legitimately could be tied to a disparate impact theory?

MR. RUSSELL: Well, I don't know if they phrase it that way. But, again, even in Spun Steak, and in Gutierrez, they took the position that an English-only policy that had an adverse impact on Hispanic-speaking employees would adversely affect them, or have a disparate impact. So they accepted that theory, even if they didn't articulate it as well as you have.

COMMISSIONER KIRSANOW: One final one. Have there been any cases that you're aware of that --

for example, in my practice, and I've been doing Labor and Employment Law for about 30 years, a number of workplaces are workplaces where the majority of the workforce speaks languages other than English, could be Chinese, Korean, Spanish, Russian, you name it. Have there been any cases litigated where the EEOC has brought a lawsuit, or brought complaint against an employer that maintained an other-than-English workplace policy?

MR. RUSSELL: I don't know of any off the top of my head. I will certainly look into it, but the guidelines do provide that you could have a challenge - not the guidelines, the compliance manual to inform the claim. And if the standard is met, I think to get back to just the basics, the question is, is there a disparate -- if you assume, and I understand that it may be in dispute in your view, if you assume that a linguistic characteristic is tied to national origin, several courts have assumed, have agreed with that, many commentators have agreed with that. If you take that as true, then the question is, is there a disparate impact on a group of a particular national origin? It could be the case that you could have the situation you posit, where a non-English speaking workplace discriminates under a disparate

impact theory against English-speaking employees, because it's the same analysis under Title VII.

COMMISSIONER KIRSANOW: Right. I understand you don't have the figures at your fingertips, but you're not aware of any cases where EEOC has brought complaint against an English, or non-English workplace rule.

MR. RUSSELL: I don't know any cases.

COMMISSIONER KIRSANOW: Mr. McAlpin?

MR. McALPIN: I would like just to say that, first of all, by its own standards, the EEOC is discriminating because its Spanish language policies are not -- Spanish-only policies, whatever you want to call it, is not a violation. Any other language is not a violation, it's only English that’s a violation. That's very clear that they say that.

COMMISSIONER KIRSANOW: What's the example in your -

MR. McALPIN: In Garcia v. Spun Steak, the fact that the company had English-on-the-job rule during its day shift was a violation. The fact that it had Spanish as the official language, or the language of the workplace in the night shift, was not a violation for the EEOC.

I also want to say that in Garcia v. Spun

Steak, the EEOC is citing from the minority opinion about the fact that there's a correlation between national origin and language. And the majority opinion in Spun Steak was that the EEOC was acting outside the scope of its statutory authority in bringing these cases, that language equals national origin is invalid. In my testimony I attached a list of 21 cases that have been adjudicated at the state, federal, and the Circuit Court level that have all gone against the EEOC. There's only been two cases that I'm aware of in which there was an initial ruling for the EEOC's position, that was the District Judge in Spun Steak. It was overturned at the Ninth Circuit level. And then in Premier Operator, there was a decision that supported the general proposition that the EEOC is advancing, but that's not controlling in the Fifth Circuit because of Garcia v. Gloor.

I'm not a lawyer, but the legal basis, and I have been working with this for several years, the legal basis that the EEOC is acting on is incredibly -- it's like a thin reed. It's like they extract from even decisions that go against them to try to justify their position, and ignore Circuit Court decisions that basically say you're acting illegitimately in bringing these cases.

MS. CHAVEZ: Commissioner Kirsanow, as I mentioned in the case where the employer was forced by the court to hire bilingual supervisors, and they were accepting the disparate impact theory, and accepting the case, and finding in favor of the plaintiffs, they then seemed to ignore the disparate impact theory in essentially forcing the employer to get rid of the existing African American supervisors. African Americans, by and large, are not Spanish speakers. It would have a disparate impact on that population if you forced bilingual translators, or bilingual speakers, rather, to be hired. So that is one case where, whether it was EEOC or the court, the court did find in favor of a language other than English to be used on the job.

COMMISSIONER KIRSANOW: Thank you.

MR. RUSSELL: May I make just a point of clarification? In this case, the English-only policy falls within the adverse effects -- disproportionately those of Hispanic origin. But this is not an idea I plucked from a single dissenting judge, and I picked Spun Steak simply to point out this is a case where the court ruled against the EEOC on a fairly narrow point, that there was no adverse impact with respect to truly bilingual employees.

I will stipulate for my friends here that EEOC's position on truly bilingual employees is controversial, and may not have garnered consensus. But even the Spun Steak court found that there would be adverse impact on employees who spoke no English, or very little English. And buried within that comment is the assumption that primary language is linked to national origin. And that's all I'm saying, so it may be true, ultimately, if the Supreme Court rules that language is not tied to national origin, EEOC will revise its policy, and come into compliance with the Supreme Court's decision, but that has not happened. And, in fact, several courts have either assumed or said that primary language, or accent, or language is a component of national origin. And our guidelines leave some wiggle room for the circumstances that you posit, of the individual who may be from a different national origin, and says often, not always. It says often a component of national origin. So I apologize, I do not mean to be contentious, but I think we need to speak with precision about what EEOC's position is. I think we need to speak with precision about what the court cases hold, and we need to speak with precision about what the state of the law is.

I think it serves the debate much better than hurling accusations at the agency of bad faith, of persecution, of being completely at odds with the law. Thank you, ma'am.

VICE CHAIR THERNSTROM: Well, this reinforces the point that diversity of views on this panel is absolutely essential, and I thank you for that intervention. Yes?

COMMISSIONER GAZIANO: I'd like to, first of all, thank the Staff again for the wonderful briefing that they've set up, and thank all of the witnesses, those who have appeared today, and those who we have their written statement.

If I'm allowed a second question, I might want to ask Mr. Kidman some questions, but I would like to focus, at least initially, on a couple of questions between the presumption that Linda Chavez talked about, and that appears in the EEOC's regulations. Thank you by the way, Linda, for coming. You were not introduced as the living legend that you've been recognized by elsewhere, but you're one of my heros and living legends.

Clearly, a lot of policies, almost any policy a company can have, you can look at the statistics and say it has a disparate impact. Your

own -- the EEOC's own regulations recognize that some English-only policies may be justified, so the question is, where do you -- what presumption you use in initiating an investigation, or conducting an investigation? And I just want to establish a couple of quick things.

In your Regulation 1606.7, you have two subparts, A and B. You pretend there's some difference between them, and there is in some respects. A covers when the English-only language is applied at all times; B is when that rule is applied only at certain times, but it seems to me that the presumption you use applies equally in either case. And let me just run through that.

Subpart B, when applied only at certain times, you phrase it in a different way, but you said an employer may have a rule only in English at certain times where the employee can show that the rule is justified by business necessity. If you're investigating such a claim, and the company says I have a business necessity. Is that -

MR. RUSSELL: Do you want me to answer now?

COMMISSIONER GAZIANO: Yes.

MR. RUSSELL: No, sir.

COMMISSIONER GAZIANO: Okay. So, in other words, they have to prove, they have to establish this business necessity to your satisfaction.

MR. RUSSELL: May I?

COMMISSIONER GAZIANO: Yes.

MR. RUSSELL: Okay. I'd be happy to -- I do think there's a meaningful distinction between the two subparts, if I may. What is the same -

COMMISSIONER GAZIANO: If you don't mind, answer the question posed, they have to prove it to your satisfaction, or you're going to -

MR. RUSSELL: Well, to the satisfaction of what we understand the jurisprudence to be on the establishment of the business necessity defense, yes.

COMMISSIONER GAZIANO: Okay. So we have Linda Chavez saying there should be a -- by the way, these are employers. I'm going to, for the sake of my question, take off the table serious evidence of intent.

MR. RUSSELL: Right.

COMMISSIONER GAZIANO: All you have is disparate -- this is -- by the way, we're not in a -- this a rule applied to existing workforces, presumably by employers who have blocks of non-English-speaking primary workers, so there isn't a

strong evidence anyway that they're -- this is a rule that they are imposing to manage the workforce, not to keep people from being hired in the future.

MR. RUSSELL: I don't know if that's true in every case, or in some cases.

COMMISSIONER GAZIANO: Not necessarily in every case.

MR. RUSSELL: I don't know.

COMMISSIONER GAZIANO: It's, again, where the presumption is. Now, continue with your answer.

MR. RUSSELL: The presumption is one of an establishment of disparate impact. That is in Subsection A, and Subsection B. So, in other words, EEOC has taken the position historically that because of its view, that primary language is linked to national origin, that a policy that requires you to speak English only, or English at all times at work, there will be a disparate impact as an enforcement position.

COMMISSIONER GAZIANO: Understand.

MR. RUSSELL: The difference between A and B is that if the English-only policy is truly English-only; in other words, you are not permitted to speak other than English while at work period, including during breaks, lunch, on personal time, EEOC, as an

enforcement position, believes it will be virtually impossible, or very difficult, at least, to establish a business necessity for that policy, in which case it says in Subsection A, "The Commission will presume that the rule violates Title VII." So what it's saying is, (A) it will presume there's a disparate impact; and (B) it will presume at the investigation stage that there is no business necessity justification, because the rule is so broad. But I think it's important to point out, it says, "and will closely scrutinize". In other words, an investigation will occur. The investigation has to occur, and then a determination must be made to either find reasonable cause to believe that discrimination occurred, or not. That is not automatic, even under Subsection A.

COMMISSIONER GAZIANO: I understand that. What you're saying is that there's some slim chance under A or B, at least some slim chance under A or B that an employer could convince you that they need to do that.

MR. RUSSELL: I would say there's some slim chance under A. I would say there's a perfectly good chance under B.

COMMISSIONER GAZIANO: But there's a presumption.

MR. RUSSELL: A presumption of disparate impact.

COMMISSIONER GAZIANO: There's a presumption, and a presumption that you will -- you have the opportunity to file suit if you're not satisfied with the business necessity justification when you make a disparate impact finding.

MR. RUSSELL: If the evidence shows that there's no business necessity justification, then a determination will be made at that point whether we would file suit.

COMMISSIONER GAZIANO: Okay. Let me give you a hypothetical under A, but just to close out this. I think it was then-Chairman Specter of the Judiciary Committee who tried to establish that certain things are super duper precedents. As I read it, as any lawyer who might be counseling a client would read it, if your English-only is just during emergencies, the EEOC will presume that you're violating Title VII. Under A, there's a super duper presumption, at least that's the way I read it. But I want to go with a hypothetical under A. Are there any places in the -

COMMISSIONER YAKI: Has any court used the word "super duper"? I was just wondering.

COMMISSIONER GAZIANO: I haven't seen that yet. Okay. Is there any -- is the break room a sex harassment free zone? Is there any place under the employer's control where sexual harassment can take place, and the employer has no liability?

MR. RUSSELL: Not that I'm aware of.

COMMISSIONER GAZIANO: Okay. So the lunch room, the break room, sexual harassment can occur nowhere and at no time under the employer's control. Is that the case?

MR. RUSSELL: That would be the best approach.

COMMISSIONER GAZIANO: Okay. Now, I remember a Fifth Circuit case, and I remember several other cases where women were being integrated into a particular shop environment where there weren't a lot of women, and the sexist atmosphere, at least the allegation was, was pretty -- by the way, bathrooms in that case were one of the sex -- bathrooms are not sexual harassment free zones either. Right?

MR. RUSSELL: Right.

COMMISSIONER GAZIANO: You've got a situation where the employee brings to the employer's attention that most of the men, there's a pervasive atmosphere of sexual harassment. Is there any way to

come up with a -- and this is being, let's assume in the hypothetical, that it's being done through language that the supervisors don't understand. Is there any logical way to try to shut that down by making it just certain parts of the shop floor during certain hours? If you're advising the client who's worried about a hostile work environment claim, can you think of a way to limit it to just certain times during the day, or certain places in that plant?

MR. RUSSELL: No.

COMMISSIONER GAZIANO: Does anyone else on the panel want to comment on what are employers supposed to do in that situation?

MR. RUSSELL: Well, I guess I don't understand what that has to do with English-only. And I haven't heard anything that you've said that ties it in any way to English-only, unless the presumption is that people who don't speak English engage in sexual harassment.

COMMISSIONER GAZIANO: The allegation is that the language that the supervisors don't understand is being used in my hypothetical.

MR. RUSSELL: Pervasively?

COMMISSIONER GAZIANO: I see, Linda, nodding your head. Do you -

MS. CHAVEZ: Well, I think what Commissioner Gaziano is referring to is a case in which you had employees -- perhaps it's a poultry plant, and you've got lots and lots of Spanish speakers. And during the break room, the company finds out that the female employees are being harassed in the break room in Spanish, and most of the supervisors are English speakers, so they may be in the break room but don't understand what's going on. And in those circumstances, it would seem to make perfect sense for the employer, in order to avoid being charged with sexual harassment, to have a English-in-the-workplace rule that applies to the break room and to breaks. I mean, I would see that as very different, for example, to a policy that says we allow employees to make phone calls home during emergencies. But, oh by the way, they all have to be in English. That, to me, might be more suspect, but the kind of rule that Commissioner Gaziano is talking about would seem, to me, quite reasonable under certain circumstances.

MR. RUSSELL: I'd like to thank Ms. Chavez for clarifying that. She certainly helped me out.

COMMISSIONER GAZIANO: Sure.

MR. RUSSELL: But what I would say to you

is you're using an elephant gun to shoot a fly, because what you could do in that circumstance, perhaps, given the facts as you've posited them is say, we have to have English-only in the break room. But that doesn't mean you need it on the shop line, because under your example, all the harassment was occurring in the break room, so you say you have to speak English only in the break room, because that's where we have this pervasive, overwhelming problem. And so supervisors have to be able to monitor it. And I think that circumstance is posited in my statement this morning, is consistent with our existing guidance. It's consistent with court cases that we've identified in our guidance that say if the problem is pervasive, sure. The question is, do you need then to go out and say you cannot speak other than English here because we have a problem in one particular part of the shop.

COMMISSIONER GAZIANO: Let me clarify my -- - thank you very much for making my question a little bit more clear. But the evidence is that the complainant just says it's happening all the time. There was something written in the -- and this is an actual case, but not with the language twist. There was something written about me in the bathroom. There

was something on the shop -

COMMISSIONER YAKI: I'm sorry. What do you mean it was actual case without the language twist? So this was not actually -

COMMISSIONER GAZIANO: It was a sexual harassment claim. And when sexual harassment is occurring, it's generally not just in the break room, or just on the shop floor, or just in the bathrooms.

COMMISSIONER YAKI: Right.

(Simultaneous speakers.)

COMMISSIONER GAZIANO: It can occur anywhere, so if you tell employees -

COMMISSIONER YAKI: That would seem to -

COMMISSIONER GAZIANO: Let me ask the question, please.

COMMISSIONER YAKI: Okay. Well, I just want to object to the hypothetical as you're giving it right now.

COMMISSIONER GAZIANO: The employee said there was something written about me in the bathroom, and there was another incident on the shop floor. And during our breaks, there was a -- now, once an employer is on notice that someone feels like there is a hostile work environment, and there are different incidences in different places, different times during

the day, aren't they in serious jeopardy if they don't do something pretty comprehensive to stop it?

MR. RUSSELL: They should do whatever they need to do to stop that sexually harassing conduct, yes. If the only way to do it were an English-only policy, I think the evidence would bear that out. But even if an employer presents a business necessity justification, the plaintiff is allowed under the statute to come forward and say there were other equally effective alternatives that the employer refused to adopt. So I guess what I would advise my client if he said I think the way that I'm going to deal with this pervasive sexual harassment problem that apparently is only being engaged in by people who speak languages other than English is to impose an English-only policy, I would say well, is there anything else you'd consider? Maybe you can monitor break rooms with video tape, maybe lawful, maybe not under the particular state statute. Maybe you can conduct an investigation and interrogate the person who you believe is the offending individual or individuals, and if or she refuses to respond to questions. You say did you say X, what does X mean in English? And if he refuses to answer you, of course, could terminate them for refusing to participate in an

investigation. So my point is simply that I don't think that the reaction should automatically be, assuming that hypothetical that you posited exists, that you then institute an English-only policy as the way to resolve it.

COMMISSIONER GAZIANO: I'm sure it's not the first thing that most people would come to, but -

MR. RUSSELL: It's not even -- they don't even know what -

COMMISSIONER GAZIANO: -- the legal jeopardy, after you've been told, the first complaint, the legal jeopardy is great if any subsequent incidents occur. So something pretty comprehensive has to be done, whether it's English-only, would only fit in one circumstance.

VICE CHAIR THERNSTROM: Commissioner Gaziano, we need to -

COMMISSIONER YAKI: I just want to ask him, just follow-up. I mean, am I incorrect in that in the panoply of responses there are, indeed, a panoply of response to this kind of conduct. That does not necessarily result in the consequence of imposing an English-only rule. I believe in the instance of sexual harassment, there are a number of other steps you can and should be able to take to

respond to it, rather than simply adopting an English-only rule. That's why I could not understand this reduction argument that went toward that in that particular instance, given the hypothetical you had. Because surely, in that hypothetical there were -- the court, or whoever, was told, instructed, or advised to follow certain steps to respond to it?

COMMISSIONER GAZIANO: Without going into the details of that case, but my question really is on where the presumption should lie when an employer believes that is what is necessary to address the discrimination. And it seems to me, the EEOC's policy has the wrong kind of presumption.

MR. RUSSELL: May I?

VICE CHAIR THERNSTROM: Of course.

MR. RUSSELL: I would just make the point, if you're talking about sexual harassment, there's a very ample body of case law that talks about the employer's obligations, and when it can be held liable and when it cannot. And it's did it know, or should it have known, if it's a co-worker to co-worker harassment situation, and if it's a supervisor, is there an effective policy, and did they investigate, et cetera. If the fact is that because of a language difference that impedes its knowledge or its ability

to investigate, I think that's part of the analysis. I think that's separate and apart from English-only. English-only is simply, or primarily a disparate impact theory of discrimination that arises out of the jurisprudence with Griggs v. Duke Power, that says that policies which are fair in form, but discriminatory in operation, must be justified because of job relatedness and consistency with business necessity. EEOC didn't make that stuff up. That's just the law that we're enforcing. And not only is that the law as stated by the Supreme Court, Congress saw fit 20 years later to adopt it in statutory form, and the President signed it. So we're just enforcing that law.

VICE CHAIR THERNSTROM: Yes, Commissioner Melendez.

COMMISSIONER MELENDEZ: Yes. Again, I want to thank the panel for being here today. You know, it's unfortunate that there's only one person here representing the EEOC. I would sure like to have heard from the people who basically are using the EEOC for their -- the poor people that were in the establishment, I believe in Page, Arizona. It would be nice to hear their position on why the EEOC is representing them.

I think there's a certain amount of sensitivity, I think, in this whole issue on how we implement policies across the board. And what you have to have considered, too, is from the foundation of this country, language is -- there's the Native Americans, we understand that there's a language passed by Congress in 1990 that basically enhances languages as part of our culture, so to try to separate those out, I would be in disagreement with that issue on whether or not language is tied to our origin and all those different things. But let me also point out that when a prohibition of languages in the boarding schools back in the early parts of this country, there's still a certain amount in Navajo, or any of these tribes - if you try to come back today and try to implement anything that has to do with prohibition of languages, well, you already know the history of this country, so the only point I'm making, there's a certain amount of sensitivity in how you implement -- if you put up on a wall no Navajo allowed, for example, well, we know the history of this country that said that no dogs allowed, no Indians allowed in a restaurant, so the sensitivity is, if you ever try to put a sign of no Navajo allowed in your workplace, well, you know where that's

leading. So I'd just like your response as to implementation, as far as sensitivity to the issue. Does anybody want to respond to that?

MR. KIDMAN: I have a first-hand experience with that, because I have 25 employees, and 23 of them were Navajo. The majority of them spoke just English, the younger people hadn't picked up on the Navajo language. But my problem was, the ones that wanted to further the cause of speaking Navajo, took up that case, that movement in my workplace to the point where they would -- two Navajo employees that were waiting on a non-Navajo speaking customer would speak Navajo to each other, and then look at the customer and giggle or laugh. And the customer would leave my store and never come back. And I have that on testimony in deposition, that they'd just make them totally sick.

Another Navajo man, quite a traditional man with the bun, he came in, ordered his food, and then he heard this terrible language going on. And I was there at the same time, but I didn't know what they were talking about. And they were talking -- the cook was talking in a terrible language in Navajo, and cussing and swearing, and things with some of the others. And in the Navajo culture, they believe that

if a person is preparing food and has a bad attitude or speaks badly, that is passed through the food to the individual that's eating it. And I was losing customers right and left, and I didn't know why. They just would leave. And somebody will say well, why didn't you know? What's the matter? Well, because in the Navajo culture, it's very, very taboo for one Navajo to speak badly about another Navajo person to a white person. Well, I'm the white person. My employees are not going to say bad about -- complain about this person talking Navajo. They won't say anything bad to me, and so what do they do to rectify their problem, they just leave? They leave my employ. And I was losing employees, I was having 50 percent turnover back six years ago. Today, in 2008, I have zero turnover, because they all have a common language, and they're very happy with it. All those that can speak Navajo, no problem. They speak English on the job, and they've very happy.

COMMISSIONER MELENDEZ: And my second question was having to do with, it almost sounds as if -- because in English we have all these personnel problems within the workplace, and it almost sounds like we have to have somebody that is there all the time. And, as we know, incidents that happen in a

workplace usually happen second-hand. In other words, somebody will say somebody said something about me, then it's not that, because a supervisor was there as a monitor listening, and he's hoping to catch somebody saying something. That's not going to happen. Usually what happens is somebody will complain that somebody said something about me. So if you have a predominantly -- say there's all Hispanic, 90 percent, or they're all Native American, you would think that your supervisors would be trained to pick up multiple languages, and be able to know whether or not people are being harassed in the workplace, either by second-hand, people telling them that's happening, and that you would actually take the disciplinary action by whoever your lead supervisors are, that hopefully you'd hire some that know both languages, and can basically know what's happening in the workplace. So it sounds like those -- is that part of the issue, that you don't think that you can address the personnel issues through --

MR. KIDMAN: We did it constantly over years, we had this difficulty, being rude. They were just being rude, and we would talk with them, meet with them, counsel with them, and so forth, but it just got really, really heated when four or five of

the employees decided they were going to just strictly talk in another language, and they were not going to communicate with any of the other employees in English. They were just going to stay in that language, and it demoralized the other employees. And they ended up walking off the job, and I couldn't hire any new ones because the word got around town that hey, you don't want to be hired on at R.D.'s. You're going to be treated rudely by these people, if you can't speak their language, if you can only speak English. So they wouldn't come in and apply. I was in a mess.

VICE CHAIR THERNSTROM: Mr. Russell, how distinctive are the facts in that case? Would you say that's an outlier?

MR. RUSSELL: In the R.D.'s case?

VICE CHAIR THERNSTROM: Yes.

MR. RUSSELL: I haven't reviewed the whole file, Madam Vice Chair. I didn't litigate the case, and I would be very uncomfortable engaging on the individuals facts of the case. I did read the District Court and the Appellate Court decision with respect to the enforcement of the settlement agreement, but I have not read the file. So it may be an outlier. These cases are very individual. You

have individual charging parties filing them. You have an investigation that goes where it goes. The evidence is going to vary case-to-case.

I would just return to the point that, again, EEOC, it litigates two or three of these a year out of several hundred cases. And out of 80 to 90,000 charges that we receive, 80 to 90,000, maybe this year 100,000, English-only charges represent a de minimus amount. I'm not saying that for the people who are filing those charges it's not a problem, but this is not something where there's just mountains of -- there's 15,000 ADA charges, 30,000 retaliation charges. This is not where EEOC is spending the bulk of its time.

COMMISSIONER MELENDEZ: Just one for my closing comment. It would have been nice to have one of the Navajo four people here to testify at this hearing, so that we could hear the perspective as to why they used the EEOC. I just think it's important to hear the other side of the -

VICE CHAIR THERNSTROM: Did you make an effort to make sure that one of the Navajo people, indeed -

COMMISSIONER MELENDEZ: No, I didn't have the time to actually do that. I don't know who -

VICE CHAIR THERNSTROM: I mean, because that's an obvious contribution you could have made, that I would have liked to have.

COMMISSIONER MELENDEZ: I wish we would have.

VICE CHAIR THERNSTROM: Pardon me?

COMMISSIONER MELENDEZ: I wish we would have. I didn't know that we were going to have individual - I thought mostly it was organizations. But it would have been nice to have that.

VICE CHAIR THERNSTROM: Commissioner Taylor.

COMMISSIONER TAYLOR: Thank you. And I, too, would have welcomed the involvement of the plaintiffs in the case. And I'm sorry they're not here. I'm concerned that we're losing sight of those voices, and I'm pleased that, frankly, we have written testimony from both CASA and from the Legal Services Managing Attorney for the D.C. Employment Justice Center here to flesh out the record. And they raised some of those points I think that would be raised by the plaintiffs if they were here. And their broad point, to me, as I read their testimony, appears to be that there is a broad effort being made by employers across the country to institute these English-only

policies as a -- and I'm reading now from the written testimony from Kerry O'Brien, the Legal Program Senior Manager for CASA de Maryland, in terms of an anti-immigration policy. And that strikes me as inconsistent with the numbers I just heard from the EEOC, so I would -- in that respect, I would give you back your chair in the hot seat, to explain, if you could, what appears to be two ships passing in the night. We have written testimony from these two groups, and they say this is widespread across the country, from their perspective, at least. And I'm glad their perspective is represented in the record, but I just wanted to hear your thoughts as to your numbers, and their perspective. How do you square that?

MR. RUSSELL: Well, Commissioner, what I try to do as a lawyer is to reconcile conflicts. And what I would say to you is what I read in her testimony, and I just read it last night very quickly, she was talking about implementation of policies. And it may be as widespread as she suggests. I'm not saying it's not. What I am referring to are charges of discrimination, where someone who is subject to a policy has had an adverse action, in their view, taken against them, and they have chosen to initiate the

administrative process by filing a charge with the EEOC. There could be ubiquitous policies, and still only be several hundred charges per year.

I don't think there's a conflict between what she's saying, and what I'm saying. There could be any number -- people choose to file or not file charges for any number of reasons, so it's not -- I don't want to suggest that her testimony is inaccurate. I do not know. I don't think there's necessarily a conflict between that, and what I'm saying with respect to charges being filed. And I'm sorry if I gave the wrong impression.

COMMISSIONER TAYLOR: Not at all. Yes, ma'am?.

MS. CHAVEZ: Commissioner Taylor, I would take issue with that allegation, and for those who don't know me well, those who do, are quite aware that I have been very active on the immigration issue, and have been very supportive of changes in immigration law to allow all people to come here legally, as well as to support a path toward legalization for those who are illegally here. So I am not at odds with CASA de Maryland on some of those issues. And I would say that quite to the contrary, that certainly in large sectors, which I am familiar with, because I happen to

sit on some corporate boards that employ large numbers of foreign-born persons, that there is a frustration on the part of many employers that Congress has not moved to, in fact, enact comprehensive immigration reform, because they are desperate for workers, many of whom don't speak English, and many of whom were born outside the United States. So this idea that there is this large scale move, I don't think is accurate. That's not to say that in many communities there are groups that are advocating crackdowns on illegal immigration, and are enacting in many places punitive measures aimed at persons whom they perceive to be here illegally, and the effect of some of those procedures is to discourage employers from hiring people who may be members of certain ethnic groups, or may be foreign-born. But I just don't think that it's accurate to suggest that there is this large-scale move to enact English in the workplace rules in order to drive out non-English-speaking workers. I just don't see any evidence of that.

VICE CHAIR THERNSTROM: Yes, Mr. McAlpin.

MR. McALPIN: Can I just say a couple of things. One is that it's quite -- it should be apparent to everybody that one of the reasons they were having these problems frequently with language in

the workplace is because of the large-scale immigration that's occurred in the last four years, much of which has been non-English-speaking. So I think that employers are trying to make rational responses to try to deal with the problems that those kinds of conditions create. It's not an immigrant kind of impetus. I mean, employers are in business to make money and survive, and they mostly tend to like their workforce, those are the people they've hired and given employment to.

And I just also want to say to the EEOC here that I have attached 21 cases that have been adjudicated on this issue, and they include quotes from court after court, after court, up to the Circuit Court level, that basically say the EEOC's idea that language is closely associated with national origin, it's just wrong. It's flatly wrong. And I'd like to ask the EEOC that if they accept -- if we accept that proposition, why is it that they would - I mean, as far as I'm concerned, if an employer chose to have Spanish as the language of the workplace, that should be their right to do that, because that's the language that they understand, and they need to supervise. Why is that not a national origin discrimination case as far as EEOC is concerned, but if they choose English,

it is?

VICE CHAIR THERNSTROM: Mr. Russell, do you want to answer that? Or Commissioner Yaki also has a question, but would you like to answer that?

MR. RUSSELL: I said earlier, it goes to the same -- I'm not saying that you wouldn't. I understand that EEOC issued in the late 1970s and 1980s a guideline for English-only. They have not -- we have not seen fit to issue a later guideline that says and also fill in the blank only, including Spanish-only, Chinese-only, French-only, German-only. But under the Title VII analysis, if you had a disparate impact based on a Spanish-only policy, and there were no business justification for it under the standards that have been enunciated in the statute, and by the courts, then there would be, assuming a charge was filed. But as far as I know -

VICE CHAIR THERNSTROM: No charges.

MR. RUSSELL: -- there may be charges, but maybe they were meritless.

VICE CHAIR THERNSTROM: Yes. But you don't know.

MR. RUSSELL: Maybe they were administratively closed. I just don't know the case.

MR. McALPIN: We do have a case -- there

have been a number of people, and I have a file on this, who have filed complaints with EEOC, or asked the EEOC where they have been discriminated against because they spoke English alone in the workplace. The EEOC's typical response is to issue them a right to sue letter, and then they go away. They never do an investigation, never follow-up and pursue those cases like they do with complaints against English-on-the-job policies.

MR. RUSSELL: Madam Vice Chair, may I speak?

VICE CHAIR THERNSTROM: Absolutely. And then Mr. Riordan wants to speak, as well. Go ahead.

MR. RUSSELL: EEOC issues right to sue letters in the overwhelming majority of cases. I dispute, absent specific evidence, that we have failed to investigate charges filed by a charging party. The investigators take each charge seriously. They investigate it based on competing priorities under the statutes and the guidelines that EEOC has issued, and in conjunction with discussions with their supervisor, and maybe a regional attorney, decide whether to pursue that investigation forward because they believe there's reasonable cause to believe discrimination occurred, or to issue, in effect, a no-cause finding,

and to allow the person to go have their rights in court. Again, 80 to 90,000 charges a year. If there have been -- let's assume that all 200, which is a slight overstatement of the charges were non-English-only, they were effectively reversed, English-only discrimination cases, that would still be less than about two-tenths of 1 percent of the charge volume. I'm not sure that can reasonably be construed as widespread charges that are being ignored by the EEOC.

VICE CHAIR THERNSTROM: Yes. This is extremely useful, of course. Mr. Riordan.

MR. RIORDAN: Just a couple of things. I think I was asked to come here to give some insight into how you handle a lawsuit, or when this comes up, how a company deals with it. And, unfortunately, I was in a situation, I had to defend a policy that I had something to do with putting into place.

We were asked to counsel the client when these problems arose, and we did the research. And at that time, there was the -- it was a Ninth Circuit case that held that the EEOC guidelines were invalid. Now, we advised the client at that time that that wasn't a final decision, that it wasn't binding in our jurisdiction, and we talked about the practicalities of going forward. I can assure this panel that there

was no global issue that was discussed at that time about anti-immigration or any such thing. We had a very diverse employment group, and it was simply an attempt on management's part to deal with what was perceived to be an extremely serious problem in its workplace.

I would agree with Ms. Chavez that there should be a pretty high level of proof, if you will, or burden before management's prerogatives are taken away. And I'm not sure that the current regulations and the enforcement efforts of the EEOC give enough weight to that.

The other thing is from a litigation standpoint, I think the burden of proof that is now shifted to the employer proving a business necessity is something that gives the EEOC too heavy a hammer in its enforcement.

In fact, I'm surprised. Our client was sued by the EEOC. This was not an individual case, so we were one of one or two a year where the EEOC came after my client for having this policy. In retrospect, I know we were chagrined a couple of times that the EEOC put out press releases about our case, and the press releases may not have been exactly what the EEOC had told the press, but they were factually

incorrect in a number of respects.

And in a second, for example, when the motion to dismiss was denied, which was basically just saying the EEOC had drafted a complaint that satisfied the minimum pleading requirements, and that this District Court Judge held that the EEOC standards were valid, the complaint or the case could go forward, the EEOC put out a press release, I don't know exactly what it was to be honest with you, but the press report of that motion to dismiss resolution was, in effect, saying that the EEOC won, and that our client had been shown to have been discriminating by English-only policy.

So I think I agree that each case is very, very fact intensive, but I think the burdens that these regulations put on employers to prove their case, rather than having the EEOC prove that there was no business necessity is an unfair burden.

VICE CHAIR THERNSTROM: I want to turn to Commissioner Yaki.

COMMISSIONER YAKI: Thank you very much, Madam Chair.

My concern about this briefing hasn't gone away. I want to say that I appreciate, and thank all of you for coming here, and giving us your insight.

But I think that what, to me, becomes more and more clear is that there's a severe deficiency in this briefing. And I guess to go on to the metaphor started by my colleague, Commissioner Gaziano, we may be making mountains out of molehills, and not seeing the real mountains of issues that we really need to take a look at. And I think that it bears stressing about the small percentage that these claims comprise of the entire EEOC docket, how many of them actually do get dismissed, how many of them actually go to a full suit.

Now, does that diminish anything that Mr. Kidman has to say? Of course not. And we're not here to pass judgment or way or another. Certainly, his story is very compelling, but as Commissioner Melendez said, there are always two sides to the story. Nevertheless, certainly, I think people can sympathize with some of the issues faced by Mr. Kidman.

But the concern I have is that it's one thing -- and maybe we sort of danced around it, but it's clear, at least from what I understand, is that the vast majority, if not, indeed, the overwhelming majority of cases that are brought forward, or that are filed deal with Spanish-speaking claimants, number one.

Number two, that when we deal with this issue, we haven't really certainly dug around to see sort of is -- I asked off-line, Mr. Russell, if there's any correlation between where these claims come from and geography, just for my own curiosity. The reason I ask these questions is because - and this is something where I'm very sympathetic with what Ms. Chavez has said - and that is, how this issue gets conflated with the whole anti-immigrant, I don't want to say movement, but mood that some -- movement, or activities, or organizations that are conducted around this country. And we look at Arizona, Texas, and other parts -- well, two young Latino men were jumped and beaten rather severely in New York just over the past, I think last month, by folks who identified themselves with an anti-immigrant type of group.

And here we are talking about an issue that at least so far, unless we have better materials in which to deal with, I'm afraid that we are statistically incompetent to propound upon after this type of briefing, because we don't know, we really don't know what we really do need to look at in terms of what these cases really mean, how they really impact employers.

I mean, for me, one question I have is,

maybe the number of cases is actually too low. And why is it too low? Is it because employers are intimidating low-wage Spanish-speaking workers who are in those sort of jobs. You just don't know these kinds of things. I'm not going to say that as happening, but I will say that it is something that certainly should be part of any analysis that goes on into the input of what we come out here to take a look at, because we have one or two outputs here with Mr. Kidman and Mr. Riordan, but we don't have as many -- much knowledge on the input side about what's coming in, why is it coming in, what's not coming in. And maybe in the case of CASA and EJC, they have more specific knowledge of people who are afraid to come forward and avail themselves of the system because of worries about their immigrant status, or the immigrant status of their families, what have you.

So I just want to say that I appreciate everything that you have said, certainly everything that you say, you speak to from your own experience, and we can't argue with that. But there are other measures out there with regard to this type of a briefing that really need to come to the floor in order for us to have any real competence to opine, find facts, and find principles upon which to go

further on.

And that goes back to my initial point, which is we need to do something. We need to change something, and I don't know what it is, to bring people into the Commission who, for reasons that I don't know, and I'm not going to speculate, are no longer coming in to talk about these issues. Because, normally, this is a kind of thing that you would expect groups like MALDF and others to come forward and talk about, because they have a lot of experience on this, as well.

That's really all I have to say, and I have to say, I apologize, but I have a meeting back on the west coast I have to go to, so I have to leave.

VICE CHAIR THERNSTROM: Hold on one second. Let me just ask you a question. Is it my correct understanding that you -- two things. One is that you've asked for a great deal of case data from the -- are you going to get -- your very legitimate request, are we going to get some of the information that you would like to see? And the second thing is, Commissioner Yaki, I mean, I don't think I am less concerned than you are with a balance on these panels.

COMMISSIONER YAKI: I didn't imply -

VICE CHAIR THERNSTROM: I know you didn't,

but I think we need some help from you on this, because this is -- I agree, this is awful not to have the people -- not to have a really balanced group, and not to have had the people who we expect would show up.

COMMISSIONER YAKI: Madam Chair, I would say that we should devote the rest of the time with these folks. That's a conversation we should have. But I just wanted to say, unfortunately, because I have to catch an earlier flight than I normally would, because I have a business meeting back on the west coast, I would ask that if we can have this discussion, we have it at the next meeting, not -

VICE CHAIR THERNSTROM: Not this afternoon. Okay. That's fine with me, if the other Commissioners would go along. Just on the first question, are we at your request -- is it your understanding that we are going to get some data that would be helpful?

COMMISSIONER GAZIANO: I think we've already asked the Commission. The Commission has already given us some data, and they're going to give us more. Is that not correct?

STAFF DIRECTOR DANNENFELSER: We have gotten some data, and I believe that Mr. Russell is

going to try to have some additional data. Is that -

MR. RUSSELL: Well, I don't know where you are in terms of the paper flowing through your system to get to you. I know that I sent you a statement, and the statement has a little data.

VICE CHAIR THERNSTROM: Right. But are we expecting more?

MR. RUSSELL: I sent you some statistical data a few days later.

COMMISSIONER YAKI: I would say that there are a couple of questions that we asked about with regard to the number of claims filed, how many were dismissed, sustained, what have you. But, again, there's some questions for which they simply will not be able to answer, which goes to my point of what's not going into the system, and why is it not? You can answer what percentage of these are in terms of the total claims that EEOC receives. We can go into that kind of percentage breakdown. And if you could do that, that would be great, but I am concerned as much about maybe why and where are these complaints coming from, as well as what complaints may or may not actually be coming in. And those can only be answered by people who work with a lot of these organizations, or individuals who may be concerned that filing a

complaint would lead to retaliation, things like that that we can't speculate on. And I would be loathe to speculate, is or is not actually occurring.

VICE CHAIR THERNSTROM: Well, there is precedent, plenty of precedent for having additional material inserted into the record. And I would certainly welcome that from you.

COMMISSIONER YAKI: I will ask. But, again, the -- I will ask that of groups that, like I said, have not been here as much as they used to. So I do not know if they will be as responsive, for whatever reason. I mean, that's sort of the conundrum that we're in, that we need to discuss off-line, rather than take away time from these people who have taken their time and energy to appear here.

VICE CHAIR THERNSTROM: All right. Well, I'm very sorry you're not going to be -

COMMISSIONER YAKI: I really -- I actually believe I actually ate at your place.

MR. KIDMAN: I hope it was pleasurable.

COMMISSIONER YAKI: Oh, it was very good. I did -- well, I'll tell about it later, but I'm pretty sure when you mentioned bacon chili cheeseburger, I was like, yes. And I remember thinking I didn't want to go -- I was in Page. I

didn't want to go one of the chains. I deliberately wanted to find something that -

MR. KIDMAN: We're the only other ones, yes.

COMMISSIONER YAKI: So is the -- what does the D stand for?

MR. KIDMAN: It was a former partner.

COMMISSIONER YAKI: Okay.

MR. KIDMAN: His name was Dean, Richard and Dean.

COMMISSIONER YAKI: Got it.

VICE CHAIR THERNSTROM: Well, I'm very sorry you're not going to be here for the business meeting, as I said.

COMMISSIONER GAZIANO: Madam Chair?

VICE CHAIR THERNSTROM: Yes.

COMMISSIONER GAZIANO: Do we have time for me to ask another question, or do we need to dismiss the panel?

ADJOURN

VICE CHAIR THERNSTROM: I think we need to dismiss the panel, because we've got a peculiar -- and thank the panelists very much. We've got a peculiar schedule, in which we need to accommodate the Chair. We need to have a very partial business meeting, a

personnel matter, and then we're going to stand for lunch, and then we're going to come back for our regular meeting.

So let's take a five-minute break, and please, Commissioners, please come back.

(Whereupon, the above-entitled matter went off the record at 12:03 p.m.)